

## RESOLVING DISPUTES IN SPORTS and ADVOCATING ALTERNATIVE DISPUTE RESOLUTION

This Primer identifies and explains the different uses of Alternative Dispute Resolution (ADR) in sports law disputes. It discusses three types of ADR mechanisms (i.e., arbitration, mediation, and hybrid modes of dispute resolution) and how these could be used in sports law disputes. The Primer contains a discussion on arbitration and mediation in the Philippines, arbitration and mediation in the United States, international arbitration, and arbitration and mediation in the Court of Arbitration for Sport (CAS).

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### 3) What are the mechanisms by which these disputes can be resolved?

The mechanisms and approaches are:

1. Litigation,
2. Mediation,
3. Arbitration, and
4. Hybrid.

The author proposes and advocates alternative dispute resolution mechanisms, i.e., mediation, arbitration, and hybrid approaches.

### B. Arbitration

#### 4) What is Arbitration?

Arbitration is an alternative mode of dispute resolution, "where an arbitrator or panel of arbitrators is appointed by the parties to make a binding decision, from which there are very limited grounds of challenge."<sup>1</sup> Arbitration may be *ad hoc*, where parties determine whether rules they may consider appropriate for the arbitration.<sup>2</sup> Arbitration can likewise be institutional, where the arbitration is conducted under the auspices known as the ADR Act of 2004 (ADR Act), is the general law applicable to all forms of alternative dispute resolution in the Philippines.<sup>3</sup> It also recognizes the international application of the alternative dispute resolution system by adopting the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration.<sup>4</sup>

Some of the widely-known arbitral institutions in the Philippines are the Philippine International Center for Conflict Resolution and the Philippine Dispute Resolution Center, Inc. The Philippine Institute of Arbitrations is, on the other hand, the first learned society in the Philippines dedicated to both promoting private dispute resolution within the country and pursuing initiatives to enable the country to serve as a viable and practical venue for private dispute resolution.<sup>5</sup>

The UNCITRAL model law is a mere proposal. Every country that takes a model law and enacts it makes it domestic law. The adoption of the UNCITRAL Model Law was based on a report from the UNCITRAL to the effect that the harmonization of the arbitration laws of the different countries of the world could be achieved more effectively by a model or uniform law.<sup>6</sup>

When a country adopts a model law, it has a choice whether to adopt all or only part of it. The Philippines has adopted the 1985 UNCITRAL Model Law in its ADR Act of 2004.

#### 6) What is the policy of the State on alternative dispute resolution (ADR)?

Section 2 of the ADR Act recognizes that it is the declared policy of the State to actively promote party autonomy in the resolution of disputes or the freedom of the party to make their own arrangements to resolve their disputes. Towards this end, the State shall encourage and actively promote the use of ADR as an important means to achieve speedy and impartial justice and decongest court dockets. As such, the State shall provide means for the use of ADR as an efficient tool and an alternative procedure for the resolution of appropriate cases. Likewise, the State shall enlist active private sector participation in the settlement of disputes through ADR.

The Philippine Supreme Court has declared alternative dispute resolution – specifically, arbitration – as the "wave of the future in international relations."<sup>7</sup> In *Insular Savings Bank v. Far East Bank and Trust Company*,<sup>8</sup> the Supreme Court declared the policy of the Judiciary on ADR, thus:

The Philippine Sports Commission in NSA Advisory No. 58-2021 dated November 24, 2021, citing the Revised Corporation Code, required National Sports Associations to provide for an arbitration clause. The Advisory reads:

"National Sports Association (NSAs) are required to submit to the PSC, as part of their Articles of Incorporation (AOI) and by laws, an Arbitration Provision pursuant to Section 181 of R.A. No. 11232 (Revised Corporation Code of the Philippines).

For your information and strict compliance."

Section 181 of Revised Corporation Code states:

**"Arbitration for Corporations.** – An arbitration agreement may be provided in the articles of incorporation or bylaws of an unlisted corporation. When such an agreement is in place, disputes between the corporation, its stockholders or members, which arise from the implementation of the articles of incorporation or bylaws, or from intra-corporate relations, shall be referred to arbitration. A dispute shall be nonarbitrable when it involves criminal offenses and interests of third parties.

The arbitration agreement shall be binding on the corporation, its directors, trustees, officers, and executives or managers.

To be enforceable, the arbitration agreement should indicate the number of arbitrators and the procedure for their appointment. The power to appoint the arbitrators forming the arbitral tribunal shall be granted to a designated independent third party. Should the third party fail to appoint the arbitrators in the manner and within the period specified in the arbitration agreement, the parties may request the Commission to appoint the arbitrators. In any case, arbitrators must be accredited or must belong to organizations accredited for the purpose of arbitration.

The arbitral tribunal shall have the power to rule on its own jurisdiction and on questions relating to the validity of the arbitration agreement. When an intra-corporate dispute is filed with a Regional Trial Court, the court shall dismiss the case before the termination of the pretrial conference, if it determines that an arbitration agreement is written in the corporation's articles of incorporation, bylaws, or in a separate agreement.

