

THE ACTIVITIES OF THE JAPAN SPORTS ARBITRATION AGENCY*

Masato Dogauchi**

INTRODUCTION

The Japan Sports Arbitration Agency (hereinafter referred to as 'JSAA') was established on 7 April 2003. It has been accepting requests for arbitration since 1 June 2003, and five arbitral awards have since been rendered. Although JSAA might still be considered a newly formed organization, its work to date has already produced several issues worth reporting on at this moment.

This article begins by introducing the background of JSAA's establishment in Part 1. In Part 2, the organization, budget and personnel of JSAA are explained. In Part 3, JSAA's arbitration rules and significant points concerning their application and administration by the Agency are introduced. There are two sets of rules; Sports Arbitration Rules and Special Sports Arbitration Rules (Sports Arbitration Rules for Cases Based on Specific Arbitration Agreements). Under the former rules, the Arbitration Panels have decided five cases. Summaries of these cases are presented in Part 4. The author's observations are discussed in Part 5, and Part 6 contains the conclusion of this article.

1. BACKGROUND OF JSAA'S ESTABLISHMENT

1.1 Article 3 of the Judicature Act

The need for an out-of-court dispute settlement mechanism to resolve sports disputes has been academically discussed in the meetings of the Japan Sports Law Association.¹ One of the reasons for the necessity of such a mechanism is that court proceedings, especially when an appeal from a judgment in the first instance is taken, take a long time to reach a conclusion in comparison with the length of time that athletes are able to compete at their top physical condition. Also, court proceedings often incur high costs.

In addition to these problems, among many types of sports disputes, some or almost all of them are to be dismissed by the courts in Japan without their having reached the merits of the cases. The reason is that those sports disputes are not 'legal disputes' in the sense of Article 3, paragraph 1 of the Judicature Act of 1947,² which provides that courts have the

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** President of Japan Sports Arbitration Agency; Attorney-at-Law (Nagashima, Ohno and Tsunematsu, Japan); Professor at Waseda University, Law School.

¹ The Japan Sports Law Association was established in 1992, and dispute settlement has been, of course, one of the issues discussed within this association.

² Law No. 59 of 1947 as amended.

limited power to judge only "legal disputes" in all cases unless exceptions are specially provided for in the Constitution. The term 'legal disputes' here means disputes with respect to the rights and obligations of the parties which can be resolved by the application of the laws of a sovereign state. Disputes over sports associations' decisions on the selection of athletes as the representatives at athletic meets, the disqualification or suspension of an athletes' status and so on are internal affairs to the associations, and the associations' internal rules, not narrowly defined sovereign state law, should apply to such disputes. Disputes over such decisions are considered to be resolved within the society of athletes. The reasons why such disputes are left outside the subject matter jurisdiction of courts are:

1. judges in courts are trained to apply sovereign state law;
2. people who pay taxes to maintain the judicial system do not want to see resources spent to resolve internal disputes among the members of a group or organization; and,
3. the state should not intervene in such internal disputes but should allow the group or organization to deal with their own disputes.

Thus, the Tokyo District Court on 25 August 1994 dismissed a case involving a sports dispute. The plaintiff was a racing car driver who received a penalty from an umpire committee in a car race. He appealed to the controlling body of the car race, but the body dismissed his appeal. Then, he filed a lawsuit against the body for nullification of its decision. The Tokyo District Court dismissed the claim without considering the merits of the case in accordance with Article 3 of the Judicature Act mentioned above. The court held that, since the objective of the civil procedure system is to maintain the social order by providing a means of settlement of disputes or confrontations between private parties, the role of the courts is limited to promoting this objective and does not encompass addressing disputes of every kind that arise in daily life.³

1.2 Developments since 1998

A definite proposal for introducing a sports arbitration mechanism in Japan began to emerge along with the anti-doping movement. The Report on the Anti-doping System in Japan (1998) written by the Consultation Group on the Anti-doping System⁴ contained the first written assertion of the necessity for introducing a sports arbitration system to Japan. The main objective of this report was to propose to establish an agency to enforce anti-doping rules in Japan.⁵ According to this report, considering prospectively that stringent enforcement of anti-doping rules would produce more disputes upon application of such rules, an appropriate mechanism to efficiently resolve such disputes would be necessary.⁶

In response to this report, Japanese Olympic Committee formed a study group on sports arbitration in December 1999.⁷ The study group conducted research into the history and structure of the International Council of Arbitration for Sport (ICAS) and cases from the

³ Similar decisions are found, among others, with regard to a dispute over the religious faith (Supreme Court Judgment on 7 April 1981), and with regard to a dispute on estimation of academic works (Tokyo District Court Judgment on 16 December 1992).

