Research Paper

Arbitrability of sports disputes in the field of sports marketing in the international legal system

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Abstract

Arbitrability or the ability to refer disputes to arbitration is a concept that clarifies the scope of litigation that can be referred to arbitration as a private method of resolving disputes. The issue of arbitration may arise at different stages of the proceedings. Complaints of non-arbitration in sports marketing disputes may be made directly to the sports dispute arbitration tribunal. If the arbitral tribunal finds such an objection, it will prevent the proceedings by issuing an order or ruling; Otherwise, the arbitral tribunal may recognize its jurisdiction by issuing a separate judgment or only by continuing the proceedings. The main question of the present study is that given the laws and procedures of international jurisprudence and arbitration in sports dispute arbitration in the field of sports marketing, what is the law to execute in this regard? Based on the result of the study, it is revealed that governments, because of their respective public policies, tend to apply their law to arbitration. The New York Convention of 1958, which is considered to be the most important arbitration convention to date, recognizes this tendency of States . The arbitral tribunal shall seek a separate solution other than that provided for in the International Arbitration Conventions and the UNCITRAL Model Law. Nonetheless, if the institution pays attention to arbitration theory, it will encounter several scattered ideas.

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Introduction

In the modern period, advertising and marketing play a significant role in the sale of commercial products, including sports products, so that without advertising and marketing, it would not be possible to sell or continue selling commercial products .Combining its economic impact with its sociocultural importance in people's lives and in local and wider communities, it is of little surprise that academics have been increasingly interested in studying the sport industry, including its particular functions and peculiarities(1).

Athletes and teams may endorse a particular product or brand image . Basically, anything with a benevolent intention may be promoted by athletes as a sports brand .Athletes and sports teams are very popular, and both producers of goods and services and athletes and sports teams can benefit from this popularity. The consumer is part of the process of purchasing sports-approved products.

The producer supports athletes, teams, and events. Advertising and marketing play a role in a number of major areas of sporting dispute: First, given the principle of certainty as an ethical principle, the consumer cannot make his purchase unless he will reach the conclusion that the advertiser has confidence in his commercial product or service, thus the first ethical principle that the advertising and marketing provider must follow is the principle of certainty. This is not only at the level of ethical requirements, but has also penetrated the level of legal rules and regulations. For example, we can refer to EU Directive 450/84 (1984), which specifies the principle of certainty, as an ethical principle, in the field of advertising and commercial marketing(2).

The principles of European private contract law also refer to the subject of advertising and marketing as an ethical principle, as stated in Article 59 in line with the information duties: "The rules related to optimizing efficiency and improving contracts are those related to information tasks. There is a general value to information-based decision making in a contract .Such interventions in the freedom of contract can be justified on the grounds that information can lead to improved economic well-being because a lack of market information can lead to contract inefficiency" .(3)

One of the most important issues in the role of ethical requirements in advertising and marketing is Unfair competition, which is mainly related to the principle of fairness. In a free market economy, the rules governing the free market, including competition, are determined by the market itself . Competition causes the producer to improve the quality of the product, and to provide the consumer with the most suitable conditions. Unfair competition is a business misconduct that violates business ethics, and is commonly used to deceive competitors and infringe on

competition, also called unfair competition, is not unique (4). In fact, the profitability of people in business depends on the number of their customers. The merchant tries to attract more customers by gaining a good share of the market.

If the merchant can attract more customers by providing better services, it is a good thing, even if it leads to attracting business competitors' customers. In fact, every business has the right to increase the number of its own customers by attracting its business competitors' customers, but only if it is done with the use of permissible means .If the trader uses illegal means to attract his business rival customers, or seeks to attract them to himself, or harms his business rival by using illegitimate means, or seeks damages in his interests, his action is considered illegitimate competition(5).

The issue of arbitrability used in the narrow sense here is related to important public interest.(6) For example, a government may decide not to refer antitrust cases to arbitration because the private plaintiff in an antitrust lawsuit is defending not only his own interests but also the interests of millions of consumers .However, a government can exclude disputes over the validity of patents from the scope of arbitration because patents restrict competition and, therefore, affect the interests of consumers in order to keep prices as low as possible(6).

It is clear that governments, because of their respective public policies, tend The New York Convention (1958), which is by far the most important arbitration convention, recognizes this tendency of States in clause A paragraph 2 of Article 5 .(6) According to this regulation, the courts, at the time of determining the arbitration of a dispute, turn to the application of the laws of their home states(7). A similar invocation to the domestic law of the court can be found in the second clause of paragraph 2 of Article 6 of the 1961 Geneva Convention and clause A paragraph 2 of Article 5 of the Panama Convention(8).

