



SLAM DIGEST



SPORTS LAW ASSOCIATION
OF MALAYSIA

SLAM Editorial Sub - Committee 2021

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WELCOME

BY: SAMRITH KAUR

It is with profound pleasure and much anticipation that we celebrate the launch of our first SLAM Digest, with this inaugural issue. On behalf of SLAM and the SLAM Editorial Team, I would like to extend a very warm welcome to the readership of SLAM Digest. I take this opportunity to thank our authors, editors, interviewees, and reviewers, all of whom have volunteered to contribute to the success of this journal.

SLAM was set up in 2016 as a professional body to inspire leadership, reform and interest in the issues of sports law and sports arbitration with the aim of creating a knowledge-sharing platform for communication amongst not merely sports lawyers but any players, enthusiasts and sports bodies in the sports industry, with the objective of achieving best practices among practitioners and sharing experience with anyone related to sports.

The primary focus of SLAM is to be the unifying platform for people with interest in the area of sports for the growth of sports law and sports arbitration in Malaysia and overseas. Its objectives include to promote the study and advancement of sports law and sports arbitration, to create awareness through workshops, seminars and webinars to discuss and understand the issues relating to sports law and arbitration, and to create and maintain relationships with other sports enthusiasts and sports bodies. SLAM also aims to disseminate information and knowledge of sports law, sports arbitration and other areas associated with the sporting industry by publishing articles, newsletters and journals pertaining to sports law and sports arbitration for the benefit of all. Our Patron is none other than YAM Tunku Imran who has always been ever so supportive and willing to assist and advise SLAM since its inception.

SLAM had previously co-organised a number of talks, seminars, webinars and workshops with the Asian International Arbitration Centre (AIAC). This year, we are also proud to announce that we are organising a series of webinars and interviews with sports personalities, enthusiasts and sports bodies on their struggles and triumphs, and how to overcome the challenges faced by our sporting industry. To commemorate the Tokyo Olympics 2021, we kick-start SLAM's Webinar Series with our very own Malaysian Olympians, Jeffery Ong and Noraseela Khalid.

We would like to invite anyone interested in sports, practising sports law and sports arbitration and any other related sporting field to contribute and share their thoughts and experience with us for the betterment of the sporting industry.

Once again, I welcome you to this SLAM DIGEST - your journal!

With your support as authors, reviewers, interviewers, interviewees and editors, I am confident that this is a good start to many more informative articles in future journals. We hope to hear from you and welcome your feedback.



Samrith Kaur

President, Sports Law Association of Malaysia

COMPETENCY & JURISDICTION IN SPORTS ARBITRATION

BY: ASSOC. PROF. DR. JADY ZAIDI HASSIM

The sports tribunal must have “legal ability” to deal with sports matters. The first ability is competency, which means the authority to exert jurisdiction over a person or an issue that is the subject of a suit. The second ability is a jurisdiction that refers to the power to hear, interpret and apply the rules. The Malaysian Sports Dispute Committee (SDC) is an example of an adjudicatory body with the legal ability to hear and resolve disputes. Unfortunately, SDC is still not in operation despite its creation in 2018. Therefore, sports mediation and arbitration are the best and practical dispute resolution mechanisms available for sports as an alternative.

Sporting Autonomy

The jurisdictional authority of the sports governing body (SGB) is determined by its Constitution. SGB at the national and international level have a specificity authority in their sporting autonomy. Denning LJ in *Russell v Duke of Norfolk* [1949] 1 All ER 109, at p. 119, clearly stated that SGB possessed unique and extensive regulatory powers. That enabled them to be exclusively competent to apply the rules affecting athletes, coaches, office bearers, agents and even supporters. The source of the authority is consensual and based on the contractual relationship between the parties. The concept of specificity authority of the sport constitutional structures includes the autonomy and diversity of sports organisations at all levels (from club to national) and the principle of a single federation per sport.