⁴ This Consultation Group was established by Japanese Olympic Committee and Japan Amateur Sports Association in 1996.

⁵ In accordance with this proposal, Japan Anti-Doping Agency was established in September 2001.

⁶ At that time, it was considered, in the Report, to be one of the appropriate solutions that a branch of the Court of Arbitration for Sport should be established in Japan.

⁷ Some law professors and practicing lawyers, including the author of this article, were the main members of this study group.

Court of Arbitration for Sport (CAS),⁸ as well as sports arbitrations by the American Arbitration Association. It also examined the rules of commercial arbitration in order to gain insights beneficial to preparing prospective sports arbitration rules. Based upon the research and examination, the study group made a first draft of the sports arbitration rules.

While the above study group was considering a prospective system of arbitration in June 2000, a dispute over the selection of an athlete for the Sydney Olympic swimming competitions broke out. A female swimmer, Ms. Suzu Chiba, raised a claim against the Japan Amateur Swimming Federation over her exclusion from its Olympic swim team. Although there was no rule or precedent beforehand on how to deal with such kinds of complaints in the Federation and, therefore, the Federation was not under any obligation to accept arbitration, she thus filed a complaint to the CAS. Because of the public pressure, especially from the mass media, surrounding the incident regarding a popular Olympic athlete, the Federation could find no way to not accept the arbitration by the CAS, which decided to hold the proceedings in Japan with a sole Swiss arbitrator. In August, one month before the opening of the Olympic games, the CAS rendered an arbitral award to the effect that the claim was dismissed, but the Federation was ordered to pay CHF 10,000 (around 656,500 Yen) to the claimant on account of the Federation's impropriety in not having made clear the criteria for the selection beforehand. This was the first arbitration case in Japanese sports history. This case proved a good lesson for both Japanese athletes and officials of the sports associations. For the former, they learned that there were means to contest unfavorable decisions lacking of acceptable reasoning made by sports associations. And for the sports associations, it was seen that arbitration could be a good mechanism to properly deal with baseless complaints as long as their decisions were in accordance with sound standards and procedures. Without such a mechanism, disputes between popular athletes like Ms. Chiba and the federation to which she belongs, over such attention-grabbing decisions would be discussed constantly and interminably by the mass media with a sense of amusement. The issuance of a third party decision would stop such intense media coverage.

According to answers provided in response to a survey questionnaire circulated by the study group in fall 2000, many sport associations supported the idea of establishment of an arbitration body in Japan.⁹ The study group made public its report in March 2001 on the establishment of an independent arbitration body in Japan and distributed a draft of its arbitration rules. The reason why the study group chose to establish a Japanese arbitration body was that, as the CAS procedure was to be conducted in accordance with Swiss law and its working languages were in principle English or French,¹⁰ the attorney's fees to be borne by both parties would be high in cases between Japanese athletes and Japanese sport associations.¹¹ The group felt that such disputes should be conducted in Japanese under Japanese law.

⁸ This was originally established in 1984 by International Olympic Committee (IOC). In 1994, ICAS was created in order to make CAS definitively independent from IOC. See <<http://www.tas-cas.org/>>.

⁹ The Survey was done in November 2000 to 38 sports associations. 79% of them supported the idea of establishment of an arbitration body.

¹⁰ Rule 29 of CAS Procedural Rules.

¹¹ Athletes must pay just CHF 500 as a court office fee in the case of CAS procedure (Rule 65.2 of CAS Procedural Rules). But, it was reported that Ms. Suzu Chiba spent around 10,000,000 Yen (about USD 100,000) for her appeal including attorney's fee.