The UNCITRAL Model Law on Commercial Arbitration, in the first section of clause B, paragraph 36 of its Article, proposes a change in the rule contained in international conventions to a provision of domestic law.

The court can easily apply the laws of its jurisdiction. However, from the judges' point of view, applying such rules is not easy. The arbitral tribunal is not part of the judiciary of any country . Therefore, the arbitral tribunal should choose from among different national laws, before he can make a decision about arbitrability. Therefore, an arbitral tribunal cannot avoid conflicts of law in the field of arbitrability by exercising only the rights of its respective government. The arbitral tribunal shall seek a separate solution other than that presented in the International Arbitration Conventions and the UNCITRAL Model Law.

Mark Blessing In his report *in the 1998 Congress of the International*

Council of Commercial Arbitration (ICCA) in Paris, identified eight different rules for resolving conflicts of law, plus a transnational approach that could be applied to arbitrability .If one party claims that the arbitration clause is invalid due to its non-recourse to arbitration, most arbitral tribunals apply the law of a country whose court has jurisdiction over arbitration(9) .Some arbitral awards determine the law of arbitrability based on the intent of the parties(7). Reference to such a view is rooted in the fact that it stems from the autonomy of the parties and the comprehensive principle of international commercial arbitration. However, this issue has been criticized because the rules on arbitrability are authoritarian(7).

The view that both parties can avoid authoritarian arbitrability regulations simply by choosing a different law to enforce their arbitration agreement is attributed to the view of Baron Von Munchhausen(8) .The application of the autonomy of the parties to arbitrability, does not take into account the public interests at the heart of the law or the rulings of the courts, which exclude disputes from arbitration. These interests are so important that they cannot be chosen by the parties.

Another view is that arbitrators should consider arbitrability issues under the national law in which the reward is much more likely to be enforced.(8) This theory is based on the argument that the arbitral tribunal is expected to ensure, as far as possible, that the reward is enforceable . However, this view faces practical problems. First, to be able to determine the country where the reward is most likely to take place, it is necessary for the arbitral tribunal to determine the country in which the assets of the losing party are. This is problematic and often an impossible responsibility(6).

A very different approach is to consider the substantive law applicable. The present method has been defended by Pierre Mayer in his lecture at the Hague Academy of International Law .

Mayer argues that arbitrators should enforce rules that exclude arbitrability, as with any imperative rule of jurisprudence. His view is based on the fact that judges should respect any dispute that falls within the scope of their actions .Mayer argues that otherwise, the arbitrators will not recognize the legitimate role of the government .Other comprehensible methods for determining applicable law are the application of the respective law of one or both parties to a dispute and the application of the state law, the courts of which usually exercise jurisdiction over the dispute .

Existing international approaches to arbitrability in the field of sports disputes on sports marketing

One of the first rewards that necessitated the general legal principle related to arbitrability was the reward in the *Framatome case*. In the Framatome case, the arbitral tribunal based its judgment on the principle of arbitrability, meaning that an arbitral tribunal could always award damages

for violation of contract, even if such a violation can be based on a ruling decision of one of the parties to the dispute. Other arbitral awards followed the same principle. What is important in our structure is that the arbitrators did not comment on their perception of the principle of arbitrability. Was the law applicable to the nature of the dispute an international law or an arbitration law?

It is obvious that the judges considered the principle of arbitrability to be so natural and clear that it was unnecessary to name the sources from which the principle was taken. However, even the most obvious legal hypotheses must be protected by rules of law derived from two or more legal systems.

Other arbitral tribunals have found such principles necessary, but at the same time have established specific legal sources for claiming that a dispute can be referred to arbitration. This was true of the two votes cast on antitrust law. The rationale for this process is that transnational principles exist fully in the legal order, although collectively, they are implicit and evolving, and they have entered, at least partially, into domestic law or are reflected on their side, and if accurate assessment of the difficulties and inflexibility, the impracticability, and the distinctions made from any domestic law is left out, an international legal order remains(10). Apart from the claim that international law constitutes a complete set that is a basic idea of its existence, the above-mentioned author's view describes the methodology of finding transnational legal principles. Therefore, it is necessary to take a closer look at the national laws governing arbitrability and determine whether the important and fundamental principle that can be shared in those laws is recognizable or not .It would be desirable for legal systems to reach the same conclusions about arbitrability but to apply it in a different way. Such features of special laws should be ignored.

