

A Look At Olympic-Level Dispute Resolution

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Going into and during any Olympic or Paralympic Games there are a myriad of disputes that arise. Athletes and governing bodies fight over selection and eligibility issues where the main question is who should be on the Olympic team. Athletes and disciplinary bodies, like the World Anti-Doping Agency (WADA), and sometimes even their own national Olympic committees, fight over conduct-related issues, like doping or violation of acceptable norms of behavior. The Olympic entities have developed a number of processes for resolving such disputes. The purpose of this article is to discuss, in an overview fashion, how these disputes are resolved, as we head into the Olympic Games in Rio in a few days' time.



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Before the Olympic Games begin, international sports federations and national Olympic committees set criteria for selecting the Olympic teams from each respective country. The international sports federations have a qualification guide that sets criteria for how countries/regions can obtain quota spots (for the countries to fill, set by their own criteria), or for athletes to directly qualify by name, applicable to each of its member federations. (The games are limited in their participation to 10,500 athletes, so there are boundaries on who qualifies to compete). Often these decisions create disputes.

A recent example of this is the case of the Russian National Olympic Committee, and 68 Russian athletes versus the International Track And Field Federation (IAAF) where it was determined that the international federation governing track and field had legitimately implemented a rule that effectively barred the participation of Russian athletes to compete in Rio, though it left broad discretion to the International Olympic Committee to make its own determination.

National Olympic committees, like the U.S. Olympic Committee, can have their own criteria for team or player selections that might vary from the minimums set by the international sports federations. Often, Olympic trials events are held, or sometimes athletes are selected based on their finish at certain events. In team sports other criteria come in to play, including team dynamics and position-based skills. The USOC reviews and approves its national federations' selection criteria, but the national federations are required to implement them. These cases are often arbitrated. In the U.S., the system is administered by the USOC, using the American Arbitration Association's commercial arbitration rules, as set forth in the USOC's bylaws and the law governing the U.S. Olympic movement, the Ted Stevens Olympic and Amateur Sports Act. In the U.K., a similar system is implemented, using domestic arbitration rules and Sport Resolutions, the U.K. body charged with administering these disputes. Before any games, selection cases arise in varying numbers about varying issues, typically focused on the application of the written, objective selection criteria (or if subjective then backed by objective factors)

used to select particular athletes to compete for their country at the games.

In addition, elite-level athletes are subject to testing for performance enhancing substances and required to follow the requirements of the World Anti-Doping Code, promulgated by WADA with input and buy-in from its various stakeholders. Stakeholders include the International Olympic Committee, the International Paralympic Committee, national Olympic committees, international sports federations, and governments. The recent controversies over doping of athletes and anti-doping testing and management in Russia are but a microcosm of the array of doping cases that arise throughout the Olympic cycle.

Athletes enter into membership agreements with international Olympic governing bodies or enter international events and these agreements have a clause requiring resolution through a governing body internal first instance process, often with a right of appeal to the Court of Arbitration for Sport (CAS). These clauses have been upheld by national courts around the world, including in the United States, despite their compulsory nature. These cases are often heard over weeks or months, though they can be rendered faster.

Athletes participating in the Olympic Games are required to sign a clause, contained on their entry form that requires them to adjudicate any Olympic Games disputes with the CAS. The CAS has been on-site at each games since 1996 with an ad hoc division responsible for hearing and adjudicating disputes that arise during the games or over the 10 days before the games begin.

I have personally had a case served on my client at the Olympic games at 4 p.m., appeared with an answering statement and motion to dismiss at a hearing at 10 p.m., received an oral decision and dispositive award rendered within 30 minutes after the evidence closed at 2 a.m., and had a written award rendered by the end of that day. In other words, the ad hoc division at the games is empowered and can render awards within 24 hours of a dispute arising.

For the first time, at the Rio games, the CAS will have a first-instance doping panel in place to adjudicate doping cases that arise at the games. In the past, doping cases arising during the games have not been fully adjudicated. Typically athletes who test positive, and anti-doping authorities, prefer to wait until they can muster their evidence for a full hearing at a later date. It remains to be seen what role this new first-instance doping panel will serve in practice, but it is an interesting enhancement to the availability of alternative dispute resolution in the games environment that will continue to develop.

American athletes are also required to enter into code of conduct agreements that require resolution under the AAA commercial arbitration rules even at the site of the games through internal processes. So if athletes fail to wear their official team apparel at official functions, or if they engage in a crime or vandalism or other misconduct in the games host country, they are subject to removal from the U.S. Olympic Team by the USOC using a hearing process that has built-in procedural protections.

Field of play decisions are not arbitrable in the absence of fraud, corruption or some other form of bad motivation by field of play officials like referees and ground juries. Athletes and teams are unable to challenge field of play disputes absent this showing, so officiating does not have to be accurate or correct, but it does have to be in good faith. This is a defining feature of the *lex sportiva*, the rules common to sports are expressed by and continue to develop through the jurisprudence of the CAS.

What about mediation? Sport has a strong recent history of using arbitration to resolve its disputes, but does not use mediation as much. The reasons for this are often theorized about, but they are anecdotal.

We do know a few things about the culture of sport and sport governance that might cause this lack of use of mediation. Sport is inherently decisive, with athletes seeking to finish first, second or third. In addition, most international sports are governed by bodies based in or staffed by lawyers and others from civil law countries where there is little or no tradition of using mediation to resolve disputes. The greatest potential for innovative, efficient and effective sports ADR growth, from my perspective, is in sports mediation, but it will take various factors to change, including greater encouragement by institutions, for the number of cases to grow.

A bright spot on the Olympic ADR front is the USOC's athlete ombudsman position. The ombudsman has become the frontline for any disputes affecting Olympic sport athletes in the U.S. It's typical that hundreds of disputes are resolved each year before arbitration is filed. This position endeavors to educate athletes about their rights and identify areas where the rules were not followed. It also aims to convince governing bodies of the benefit of changing their position or views, find common ground and informally advance the cause of dispute resolution. A model like this would benefit the international Olympic movement and other national Olympic committees, and the growing positive results has encouraged officials to further explore that possibility. But as in all of dispute resolution, some disputes simply cannot be resolved informally or perhaps should not be, so arbitration is often the only recourse.

One other point worth mentioning is that sports cases are published; arbitration outcomes are not confidential in selection or doping cases which brings some transparency to the system and also fosters the development of precedent.

Commercial practice can learn some things from the sports experience in ADR, particularly the ability to render very fast resolution when necessary in a manner that satisfies the requirements for a binding, enforceable award, just as sports has a lot to learn from commercial practice, but the current system reflects a blend of both worlds. The development of speedy arbitral resolution, and the development of the *lex sportiva*, are important features of Olympic sports ADR. But mediation could and should be more widely practiced in sport.

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