Based upon the above report, Japanese Olympic Committee (JOC), Japan Amateur Sports Association (JASA)¹² and Japan Sports Association for the Disabled (JSAD)¹³ set up a committee in August 2002 to lay the foundation for the future Japan Sports Arbitration Agency. This committee considered such details as the location of the Agency, internal operations, and a financial affairs mechanism.

2. STRUCTURE OF JSAA

2.1 The Statute

On 7 April 2003, JSAA was established. In accordance with the Statute of the Agency, '(t)he objectives of the Agency is to support the development of sports by administering services to efficiently settle disputes between, among others, athletes and sports associations through arbitration' (Art. 3).

It is important to arrange the governance of a decision-making body properly and effectively. It was considered that the neutrality of the Agency in the sports world would be the most significant attribute of the structure of the Agency. Thus, as the Board of Directors possesses the highest governing power over the activities of the Agency, there have to be diversity in its composition. The Board consists of nine Directors (Art. 13), who are to be divided into three categories: three, at least, are or were athletes, three, at most, are officials of sports associations, and the remaining three are neutral persons. Since the establishment of the Agency was promoted by JOC, JASA and JSAD as mentioned above, these three bodies were allowed to designate two Directors respectively, provided that at least one of the two designated persons were athletes or ex-athletes (Arts. 14(1) and (2)). The six Directors designated in such manner, in turn designate three neutral persons as the remaining Directors (Art. 14(3)). All decisions of the Board of Directors are rendered by majority vote (Art. 23 (2)). This system makes it impossible for any collective of all Directors from a single interest group to decide any matter without the support of at least two other Directors. The nine Directors so designated choose the President and two Auditors (Arts. 14(5) and (7)).

2.2 Financial affairs

The above three sport bodies provide financial support to the Agency. Each donates to the Agency 3,000,000 Yen (approximately USD 30,000) a year. The Agency utilizes 9,000,000 Yen a year for promoting the rule of law in sports not only by providing arbitration services but also by providing information concerning sports law (Art. 4).

2.3 Personnel

This article's author, Professor of Law at the University of Tokyo then, was elected President by the Board of Directors and designated Mr. Tadahiko Fukushima, Senior Executive Board Member of JOC at that time (after his retirement from JOC, Mr. Joichi Okazaki,

¹² JASA is responsible for holding National Sports Festival (Japan's largest national sports meet), which has been held every year since 1946.

¹³ JSAD is responsible for selecting athletes for the Paralympic Games.

Director of JASA was designated) and Mr. Tetsuro Sugawara, attorney-at-law, as Senior Managing Directors. At present, two officers are engaged in the daily administrative work of the Agency and serve also in arbitration proceedings. The office is located in the National Yoyogi Stadium Building in Tokyo. The office is open from 14:00 through 17:00 on weekdays. Almost all communication is done by e-mail. In order to carry out prompt and efficient arbitration proceedings, e-mail communication between the office and parties and between the office and arbitrators would be indispensable. A website also facilitates JSAA's activities and public relations (<<http://www.jsaa.jp>>; only available in Japanese at present).

3. ARBITRATION RULES OF JSAA

3.1 Two sets of arbitration rules

JSAA has two sets of arbitration rules; Sports Arbitration Rules and Sports Arbitration Rules for Cases Based on Specific Arbitration Agreements (Special Sports Arbitration Rules). The former was adopted on 7 April 2003 as the first task completed by the Board of Directors and was put into force on 1 June 2003. The latter was adopted on 14 May 2004 and was put into force on 1 September 2004.

The key difference between the two is the scope of their subject matter. The scope of the former rules is limited to cases where athletes governed by JOC, JASA, JSAD and their affiliated sports associations file appeals against decisions of such bodies, whereas that of the latter is wider and covers all sports disputes, including sports business disputes. Due to this difference, the application fee corresponding to cases brought under the former is nominal (approximately USD 500), whereas that of the latter is calculated in accordance with the amount of the claim brought by the applicant.

The main features of the respective rules will be introduced in the following sections.

3.2 Sports arbitration rules

3.2.1 *Scope of the subject matter: athletes v. sports associations only*

It would be highly desirable for JSAA to be able to deal with all manner of sports disputes, but considering the limited staff available to JSAA and its budget, JSAA limited the subject matter jurisdiction of its sport arbitration to disputes where athletes request arbitration against sports associations with regard to decisions taken by JOC, JASA, JSAD or other sports associations which are their affiliated members or associate (Art. 8(1)). Judgments by umpires during games are excluded from this scope (Art. 2(1)). Thus, typical cases are over decisions on the selection of athletes to such sporting events as the Olympic Games, National Sports Festivals or Paralympic Games, or decisions disqualifying individuals for violations of anti-doping rules.