The US Supreme Court ruling in the Mitsubishi case in 1985 significantly increased the scope of referable matters for arbitration .The Supreme Court of the United States based its activities and opinion on the extension of the possibility of referring to arbitration in the 1974 judgment of Scherk v. Alberto-Culver Co., in which the Court declared that the condition of arbitration in an international treaty is important and effective even in disputes involving important public policies(10).in the Mitsubishi case, the US Supreme Court ruled that international arbitration tribunals are qualified even in cases where US antitrust imperative law applies.

Domestic legal systems approach to the arbitrability of sports disputes in sports marketing

The Mitsubishi case in the US Supreme Court can be considered the starting point of domestic approaches to sports dispute arbitrability in the field of sports marketing. It is true that after the verdict was issued in the Mitsubishi case, this verdict has been extended to domestic cases.(10)

This development in the United States parallels France, which is another major player in international arbitration. French courts have traditionally taken a moderation-mannered approach to resolving arbitration cases, but they have also always considered non-referral to arbitration as a guarantee to protect the public interests .Article 2060 of the French Civil Code provides a broad definition of matters which are excluded from the settlement of disputes through arbitration. Pursuant to this Article, any matter relating to public policy may not be the subject of an arbitration agreement .

Despite the inevitable limitations of this text, the French courts have interpreted the rule in such a way that they have reached an almost different conclusion .Now, this is a situation in which international arbitrators have not been prevented from ruling on disputes involving important public policy issues (11) . In a Mitsubishi-like case, the Paris Court of Appeal ruled in 1993 that disputes covered by European antitrust law could be referred to an international arbitral tribunal(11). The logic behind these rulings, at least explicitly, has not been to measure policies. In contrast, the French courts referred to international public policy as the only constraint on arbitration, which created ambiguities that the courts should argue about from the point of view of French law or international or transnational law. The fact is, however, that the French courts have reached a similar conclusion to the United States, despite differences in procedure. This is even more surprising since the courts approach the issue from a very different legal basis.

While some countries, such as France, use public policy to define the scope and limits of arbitration, others recognize all the rights that the parties can freely disclose, to be referable to arbitration. Among the latter countries, one of the most prominent examples is Switzerland.

In 1987, the non-referral arbitration rule was abolished and a broader definition of referral to arbitration was adopted in relation to international arbitration. Pursuant to paragraph 1 of Article 177 of the Switzerland's Federal Code on Private International Law (CPIL), all disputes involving financial interests can be referred to arbitration. However, even before 1987, Swiss courts interpreted the old arbitrability rule in a way that favored arbitration .In particular, they believed that the applicability of the imperative law to the nature of a dispute did not mean that the disputed right was in the possession of one of the parties, so most commentators agreed that there could be an extensive conceptual sharing and overlap between the rights of the parties that could be freely accessed as well as matters relating to financial interests.

In 1992, the Swiss federal court was asked whether arbitrators under a new provision of federal law on private international law were allowed to settle a dispute arising out of a treaty that violated UN arms embargoes on Iraq. The court's answer was positive(12). In

the same year, the Swiss Federal Court ruled in another case that arbitrators could and should rule on disputes under European antitrust law(12).

However, German doctrine and courts had already paved the way for a wider range of private litigation. Traditionally, German law has been attributed to the widespread notion that any dispute that can be settled by the parties, can be referred to arbitration(13) .This rule leads to similar conclusions because it invokes the rights available to the parties. In the 1980s, some legislators suggested that the rule did not exclude recourse to arbitration in cases covered by imperative laws of jurisprudence .The German Federal Court accepted this interpretation in 1996, allowing the German Federal Court to rule that the change in legislation envisaged at the time was entirely compliant with its interpretation of the old law. (13)

Therefore, it can be concluded that, unlike the Swiss legal system, the development of arbitration in the German legal system, was not created through the legislature but through experts and the judiciary .

English law takes an almost unique position on arbitrability. It has been said that English law has never reached a general theory for distinguishing between those which are settled by arbitration and those which are not. Comparative law, however, does not pay much attention to definitions of the functions of legal theories. In the structure of English law, the practice of excluding public policy matters from the scope of arbitration is largely influenced by the view that an arbitration clause in a contract that nullifies public policy is void(14). Instead of choosing one of these rules, the arbitrator can and should discover more about the contents of the rules. This does not ignore the legitimate interests of countries that take a more restrictive approach, yet promotes security and predictability in international arbitration(15) .

International principles governing the arbitrability of sports disputes in the field of sports marketing

Is the transnational principle appropriate for action in practice? It is obvious that a transnational rule by its very nature cannot be as precise as a domestic law. However, it is noted that the laws evaluated above agree on at least two points.