"(1) predictability, as disputes are resolved in one place and not by a race to judgment in the courts of two nations;

"(2) competence, as arbitrators will have applicable specialized commercial and legal expertise;

"(3) party participation, as the procedures are decided by the parties as well as the arbitrators, rather than dictated by detailed rules as in litigation;

"(4) finally, as the resulting award will be subject to relatively limited grounds for setting aside or modification by a court;

"(5) enforceability, as most nations, including the Philippines, are parties to the U.N. Convention on Recognition and Enforcement of Arbitral Awards (New York Convention), making a foreign arbitral award typically easier to enforce than a foreign judgment; and

"(6) privacy, as arbitration proceedings are confidential."<sup>9</sup>

Arbitration, however, is not perfect. As such, it suffers from several disadvantages, as follows:

"(1) speedy relief before the arbitral tribunal is unlikely, as a panel must be selected before anything substantive can happen;

"(2) in a bitter dispute, there may be not only the specified arbitration, but also litigation resulting from attempts to avoid the arbitration;

"(3) arbitration tends toward splitting the difference rather than deciding either side is totally right or totally wrong."<sup>10</sup>

#### 11) How is an arbitration proceeding commenced?

The commencement of an arbitration proceeding depends on whether the arbitration is institutional or *ad hoc*. But in general, it is commenced by sending a request for arbitration to the other party. The request for arbitration is usually brief and contains the following information: (1) a summary of the request by indicating the governing rule, the cause of action, and the claims or relief prayed for; (2) the parties and their legal representatives; (3) the arbitration agreement; (4) the number of arbitrators and the parties' nominees; (5)

Once parties have validly consented to arbitration through any of the foregoing forms, that consent cannot be unilaterally withdrawn.<sup>11</sup> According to the doctrine of separability, another important concept in arbitration, the arbitration agreement is an independent obligation separable from the rest of the contract.<sup>12</sup> In other words, even if the validity of the contract that contains the arbitration clause is challenged, the agreement to arbitrate remains.<sup>13</sup>

#### 14) What is the Court of Arbitration for Sport (CAS)?

The CAS is "an institution independent of any sports organization which provides for services in order to facilitate the settlement of sports-related disputes through arbitration or mediation by means of procedural rules adapted to the specific needs of the sports world."<sup>14</sup> The CAS resolves disputes through arbitration by pronouncing arbitral awards that have the same enforceability as judgments of ordinary court.<sup>15</sup>

Just like any arbitration, the parties' consent to arbitration is the cornerstone of CAS arbitration.<sup>16</sup> For a dispute to be submitted to CAS arbitration, the parties must agree in writing, which may either appear on a one-off basis or in a contract or the statutes/regulations of a sports organization.<sup>17</sup> Similar to ordinary arbitration, parties may agree to submit any dispute to CAS arbitration either before or after the dispute has arisen. Specifically, R27 of the Code of Sports-related Arbitration provides that the rules shall apply whenever the parties have agreed to refer a sports-related dispute to CAS. Such reference may arise out of an arbitration clause contained in a contract or regulations or by reason of a later arbitration agreement (ordinary arbitration proceedings) or may involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement provide for an appeal to CAS (appeal arbitration proceedings).<sup>18</sup>

Moreover, it is commonplace for an athlete to sign an entry form, which includes a provision for CAS arbitration, as a condition of entry to sports events.<sup>19</sup> While it is true that this practice raises issues as to the authenticity of the consent given, the Swiss Federal Tribunal has ruled that the need for a quick and uniform dispute resolution system in international sport prevails over an athlete's right to have his case adjudicated by ordinary courts, assuming that due process is complied with.<sup>20</sup>

#### 15) What is the jurisdiction of the CAS?

Under R27 of the Code of Sports-related Arbitration, sports disputes that parties have agreed to submit to CAS arbitration may involve matters of principle relating to sport or matters of pecuniary or other interests relating to the practice or the development of sport and may include, more generally, any activity or matter related or connected to sport. Thus, any dispute directly or indirectly linked to sport – disputes of a commercial nature (e.g., a sponsorship contract) or a disciplinary nature following a decision by a sports organization (e.g., a doping case) – may be submitted to CAS arbitration.<sup>21</sup>

In the Philippines, Section 3(a) of the ADR Act defines mediation as "a voluntary process in which a mediator, selected by the disputing parties, facilitates communication and negotiation, and assists the parties in reaching a voluntary agreement regarding a dispute." In mediation, the parties are convinced by a mediator to settle their controversy through a voluntary agreement executed by the parties called a mediated settlement agreement.<sup>22</sup>

Excluded from the coverage of the ADR Act is court-annexed mediation, which is a mediation process conducted under the auspices of the court.<sup>23</sup> Court-annexed mediation is conducted prior to the trial "where the judge refers the parties to the Philippine Mediation Center (PMC) for the mediation of their dispute by trained and accredited mediators."<sup>24</sup> Likewise excluded from the ADR Act is Judicial Dispute Resolution, which is the mediation, conciliation, and early neutral evaluation process conducted by the judge of a pending case after a failed court-annexed mediation and before the pre-trial stage.<sup>25</sup> The ADR Act, however, is applicable to court-referred mediation, which is a "mediation ordered by a court to be conducted in accordance with the provisions of the mediation when an action is prematurely commenced in violation of such agreement."<sup>26</sup>

#### 19) How is this compared to mediation in the United States?

In the United States, the use of mediation has been recognized to have become an integral and growing part of the processes of dispute resolution in the courts, public agencies, community dispute resolution programs, and the commercial and business communities, as well as among private parties engaged in conflict.<sup>27</sup> The Uniform Mediation Act (UMA) is an "attempt to bring uniformity to mediation across the country. A primary purpose of the Act is to provide 'a privilege that assures confidentiality in legal proceedings.' Providing this mediation, conciliation, and early neutral evaluation process conducted by the judge of a pending case after a failed court-annexed mediation and before the pre-trial stage."<sup>28</sup>

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