3.2.2 *Application fee: 50,000 yen*

As JSAA aims to achieve transparency in the sports world by providing a reasonable dispute settlement mechanism, JSAA's system works for the benefit of athletes who allegedly receive unfair treatment due to unreasonable decisions of sports associations. In order to make it possible for athletes to file a complaint to JSAA system, it was considered that

financial requirements should, among others, be structured in the athletes' favor. Thus, the athletes pay only 50,000 Yen as a application fee (Art. 3 of the Rules on Application Fee), and JSAA itself in principle¹⁴ bears all costs incurred in settling the disputes by arbitration. This cost burden to JSAA is another reason for limiting the scope of the disputes as mentioned above.

3.2.3 *Arbitration agreements*

There must be an arbitration agreement between the athlete and the sports association in question in writing or in some other comparable manner which definitively represents an agreement between the parties (Art. 2(2)). Where a sports association expressly states that it is willing to arbitrate a dispute with an athlete over one of its decisions, a presumed arbitration agreement is deemed to exist at the moment when the athlete files its complaint to JSAA (Art. 2(3)). Some sports associations have incorporated an arbitration clause into their statutes to the effect that they would appear in the arbitral proceedings whenever athletes filed a request for arbitration with regard to their decisions.¹⁵

3.2.4 *Three arbitrators in principle, one arbitrator in an emergency*

In ordinary cases, the applicant may choose one arbitrator and the respondent may choose another, and the two so chosen arbitrators designate the one last arbitrator (Arts. 21 and 22). These three arbitrators comprise the Arbitration Panel. However, in emergency cases, a single arbitrator panel may decide the case (Art. 50).¹⁶ For instance, when there are just two or three days before the commencement of an event to which the applicant wants to participate in notwithstanding a decision to exclude him/her from participation, the arbitral award must be delivered within a short period of time. Otherwise, any award would be in vain.

3.2.5 *List of candidates of arbitrators*

Because sports arbitration and sports law are relatively new subjects in Japan, it is difficult for the parties to find an appropriate arbitrator without proper guidance. In order to facilitate the selection of arbitrators, maintains a list of candidates of arbitrators on its website. While at its inception there were only 31 candidates on the list, there are now 60 candidates listed. All candidates are lawyers (professors of law and attorneys-at-law) who are not only willing to serve as an arbitrator but also study sports law and the reality of sports by attending regular Sports Law Research Meetings held by JSAA three or four times a year.¹⁷

¹⁴ Exceptionally, where the decision taken by a association was so defective, the arbitration panel may order the association to pay for all or a part of the cost borne by the Agency (Art. 44(2)).

¹⁵ At the time of 31 December 2004, 34 sports associations have adopted such automatic arbitration clause.

¹⁶ Among the five cases to be introduced in Part 4, two cases (Taekwondo case and Equestrian case) were dealt with under emergency rules.

¹⁷ The arbitrators' fee is in principle 50,000 Yen (about USD 500). JSAA may increase the amount up to 100,000 Yen depending on the complexity of the case or so on. This amount in fact just a honorary payment for lawyers' public service in consideration of their spending time and energy to solve the case (one of the arbitrators said that he spent 50 hours).

3.2.6 *Procedural timeframe*

Considering the short period of athletes' competitive lives, it is important to render an award quickly. According to the Sports Arbitration Rules, athletes have to submit their claims to JSAA within six months from when they were notified of the decisions in question, or in cases where they were not notified of the decisions, within a year from when the decisions were made. These time limits are mandatory in order to ensure the conclusiveness and finality of the decisions.

At least one hearing must be held in all cases. If a one day hearing is not sufficient, there should be consecutive hearing days as long as necessary.

The Arbitration Panel must, in principle, render a reasoned decision within three weeks from the date of closing of the oral hearing (Art. 42(1)). This rule is not mandatory but just simply a target standard for Arbitrators.