SGB must ensure that its Constitution and Rules are abided by and observed by all its members. Besides, most importantly, it can control and exercise jurisdiction over all activities concerning its sports (in Malaysia and by representatives of Malaysia abroad). Section 23 of the Sports Development Act 1997 (Amendment 2018) (Act A1570) is an example of exclusive power given to the sports body to resolve any dispute arising amongst its members or with its committee or governing body in accordance with the internal procedures. Besides, ss. 24 and 24A requires all remedies (disciplinary hearing, referral to SDC and appeal process to Minister) are exhausted first before arbitration or appeal to CAS (CAS Ordinary or to the CAS Appeals Division).

The legal ability of AIAC

The Asian International Arbitration Centre (AIAC) may have the legal ability to determine the dispute if the Constitution of the SGB says so. The question of the jurisdiction may arise on the validity of the source from where the power is derived.

It does not merely depend on a complete document of Sports Arbitration and Mediation Rules prepared by AIAC.

The competency in mediating and arbitrating roles for sports-related disputes by AIAC is justified in s. 18 of the Arbitration Act 2018 [Act A1563]. This section is paramount as it demonstrates the jurisdiction of the Arbitral Tribunal. This section ensures brevity in proceedings allowing the tribunal to deal with jurisdictional questions, which are generally treated as preliminary issues. Finally, this section gives the power or ability of an authority to make legal decisions and judgements on sports matters.

At the international level, the dispute may be appealed to the Court of Arbitration for Sports (CAS). The jurisdiction of CAS is also arising out of an arbitration clause contained in the Constitution of the SGB or its dispute regulations because of a later arbitration agreement (ordinary arbitration proceedings in CAS Ordinary Division). The CAS Appeals Division may also act as the court of final appeal for decisions taken by competent SGB or its International Federation (IF). The keyword is a specific clause that explicitly provides for a referral of its decisions to the CAS.

Challenges and Loopholes

(a) Internal Procedure

No sports arbitration can be conducted at the first instance. The SGB needs to exhaust all domestic internal procedure (IP) that adjudicates private disputes among members and affiliates. The IP is recognised as the main statutory mechanism in settling sports disputes, as the SDA requires the Constitution of the SGB to incorporate the IP provisions statutorily.

However, there are a few arguments on this issue. The first argument is on the transparency of the IP settlement, especially when the dispute is between the office bearers or members and the athletes. Second, the process of IP is not documented in details. The validity of the decision may be challenged further. Third, the aggrieved party may fail to refer the dispute to SDC as its establishment is on hold until the resolved issues on SDC Regulation are approved at the ministerial level. Finally, the mechanism of sports dispute is more private in nature. The disagreement usually ends up in negotiation and conciliation only.

(b) Legal Competence of the Parties to Consent

The issue of competency is essential to create ultimate enforcement of the award. The arbitration process is not solely dependent on the intention and agreement of the disputing parties only, but other considerations.

First, the arbitrator may need to consider the issue concerning the incapacity of the sports body as a legal entity and representative body. The parties may oppose recognition and enforcement of arbitration awards based on a legal entity's inability. The sports body may not exist. It may never be appropriately registered or had been statutorily revoked, or the sports body was under some legal restrictions.

The agreement entered by the parties is in breach of a public policy provision requiring the preliminary approval of the state government, sports commissioner office or IF sanctions. The lack of representative power and authority may also fall under the element of incapacity. The authority usually is conferred to a sports body's executive board members, especially the President and Secretary-General. The Constitution of the sports body is silent on the provision of contractual representative power, such as those given under a power of attorney.

The second consideration is on the personal status such as legally incompetent athletes (mental disability) or young amateur and minors under the legal age of consent. Many successful athletes are minors (Lewis Hamilton, aged 13, and Wayne Rooney was 15 years old when both entered a contractual agreement. However, representing these athletes may present unique problems not faced when representing majority athletes. There are many specific legal requirements created by SGB and IF when contracting with minors. The arbitrator must be aware of a new legal and additional layer of a regulatory framework that protects and safeguard minors in sport. The failure to pay sufficient attention to the obligations imposed on them may create a minefield of potential pitfalls. The loophole could be substantially reduced by parental permission. Still, IF's provision may vary in term of the age requirement and exceptions.