In the first place, there is a strong presumption in favor of arbitrability in international litigation. Secondly, arbitrability is no exception to the fact that disputes are influenced by public policy or the ability to enforce mandatory laws .This is a precise and important legal rule because many exceptions to arbitrability in national law or court rulings are justified by invoking the public interest or the applicable imperative law .This rule helps to preserve the integrity and consistency of the arbitration agreement and the principle of fidelity to the covenant, which are the only tools needed to prepare for predictability and subordination in the resolution of transnational disputes.

Hence, this rule fulfills an important function in promoting transnational trade .However, the principles mentioned are subject to some terms and conditions that will be discussed below .Under the second transnational principle outlined above, arbitrators have the right to decide on disputes that involve public policy as enshrined in imperative laws of jurisprudence .On the one hand, they have to influence public policy when deciding on the nature of litigation.

The Supreme Court of the United States in the case of Mitsubishi expressed the expectation that arbitrators rule over the imperative law, even if in doing so it would conflict with the law of choice of the parties. Similarly, the Swiss Federal Court has held that arbitrators can not only apply European antitrust law but are obliged to do so .A similar view was indirectly issued from the 1999 judgment of the European Court of Justice, which held that the domestic courts of the European Union should invalidate judgments that do not comply with European imperative laws of jurisprudence(16).

One cannot ignore the fact that the enforcement of coercive rules by the arbitrator can lead to complex problems .In any case, these issues and problems are the price that must be paid to the public setting for the development of international commercial arbitration .If arbitrators do not respect important public policies, governments will not allow arbitrators to decide on disputes that pertain to their policies. Arbitrators must therefore influence laws that protect the legitimate public interest in order to ensure that international arbitration is upheld by governments(16) .Even accepting the fact that arbitrators absolutely apply the imperative rules of jurisprudence does not imply that all commercial disputes can be referred to arbitration.

There are still a number of exceptions to arbitrability. These exceptions are largely due to the fact that arbitration is a decentralized method of resolving disputes. Therefore, disputes that require centralized resolution are not suitable for arbitration.

Bankruptcy law provides an example of this. The benefit of equal treatment of creditors requires a central authority to distribute the debtor's shares .Only the government, as an authoritarian institution, has the authority to establish and exercise such central authority and to pressure creditors to file claims(17). Arbitrators must respect the limitations of their jurisdiction after the commencement of the bankruptcy process for one of the parties in order to ensure the equal distribution of the debtor's assets and to maximize the value of the assets for the creditors. They are not allowed to rule on any matter that has a direct impact on the interests of other creditors, including the priority of a lawsuit or a creditor's share of the debtors' assets .Similarly, there are limitations to the arbitrator's jurisdiction in resolving disputes over intellectual property rights(17).

The function of intellectual property rights is to prevent any potential competitor from competing with the right holder. This global impact is one of the reasons why some intellectual property rights are registered by the central government .Entry to the list protected by intellectual property rights, in addition to exclusion from it, has been excluded from arbitration. It is not intended to state, for example, that arbitration is not possible in relation to registration validity(18) .However, in the interests of other competitors who need to know whether it is permissible to copy a particular innovation or initiative, the effect of such arbitral awards can be restricted, before the rights governing that innovation are registered, or otherwise can be be made available to the public(18).

Exceptions to arbitrability in the field of sports disputes on sports marketing

The issue of arbitrability in the field of sports disputes on sports marketing at the level of developed countries has also been considered(18) .In the United States, for example, the passage of Section 301 of the Labor Relations Act at the federal level allowed disputed parties seeking access to an arbitration agreement to access a more compassionate court.

What it envisioned was the opportunity to escape the limitations of common law legal system by invoking the United States Arbitration Act 1925, to the extent that the second part of that law made the contracts for the referral of future disputes to arbitration revocable and enforceable .However, a problem arose under section one of the above law, which stated that "nothing contained in this section should apply to employment contracts ".Branches 4 and 10 of the Court of Appeal stated that collective bargaining agreements are "employment contracts" that fall within the scope of the 1925 U.S. Arbitration Act (18).

Conflicting judgments were rendered in Branches 1, 2 and 6 of the United States Court of Appeal, and Branch 3 of the United States Court of Appeal concluded that the exception condition - to employment contracts - to collective bargaining agreements does not apply to workers producing goods for intergovernmental trade. The second possible obstacle to expressing federal judicial sympathy lies within the framework of the Norris - LaGuardia Act, in particular Section 7 and Section 13, Paragraph C.