3.3 **Special sports arbitration rules (sports arbitration rules for cases based on specific arbitration agreements)**

In addition to the above Sports Arbitration Rules, from 1 September 2004, JSAA began to accept applications for arbitration on all sports disputes provided there is an agreement to settle the dispute under the Special Sports Arbitration Rules, the formal name of which is the Sports Arbitration Rules for Cases Based on Specific Arbitration Agreements. These Rules apply to cases where a 'specific' arbitration agreement exists between the parties. In reality, the cases under these Rules are 'general' in terms of their scope, but as JSAA had already been dealing with specifically limited cases under the name of the Sports Arbitration Rules. Therefore, these secondly promulgated Rules are called in such way as using the term 'specific'. On the other hand, these Rules are truly 'specific', since arbitration clauses in the rules of sports association do not apply to the cases dealt with under these second Rules. There must be a specific agreement for the settlement of disputes which may arise or have already arisen between the parties.

As mentioned above, JSAA should ideally handle all cases relating to sports disputes, but in fact it only deals with a limited number of cases. JSAA, at its inception, expressed its intent to play a major role as a dispute settlement organization in the sports world. However, there is one significant difference between the first implemented Rules and the second implemented Special Rules: athletes need only pay 50,000 Yen as an application fee in the former, whereas they must pay an amount calculated in accordance with a formula adopting the same criteria as used in commercial arbitration in the latter.¹⁸ Because of the relatively high cost to be borne by the parties, prospective cases usually concern business matters such as those between a broadcasting company and an organizer of sports game, those

¹⁸ JSAA adopted the formula of the Japan Commercial Arbitration Association (JCAA), which is the most famous commercial arbitration body in Japan. The formula is somewhat complicated. Thus, when an applicant's claim cannot be calculated in economic way, the application fee plus administrative fee is 1,102,500 Yen (about USD 11,000) (52,500 Yen + 1,050,000 Yen). In addition, parties must bear the cost of arbitrator's fee (if the arbitrator's fee is 30,000 Yen per hour and three arbitrators spend 25 hours respectively, the total amount of arbitrators' fee is 2,150,000 Yen). Consequently, in this case parties must bear about 3,250,000 Yen and they must bear their attorney's fee. On the other hand, according to the formula, when an applicant's claim is 1,000,000 Yen, the above administrative fee is 210,000 Yen; when an applicant's claim is 10,000,000 Yen, the administrative fee is 367,500 Yen; when an applicant's claim is 100,000,000 Yen, the administrative fee is 1,365,000 Yen.

between a famous athlete and his/her sponsor company using the athlete's name and portrait in marketing activities, those between a professional player and the entity which runs his/her team and so on.

As of this writing, JSAA has yet to accept any case under the Special Sports Arbitration Rules.

4. CASES

1. After two-month preparation, on 1 June 2003 JSAA began to accept the applications for arbitration under the Sports Arbitration Rules. Since then, the Sports Arbitration Panels have delivered five awards (two cases in 2003 and three cases in 2004).

However, it should be noted that some cases were settled without proceeding to commencing arbitration proceedings. In these cases, sports associations read the complaints by athletes and came to the conclusion to alter their decisions at issue in favor of the athletes.¹⁹ On the other hands, regrettably, there have been a few cases where the sports associations rejected to accept arbitration notwithstanding the applications by the athletes.²⁰

Among the five cases which the Arbitration Panel has rendered, one was on dispute over disqualification and four were on disputes over selection of athletes. An applicant won in the first case (disqualification case) and sports associations won in other four cases (selection cases). The summaries of cases are as follows:

2. Weightlifting Case (4 August 2003)

A coach was an applicant. When he served as a coach for women weightlifting team in a university, one male athlete of men weightlifting team in the same university was arrested for his possession of prohibited drug under Japanese criminal law. Japan Weightlifting Association decided to render the sanction on the responsible persons in the university weightlifting team. The applicant was sentenced by the Association to be suspended/disqualified for a half a year from theas an official coach because of the fact not carrying out properly his responsibility to maintain anthe order within his team. Against this sanction, the applicant asserted that he was not responsible for the activities of the arrested athlete iin men weightlifting team, since two teams are different considering, among others, the fact that the location of the training premise for women weightlifting team was far from the location of the men team. The applicant also raised the question whether a coach must be responsible for the personal lives of the athletes in his team, especially for violation of criminal law by such athletes. The Association did agree to arbitration on ad hoc basis, in other words, with the specific consent by the Association since there was no prior acceptance in its bylaws.