However, at international arbitration such as CAS (Ad Hoc Division), the general implication of an invalid sports arbitration clause signed by young amateur and minors is different. It depends on his status as to whether the athlete is the appellant or respondent. It is acceptable if the minor appeals against his (her) disqualification for a small technical violation of a confusing and vague rule. On the other hand, it is difficult if the minor is a respondent versus the sponsors or manufacturers. The arbitrator must research the validity of the agreement signed by him (her) to agree to the arbitration.



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COMBATING SEXUAL HARASSMENT IN SPORTS

BY: SRI SARGUNA RAJ

The recent revelation by a former national swimmer, Cindy Ong, regarding sexual harassment and assault by her coach when she was in her teens casts a harsh spotlight on physical and sexual abuse in sports. Such cases relating to harassment are not something new as there have also been several high-profile cases in the past, namely the cases involving athletics coach C. Ramanathan and diving coach Huang Qiang. Such incidents in the sports world usually go unreported by the athletes for the fear that rejection or revelation of such an advance would result in the athlete being sidelined from the team or resulting in an intimidating or hostile environment for the athlete concerned.

The issue of sexual harassment in sports is often neglected and does not receive proper attention. Harassment, in general, covers a wide range of behaviours of an offensive nature. It is usually understood to be a behaviour that demeans, humiliates or embarrasses a person. In the sporting sense, this would usually include an unwelcome comment, conduct or gesture directed towards an individual or group of individuals which is obscene, insulting, humiliating, malicious, degrading or offensive. Sexual harassment specifically would include unwelcome jokes, questions or sexual utterances, requests for sexual favours, unwelcome sexual advances, suspicious body contacts or other verbal or physical conduct that is sexual in nature.

In a recent study conducted by Kolej Universiti Poly-Tech Mara in collaboration with National Sports Institute of Malaysia (ISN) on sexual harassment among Malaysian athletes, the victims claimed that the perpetrators of sexual harassment were usually teammates, trainers and officials in their respective sports.

The current legal protection against harassment in the Penal Code is perceived to be insufficient to protect the athletes in the sporting arena. The biggest problem in sexual harassment cases in sports lies in the lack of reporting such incidents of harassment by the athletes. Unless the National Governing Bodies can facilitate a better and more effective reporting method or process through new policies and awareness programmes, the same perennial problem will continue to exist. The current internal procedure for resolution of dispute under section 23 of the Sports Development Act 1997 is also not effective in protecting the victims since the power vested in the sports officials under this procedure would make the victims fearful of receiving adverse disciplinary action that may imperil their future. Also, the investigation process for sexual harassment conducted at the internal level is usually dubious, especially if the complaint relates to the reputation and image of the highly ranked officials or trainers, resulting in the victims opting to remain silent.

Although highlighting sexual abuse through the press was a good way to promote awareness, a proper mechanism to deal with sexual harassment was necessary to ensure that the perpetrators are dealt with accordingly. The existing platforms such as the Athlete Representative Committee, the Misconduct and Harassment in Sports Committee and the Athletes' Commission under the Olympic Council of Malaysia have not been very effective resolutions for an athlete to complain about sexual harassment. For an effective long-term solution, a proper channel should be set up for the victim to lodge a complaint and the complaint to be dealt with effectively.

It is obvious that Malaysia needs a systematic approach, i.e. deterrent policies, effective procedures, protection of the victims, third parties, and penalty against perpetrators. Therefore, there is an urgent need for the Malaysian government to develop a comprehensive policy on all forms of sexual harassment and abuse in sports. A strict policy must be developed in collaboration or in consultation with the relevant ministries mainly, the Ministry of Youth and Sports, the Ministry of Women, Family and Community Development and the Ministry of Health. Further, the only way to force the policy to be effective is by incorporating such policy in the constitution of the national governing bodies and for it to be enforced strictly to put an end to sexual harassment at all levels.

