

SPORTS LAW DISPUTES: ARBITRATION

A presentation at 39 Essex Chambers, London: 26.09.17

JONATHAN BELLAMY

Barrister

FCIArb, Chartered Arbitrator

THE “FRESH START”: ONE-STOP SHOPPING

- “..... the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.

Premium Nafta Products Ltd v Fili Shipping Co. Ltd [2007] UKHL 40
(*Fiona Trust & Holding Corp. v Primalov*)

ARBITRABILITY

- Commercial contract disputes – agency, sponsorship, marketing, employment, online gaming
- Insurance contract coverage disputes
- Subrogated claims: S82(2) Arbitration Act 1996: “References to a party to an arbitration agreement include any person claiming under or through a party to the agreement”
- Shareholder disputes – unfair prejudice: *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 (application for permission to appeal refused by Supreme Court)
- Tort claims, incl. player-to-player negligence claims
- Eligibility
- Selection
- Doping

- Competition law
- Regulatory law
- Insolvency

SOURCES OF ARBITRATION AGREEMENT

Express:

- Contractual term to refer future disputes
- Agreement to refer existing disputes
- Rules of relevant sports governing body
- Membership, leagues and competition entry forms – clubs and players

Implied

- Acceptance by conduct: *Modahl v British Athletic Federation Ltd No. 2* [2002] 1 WLR 1192
- Course of dealing: *Stretford v The Football Association Ltd & anr* [2007] EWCA Civ. 238 (cited in *Fiona Trust* decision)
- Implication of agreement to arbitrate (including incorporation of arbitration rules) is fact sensitive and is determined on general principles: *Bony v Kacou & ors* [2017] EWHC 2146

FA RULES – SECTION K

AGREEMENT TO ARBITRATION

1 (a) Subject to Rule K1(b), K1(c) and K1(d) below, any dispute or difference between any two or more Participants (which shall include, for the purposes of this section of the Rules, The Association) including but not limited to a dispute arising out of or in connection with (including any question regarding the existence or validity of):

- (i) the Rules and regulations of The Association which are in force from time to time;
 - (ii) the rules and regulations of an Affiliated Association or Competition which are in force from time to time;
 - (iii) the statutes and regulations of FIFA and UEFA which are in force from time to time; or
 - (iv) the Laws of the Game,
- shall be referred to and finally resolved by arbitration under these Rules.

FA RULES – SECTION K

Participants

“Participant” means an Affiliated Association, Competition, Club, Club Official, Intermediary, Player, Official, Manager, Match Official, Match Official observer, Match Official coach, Match Official mentor, Management Committee Member, member or employee of a Club and all such persons who are from time to time participating in any activity sanctioned either directly or indirectly by The Association.

FAPL RULES – SECTION X

Agreement to Arbitration

2. Membership of the League shall constitute an agreement in writing between the League and Clubs and between each Club for the purposes of section 5 of the [Arbitration] Act 1996 in the following terms:

- 2.1 to submit all disputes which arise between them (including in the case of a Relegated Club any dispute between it and a Club or the Company the cause of action of which arose while the Relegated Club was a member of the League), whether arising out of these Rules or otherwise, to final and binding arbitration in accordance with the provisions of the Act and this Section of these Rules;
- 2.2 that the seat of each such arbitration shall be in England and Wales;
- 2.3 that the issues in each such arbitration shall be decided in accordance with English law;
- 2.4. that no other system or mode of arbitration will be invoked to resolve any such dispute.

FA RULES – SECTION K

Powers & Remedies

5. The Tribunal shall have power to:

- determine any question of law or fact arising in the course of the arbitration
- determine any question as to its own jurisdiction
- summarily determine the claim
- order the claimant to provide security for costs
- appoint one or more experts to report on specific issues
- make a declaration as to any matter to be determined in the proceedings
- order the payment of a sum of money
- award simple or compound interest
- order a party to do or refrain from doing anything
- order specific performance of a contract (other than a contract relating to land)
- order the rectification, setting aside or cancellation of a deed or other document

JUDICIAL ATTITUDES

- “In the instant case the inclusion of Rule K was not in any sense required by law or compulsory. An arbitration clause has become standard in the rules of sporting organisations like The FA. The rules regulate the relationship between the parties, which is a private law relationship governed by contract... To strike down clauses of this kind because they were incompatible with article 6 on that basis would have a far-reaching and, in our opinion, undesirable effect on the use of arbitration in the context of sport generally.”

Stretford v The Football Association Ltd & Anr [2007] EWCA Civ. 238

- “There is, in reality, no room for the argument that a characterisation of the appeal proceedings as arbitral results in any reduction in standards of fairness or in recourse to law. The policy of English law is pro arbitration rather than anti-arbitration, as is that of Strasbourg, and it may well be thought that recourse to the English courts, as permitted under the Arbitration Acts, is as available, if not more available, than recourse from a contractually agreed disciplinary procedure that is internal only.

England & Wales Cricket Board Ltd v Kaneria [2013] EWHC 1074 (Comm)

- s68 Arbitration Act application (challenge for serious irregularity):

“an arbitrators’ award should not be read as a statute and should be approached in a “reasonable and commercial way expecting, as is usually the case, that there will be no substantial fault that can be found with it.”

Pulis v Crystal Palace FC [2016] EWHC 2999 (Comm)

ARBITRATION v. LITIGATION

- Party autonomy: e.g. written procedure, relaxed rules of evidence, document production
- Speed of resolution; e.g. Rule K default timetable 119 days
- Sector knowledge/experience of Tribunal
- Confidentiality
- Certainty - limited grounds of appeal: S67-69 Arbitration Act 1996

- Potential jurisdiction issues; e.g. non Authorised Agents, participation in sanctioned activities, tortious causes of action
- Tribunal fees and expenses
- Legal knowledge/experience of Tribunal
- Restricted availability of interim remedies: (1) *Sankofa* & (2) *Charlton FC v Football Assoc.* [2007] EWHC 78 (Comm), FA Rule K1(e)

- Arbitral Institutions:
 - Sport Resolutions UK (sportresolutions.co.uk)
 - Court of Arbitration for Sport
 - London Court of International Arbitration (lcia.org)
 - International Chamber of Commerce Court of Arbitration (international-chamber.co.uk)

SPORTS LAW DISPUTES: ARBITRATION

A presentation at 39 Essex Chambers, London: 26.09.17

JONATHAN BELLAMY

Barrister

FCIArb, Chartered Arbitrator