¹⁹ There have been at least three cases where sports associations amended their decision in favor of the athletes in question, before or immediately after the filing applications.

²⁰ For example, the boxing case and the cycling race case. In the boxing case, the Japan Amateur Boxing Federation rejected to appear in the arbitration proceedings. It was reported by mass media that a responsible person of the federation said that the dispute over the decision to suspend of athlete qualification suspension of capacity to play in the official games run by the associationfederation for one year, on the reason that the 16-year-old boy played in a professional exhibition game when he was 14 before becoming a member of the associationfederation, should be litigated in not in arbitration but in ordinary court, and also said such incorrect criticism against the Agency as non legally trained arbitrators were listed in JSAA suggestive list of arbitrators or so on. With regard to these reported statements, JSAA made public its regret and great concern about the attitude of the association/federation.

The Panel found that the Association did not comply with fundamental principle of procedure in many aspects (it did not give the applicant any opportunity to assert his position; it did not serve the decision to the applicant directly; and so on). Accordingly, the Panel held that the decision was cancelled, without verifying the substantive question of the merits. The Panel also ordered the Association to bear the application fee (50,000 Yen) borne by the applicant.

3. Taekwondo Case (18 August 2003)

There were two competing Associations alleging to have the controlling power over Taekwondo in Japan. In order to select representative athletes to the Universiade Games to be held in Taegu in Korea, JOC requested both associations to discuss each other to unify into one controlling body in Taekwondo in Japan in order to recommend in one voice appropriate athletes to JOC. However, two associations were not able to be unified. Accordingly, JOC decided without recommendation from the related associations that one athlete and two coaches were to be sent to the Unversiade Games. A coach who was not appointed filed an application for arbitration against JOC claiming that, if there are three seats to be sent, two athletes should be selected. JOC automatically agreed to arbitration in accordance with its previous decision of board of directors.²¹

Since there was less than a week to the commencement of the Universiade Games,²² JSAA decided to deal with this case under the emergency case rules in Sports Arbitration Rules.²³ A practicing lawyer was appointed as the sole arbitrator.

Immediately after the hearing,²⁴ the Panel dismissed the claim since it found no defects in JOC decision. The reason why two coached were appointed was found that, since the athlete moved from one association to another after the selection, it was considered necessary to appoint one more coach from the latter association. The Panel found the decision reasonable.

4. Disabled Swimming Case (16 February 2004)

A disable athlete, who participated in Sydney Olympic Game as a swimmer and won a gold medal but was not able to participate in other event because of her loss of consciousness caused by her physical condition, was not appointed by the Japan Disabled Swimming Association after Sydney Olympic Games as a specially disignated athlete for promotion of competitive ability. She suffered from nephrosis syndrome at her age of eleven and, in addition, lost her ability to move her body, except the upper part from her breast, due to myelitis at her age of 23. She, 48 years old, has been treated by steroid to maintain her physical condition for many years. The athlete filed an application for arbitration. The Association accepted the arbitration agreement on *ad hoc* basis and appeared the proceedings. Several opposing opinions from medical doctors were submitted in order to support the applicant and the respondent respectively. Instead of investigating the reliability of such

²¹ JOC is one of the sports associations which have decided to accept any arbitration application against the decisions of JOC.

²² The application was filed on 13 August, while Universiade Games was to be open on 21 August and Taekwondo games were to be played on August.

²³ Art. 56 provides that, among others, a sole arbitrator designated by JSAA must render the award in prompt way as soon as possible; the arbitrator may render the award orally and give a reasoned award afterwards.

²⁴ JOC, the respondent, filed its answer on 15 August, two days after the applicant's filing, the hearing was held on 18 August.

doctors' opinions, the Arbitration Panel examined the process of decision-making based on the doctors' opinions from legal viewpoint and found no illegality in this respect. Accordingly, the Panel dismissed the claim of the applicant.