As Malaysia currently does not have specific sexual harassment laws, the Malaysian government should table the Sexual Harassment Bill that it had promised to table in 2020 and debate the bill immediately. Once the Bill becomes a reality, it would perhaps be easier for the relevant sports governing bodies to develop policies to protect the athletes. Until then, only time will tell.



Sri Sarguna Raj

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A "FOOTBALL MATCH" WITH THE GENERAL COUNSEL OF THE AFC AND HIS SLAM-MING ADVICE FOR ASPIRING SPORTS LAWYERS

BY: JAYAVARMAN JEEVANTHAN

When the opportunity arose to interview a sports law expert for the SLAM Digest, I immediately leapt at the opportunity and reached out to Mr. Andrew Mercer. He agreed and, as I was conducting the interview via Zoom, it felt like the press conference of my new signing.

Introducing our star player - Mr. Andrew Mercer, the General Counsel and Director of Legal Affairs at the Asian Football Confederation (AFC). Like the match highlights after a game, here are the highlights of our conversation in which he shared his experience and knowledge, as well as details of his own journey in sports law.

The Kick-Off

Mr. Mercer's career in sports law

Often the path to scoring a goal is not direct, numerous passes and shots are played before getting that final score. This is akin to Mr. Mercer's career.

He started out by completing an undergraduate degree in English Language & Literature at King's College, London and then went on to work as a journalist and as an English teacher for a year in Beijing, China before returning to the UK to study law, in Nottingham.

After his studies, he completed his legal training and qualified as a solicitor at the London office of Slaughter and May, specialising in intellectual property and commercial matters.

During his time with the firm, he got involved in sports related legal work for several big Premier League football clubs. This included commercial contract work as well as image rights agreements. At this point it became clear to him how much he enjoyed sports related legal work, especially in football.

It was therefore no surprise then, that when the opportunity to join the Union of European Football Associations (UEFA) in Switzerland came by, he jumped at it. Starting off working on commercial legal matters at UEFA, over time Mr. Mercer became heavily involved in club licensing and financial fair play cases, as well as general disciplinary, match fixing and doping matters.

Building on his experience and knowledge at UEFA, he was invited to join the sports legal unit of the AFC in 2017. Early in 2020, he took on the position of General Counsel.

Mr. Mercer says that he has never shied away from the different opportunities that presented themselves to him. This enabled him to develop his expertise in sports law. He has tried to take each opportunity and challenge in his stride and has worked hard to excel in the field of sports law.

The Opening Goal

Growth of Sports Law in Malaysia

When it comes to the potential of sports law in Malaysia, he opined that Malaysia is an established sports hub, and noted that the country has a solid legal framework for a foundation and good sporting infrastructure. The individuals in the legal field are highly adept. From the time he has been with the AFC, he has personally seen students and legal professionals developing a keen interest in the field of sports law. Malaysia is an outstanding country at the centre of Southeast Asian business and is well placed to be a hub for sports law.

The Equaliser

Football vs Covid-19

As with most sectors which have faced challenges resulting from the Covid-19 pandemic, the football sector is no exception as matches across the world were postponed in 2020/2021 for health and travel reasons. From a sporting and organisational point of view, it has been challenging for football organisations to operate in such circumstances.

Nevertheless, Mr. Mercer commented that the AFC and its Member Associations, clubs and partners have done a fantastic job in planning, organising and delivering competitions as far as possible.

In legal areas the AFC legal team rose to the challenge across the full range of practice areas – commercial, corporate, regulatory and disciplinary amongst them.

Legal support has also been given in medical matters, notably in establishing effective procedures and protocols regarding Covid-19 for football matches.

The circumstances have been challenging but Mr. Mercer believes the AFC has successfully delivered positive solutions.

In this regard, it was great to see the resumption of the AFC Champions League matches in September 2020 in Doha. The competition was successfully concluded in December 2020, which saw Ulsan Hyundai lifting the trophy at the Al-Janoub Stadium in Qatar!

This positivity has also flowed into 2021, with both the AFC Champions League and AFC Cup club competitions currently ongoing.