An urgent question arose as to what criteria had been adopted at the federal level to determine whether a dispute could be referred to arbitration. In the Lincoln Mills case, Judge Douglas declared that the substantive law applicable under section 301 of the Labor Relations Act is the Federal Law that the courts must act within the framework of Carman domestic law policy, and “a number of judicial initiatives are determined by the nature of the problem”.

Given this vast new mission and the recollection of Judge Wyzanski, the observers hoped that the terms of the Kotler-Hummer rule could be violated .

However, because of these initial rulings, it was clear that the impact of the state's basic judicial doctrine was felt among the branches of the federal district courts.

The unanimous conclusion was that the arbitrator, in the absence of an expressly contrary provision of the contract, should not be allowed to determine the scope of his jurisdiction, but the issue of "arbitration" is at the discretion of the courts . Branches 3, 6 and 7 of the United States Court of Appeal dealt with this by the default of the Kotler-Hummer rule. Judges in Branches 1, 2 and 10 of the United States Court of Appeals held similar views .Only Branches 5, 8 and 9 of the U.S. Court of Appeal reflected the new, more liberal position. Then, in the summer of 1960, the United States Supreme Court moved to limit judicial intervention and persuade arbitration(19).

Judicial procedure governing the arbitration of sports disputes on sports marketing

The issue of arbitrability in the field of sports marketing was raised in two of the three 1960 Supreme Court rulings, before the case was referred to an arbitrator for the execution of the contract referral to arbitration, i.e., *United Steelworkers vs. American Mfg Co.* and *United Steelworkers vs. Warrior and Gulf Nav Co.*

The issue of arbitrability was raised in the case of *United Steelworkers vs. Enterprise Wheel and Car Corp.* after the arbitrator in a lawsuit considered a complaint to enforce the arbitral award.

In the case of *United Steelworks vs. American MFG Co.*, the question of whether an employee who has already been injured is entitled to return to work under the terms of a seniority contract was interpreted as meaning that such a complaint would be referred to arbitration.

The contract contained in that case contained a "standard" arbitration clause that required referral of "any dispute, misunderstanding, disagreement or complaint concerning the meaning, interpretation or application of the provisions of this contract between the parties" to the arbitrator.

The trial court, relying on Judge Brennan's judicial statement, coincided with Warrior's case, and affected by “Expressions in a collective bargaining agreement ...will only be understood by citing a background that leads to their inclusion”, accepted the evidence that the union was seeking to embrace a term in the contract that would specifically include granting arrears of wages in arbitration .Following the rejection of this proposal in the bargaining, the disputes were declared irrevocable to arbitration. There is still a problem in assessing the correctness of the precise application of the contract and the principles of intent to negotiate a collective bargaining agreement and its interpretation at the arbitration stage.

Although mentioned above, the problem is more clearly described by Professor Cox:

"The pressure to reach an agreement is so great that the parties are willing to enter into a contract, although each is aware that the other party has a different meaning in relation to the words and they only have a common intention to postponing this issue and gambling on the arbitration vote if the said vote is necessary ... The importance of a contract means that the arbitrator seldom states that there is no conflict of opinion about the dispute before him and, therefore, there is no contract and the parties must return and negotiate a solution".(20) Unless the contract contains an explicit condition that retains the subject matter of arbitrability for a court, there is no reason to assume that the parties who wrote the general condition of arbitration did not intend to leave certain matters of arbitrability to the arbitrator .Any danger of accepting such freedom for the arbitrator will certainly be reduced by the fact that the arbitrator's vote is still subject to judicial review in the third instance . Therefore, at this final stage, the arbitral tribunal doubts will not be again resolved solely on the basis of contractual terms, but will be in the light of all the relevant evidence that the arbitrator can cover.

Conclusions

There are gaps or ambiguities in the arbitrability governing sports marketing. Gaps or ambiguities in a contract may either be related to a problem that the parties to the sports marketing contract were aware of at the time of signing the contract or to a problem that has arisen for the first time since the contract was executed. The jurisdiction of national courts to challenge the jurisdiction of a sports marketing arbitration body is a serious challenge.in any case, all types of evidence can be presented to the arbitrator or the court to reinforce a vague or general condition. it is revealed that governments, because of their respective public policies, tend to apply their law to arbitration. The New York Convention of 1958, which is considered to be the most important arbitration convention to date, recognizes this tendency of States . The arbitral tribunal shall seek a separate solution other than that provided for in the International Arbitration Conventions and the UNCITRAL Model Law. Nonetheless, if the institution pays attention to arbitration theory, it will encounter several scattered ideas.

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