5. Equestrian Case (14 July 2004)

An athlete of equestrianism filed an application for arbitration. She believed that she would be included a member of the representatives to Olympic Games in Athens of 2004, but she was not. The athletes in this sport were informed of some minimum requirements, including participation in the certain designated games to be held in European countries. One of the officials of the Federation traveled to European countries to evaluate the performance of Japanese athletes. He submitted his evaluation report to the committee of selection established in the Federation to decide the representatives to the Athens Olympic Games. According to the applicant, the report should not be the basis of the selection since the official, who wrote the report, allegedly had, among others, some personal connections with some of the selected athletes. The Federation accepted the arbitration agreement on *ad hoc* basis.

The panel found that the means of selection was so subjective and could not gain reliance from some athletes, but came to the conclusion that the inappropriateness of the process was not so significant to make the decision invalid, since the Federation had its own discretion to the extent that the adopted means were not outside a certain permissible range. Therefore, the claim by the applicant was dismissed. However, in consideration of the gravity of the defects of the process, the Panel ordered the Federation to pay to the applicant 50,000 Yen to compensate applicant's arbitration fee and 500,000 Yen to compensate a part of her attorney's fee.

6. Disabled Athletic Case (26 August 2004)

An athlete, visually impaired 37-year-old man, participated in Paralympic Games in Sydney in 2000 and was ranked 6th place in the disabled triple-jump event. However, he failed to be selected as a member to Paralympic Games in Athens in 2004 filed an application for arbitration against the Japan Disabled Athletic Federation. He applied for arbitration, and the Federation accepted on the *ad hoc* basis. The applicant asserted, among others, that the application of the rules to him in the designated event was in violation of the official rules for the field sports made public by International Paralympic Committee and that the umpires and other officials in the event did not know the official rules correctly. In these respects, the Panel held that such incorrect application of the official rules, if any, by the umpires during the event could not be disputed in the arbitration as provided for in Article 2(1) of the Sports Arbitration Rules. In conclusion, the Panel dismissed the case.

5. SOME OBSERVATIONS

5.1 Case law

There have been just five cases in JSAA. Nevertheless, since four cases related to selection of athletes to the games or the promotion program of competitive ability, it might be possible to draw the following summary of case law or quasi case law in that respect²⁵:

²⁵ The items 1 through 3 were established by the Weightlifting case (2003), and the Panel of the Disabled Swimming case added item 4. The Equestrian case (2004) and the Disabled Athletic case (2004) followed the criteria including items 1 through 4.

Sports associations have a certain range of discretion to manage the matters relating to the sports under their control and responsibility. The Arbitration Panels shall respect the decisions on selection of athletes to the games or so on made by the sports associations. However, the Arbitration Panels may revoke the decision if the decisions meet any one of the followings:

1. the sports association did not maintain any rules of selection or did maintain such rules which were against the applicable national law or, otherwise, significantly against the reasonableness;
2. the sports association violated their own adopted rules;
3. the sports association did not violate their rules, but were significantly against the reasonableness; or,
4. the process of decision making was defective.

The cases under Sports Arbitration Rules are similar to the cases in administrative law in the point applicants are the parties whose interests were affected by the decisions of the respondents which has the powers to control the societies including the applicants. Accordingly, the above case law resembles to the established rules in the litigations where people filed a claim to revoke the decisions of the government or other similar public entities.

5.2 *Obiter dicta*

Some arbitral awards are supplemented by comments which were not directly related to the conclusions of the awards but were considered necessary to make warning to the winning party and the public. For instance, in the Equestrian case, arbitrators mentioned as the *obiter dicta* inappropriate points in the process of selection by the Federation and suggested to amend its process.²⁶

There are two different opinions among the lawyers: one supports this kind of practice in order to have the people in sports learn the rule of law; and the other opposes to this practice since this might unnecessarily cause unfavorable feelings among the people in sports. Although we need more time to discuss the matter deeply, such *obiter dicta* seem necessary at this stage where people in sports society have not understood what the rule of law required them to do in exercising their controlling power over their jurisdiction of covering sports in question.

On the other hand, the Panel should be careful not to unnecessarily harm the parties' interests in mentioning the *obiter dicta*. It is especially important to note that parties in the arbitration cannot submit any objection to the *obiter dicta*. Accordingly, the *obiter dicta* should be based upon the found facts after giving the parties opportunity to argue on such facts.