Half-Time

Most Memorable Sports Law Case Experience

Mr. Mercer singles out his early experiences with financial fair play cases at UEFA. At the time, the project was in its early stages and this presented great opportunities and challenges for a young sports lawyer to tackle. He and his teammates went on to win cases at the Court of Arbitration for Sport (CAS) and build solid jurisprudence on financial fair play and club licensing matters. He considers that it is rare for a lawyer to be able to break new ground in such unique areas, like financial fair play, as truly new areas come along infrequently. It was a very positive experience for him.

During his time with the AFC, Mr. Mercer spoke about his many memorable experiences at the CAS on competitions-related legal matters, which have included matters relating to player eligibility, often dealing with complex topics under time pressure. He added that the successful outcomes are a great achievement for the lawyers at the AFC and underline the solid work done by the AFC's judicial bodies. This is a testament to the AFC team's credibility and commitment to sports justice.

The Winning Goal

Advice To Those Pursuing Sports Law

Mr. Mercer strongly recommends all aspiring lawyers to pursue sports law as a career. For those starting off by taking sports law courses, he suggests that they be proactive in securing work placements to supplement their study. This could be in the form of an internship with an institution or organisation that is involved in sports law. To those already in the legal practice, he suggests that they keep an active lookout for opportunities to enter sports law related areas. This can include seeking out clients from the sports industry. Even if the task does not directly relate to sports itself, it is a step forward to getting introduced and familiarising oneself with the industry.

Further, he advised that basic legal skills and language skills are important. Strong research and analytical skills, legal knowledge, creativity and leadership have to be strengthened and sharpened for any role. He suggests looking for opportunities to be involved in projects that are related to sports such as volunteering at sports events, which provides knowledge as to how such events are planned, and growing your network while displaying your abilities.

Full- Time

My takeaway from this match is that as an individual looking to enter sports law, you have to be flexible and pro-active. You must have the ability to adapt to changes including the scope of your work and continuously put your best foot forward and try to excel in anything that you do. Build yourself up and make yourself visible to the people who are in the sports industry. Go on and develop additional skill sets as it will help set you apart from the rest of the industry. Ultimately, you must be ready to take on challenges and accept opportunities at any time they present themselves as you will never know when the whistle will blow, so be ready to kick the ball!



Andrew Mercer
General Counsel and Director of Legal Affairs
at AFC

MALAYSIAN SPORTS LAW RELATED NEWS UPDATES

PLEASE CLICK ON NEWS TITLE TO VIEW FULL ARTICLE

'Catalyst for change': Malaysian swimmer Cindy Ong opens up about abuse

Published: 17.06.2021

Cindy Ong's story is the latest to cast a harsh spotlight on physical and sexual abuse in sport, and follows a litany of complaints from fellow swimmers, gymnasts and ice-skaters.

But her move to go public is a particularly rare and difficult one in a country where social conservatism often discourages people from speaking out.

Ministry needs to address sexual abuse in sports, create support system for athletes, says ex-gymnast

Published: 25.05.2021

"There is a popular misconception that only female athletes are abused or harassed. It happens to male athletes, too. The problem is, our athletes are not taught what is appropriate and inappropriate touching. We need to empower, raise awareness and educate the athletes and coaches about this."

Malaysia kicked out from Asian sepak takraw body

Published: 20.05.2021

ASTAF Disciplinary Committee chairman Yogender Singh Dahiya said in a statement today that the decision was reached after hearing the charges laid out by John Vijayan Vasavan, the prosecutor appointed by ASTAF.

"It is with utmost sadness that ASTAF made this painful decision, but it has to be done for the good of the sepak takraw fraternity. It is also to send a strong signal to the sporting fraternity that irresponsible behaviour will not be condoned," he said.

Sumareh's case to go to Court of Arbitration for Sports

Published: 07.02.2021

It may be hard for Pahang FA (PFA) to beat Fifa, but they will try to do it. PFA have decided to take things into 'extra time' by dragging Fifa and Mohamadou Sumareh to the Court of Arbitration for Sports (CAS).

Earlier, Fifa had ordered PFA to pay their former player, Sumareh US\$1.2million (RM4.9million) in salary compensation.