5.3 Public acceptance

A sports journalist wrote a bitter comment on the activities of JSAA in summer 2004,²⁷ especially on the Arbitral Award in the Equestrian case, which dismissed the claims of the

²⁶ The existence of these *obiter dicta* seemed to be one of the reasons for Mr. Washida criticized JSAA in a sports journal. See Part 5.2.

²⁷ Yasushi Washida, Questioning the Reason of Existence of the Sports Arbitration Agency, No. 608, p.176 (2004).

applicant, notwithstanding its findings of inappropriate points of the selection process taken by Japan Equestrian Federation, since such defects in the selection process were not so significant to be enough to revoke the decision. According to this critical comment, the following matters were pointed out:

1. All sports associations should learn the lesson of Chiba case of CAS in 2000,²⁸ in which the Federation was ordered to pay CHF 10,000 (around 656,500 Yen) because of the inappropriateness of the process of selection by the Federation;
2. Japan Equestrian Federation, in particular, should behave carefully to observe the due process of selection, since it had a unpleasant history in 1996 when all directors resigned because of taking their responsibility for causing troubles in the selection of the representatives to be sent to Barcelona Olympic Games;²⁹
3. If the Arbitration Panel in this case, indulging mere legal interpretation without noticing the realities, could not revoke the decision of the Association, JSAA has no meaning at all for its existence.

In response to this article, JSAA explained its position to the writer and the editor of the journal and made it public on its website as follows:

4. Although JSAA was not in the position to defend arbitral awards by the Arbitration Panels, we considered it important to explain our position to acquire public acceptance of our activities;
5. The objective of JSAA was to make clear the rule of law in sports and JSAA considered that the good resulting effects had been, directly or indirectly, appearing in consideration of the situation as a whole;
6. It should be noted that sports associations in fact voluntarily amended their decisions when they found them inappropriate facing the assertions by athletes;³⁰
7. Therefore, it was not appropriate to draw a conclusion from the arbitral awards which had been made public, although an athlete won in just one case;
8. However, JSAA recognized it important that we should endeavor more to persuade sports associations to include automatic arbitration clauses in their rules in order to have sports society clear in rule of law.

6. CONCLUSION

As the people in every corner of the society are interested in sports arbitration especially involving popular athletes, it is important to make clear to the public the significance of the role of dispute settlement mechanism in sports society. On 14 December 2004, JSAA held a symposium jointly with a mass media.³¹

Although it was true that the Agency had no power to force unwilling sports associations to accept arbitration agreement with athletes, they should understand that the court procedure were in some cases useless because of its limited jurisdiction (legal disputes

²⁸ See 2.2.

²⁹ Japan Equestrian Federation adopted clear criteria according to which all candidates should participate in a single event and the upper certain number of athletes in raking should be selected. Nevertheless, it abandoned such method and returned to the unclear means of selection, Mr. Washida accused.

³⁰ See, *supra* n. 19.

³¹ Nippon Keizai Shimbun, Inc., which is publishing a famous newspaper in economy (*Nikkei*). In the symposium, one of the arbitrators listed in the website of JSAA, a sports commentator and some athletes including Olympic medalists discussed the role of JSAA in sports society.

only) and its time consuming process (if an appeal to the higher court were made, the suspension period given to the applicant would be certainly expired).

More importantly, in consideration of the sports associations' social responsibility in making decisions that significantly affect the lives of athletes, they should not hate to have their decisions evaluated afterwards from legal viewpoint. Accordingly, JSAA should endeavor to persuade sports associations to insert automatic arbitration clause in order to make the atmosphere of the sports society clear for the benefit of athlete who practices at his/her sport in relying on the good practice of the sports association.

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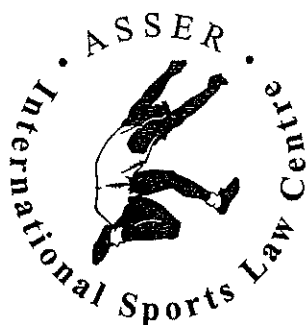
Edited by

Ian S. BLACKSHAW

Robert C.R. SIEKMANN

and

Janwillem SOEK



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