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体育法律资讯

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速览

【张冰律师被上海政法学院体育法学研究中心聘为特约研究员】

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2013年9月，北京大成（上海）律师事务所张冰律师，被上海政法学院体育法学研究中心聘为特约研究员。上海政法学院是一所以法学为主干的政法院校，拥有一大批法学专家学者，对于体育法学的研究可以提供强有力的人才资源保障，上海政法学院体育法学研究中心经学院批准2010年正式建立，上海政法学院体育部目前也拥有着一批从事体育法学研究的人才队伍。

该体育法学研究中心的基本职能包括：深入研究党中央、国务院及体育总局颁布的体育法律法规政策以及与体育相关联的其他法律法规。加强体育法学基础理论研究。组织参与体育法制建设的专项调研活动，针对体育领域出现的相关法律问题进行前瞻性研究，为政府部门制定相关法律法规提供决策咨询依据。配合协助相关体育部门进行体育政策、法规和规范性文件的解释、答复和咨询工作，为政策法规的贯彻执行服务。张冰律师的加入，将促进上海政法学院体育法学研究中心体育法律理论与实践的紧密结合，协助该中心

掌握国际、国内最新的体育法发展动态，从而推动中国体育法研究与实践领域的迅速发展。

【热点体育动态】

日本东京申奥成功，将举办 2020 年夏季奥运会

国际奥委会(International Olympic Committee)投票决定将 2020 年夏季奥运会承办权授予日本的东京。在不稳定的国际局势面前，奥委会最终选择了安全。东京击败了同为申办城市的伊斯坦布尔和马德里，让国际奥委会相信东京最有能力确保奥运会的胜利召开。这是东京继 1964 年后再次主办奥运会，1964 年的奥运会让日本在二战结束不到二十年后重新步入国际舞台。东京申奥成功，意味着远东地区将成为本十年结束前国际奥林匹克运动的中心。2018 年冬季奥运会将在韩国平昌举行。

东京奥申委首席执行官水野正人(Masato Mizuno)说：在这种不确定的时刻，我们必须确保这是一次可以顺利召开的奥运会。东京在首轮投票中就几乎锁定胜局，在 94 张选票中赢得 42 票，与获胜所需的多数票仅差 6 票，马德里和伊斯坦布尔则分别获得 26 票，在随后的附加赛中，伊斯坦布尔以 49 对 45 票淘汰马德里，留下来与东京角逐第二轮。在第二轮投票中，东京以 60 对 36 票击败伊斯坦布尔。投票结束后，国际奥委会委员在希尔顿酒店大厅表示：奥委会做出了明智和安全的决定，而不是冒险的决定。国际奥委会评估委员会主席 Craig Reddie 称，确定性是至关重要的因素，他称赞日本首相安倍晋三(Shinzo Abe)在他的陈词中直言不讳地谈到福岛核电厂尚未解决的问题，两年多前发生的日本海啸导致福岛核电厂多处熔化。Reddie 还表示，经济问题影响了西班牙申奥，他怀疑经济问题在这里发挥了重要作用。

在走出大厅时，安倍晋三表示：我非常高兴能与日本国民分享这些感动。国际奥委会委员称，在最后一轮投票中，一方是总体稳定的全球最安全的城市之一，另一方是同叙利亚接壤的过于靠近中东动荡地区的国家的首都，委员们是在这一基础上选出主办国的。来自澳大利亚的国际奥委会委员、前奥运会划船选手 James Tomkins 表示，委员们就这个问题交换过意见。伊斯坦布尔奥申委主席阿莱特(Hasan Arat)将投票结果比作体育。他说，这是比赛，你必须尊重结果。他拒绝猜测政治动荡是否阻碍了这次申奥。土耳其总理埃尔多安(Recep Tayyip Erdogan)向陪同他前往布宜诺斯艾利斯的土耳其媒体表示，他的国家尊重国际奥委会的决定。他说：我唯一的遗憾就是这次主办权给了一个已经举办过奥运会的国家；伊斯坦布尔本来可以是一个完全不同的城市，一个将许多文化与文明融汇在一起的连接亚洲与欧洲的城市。埃尔多安还表示，土耳其今后还可能再次申奥。

在东京，当凌晨 5 点左右消息传来时，聚集在公众观景区的人群欢呼雀跃，大约 2,000 人拥进一所 49 年前见证日本女排勇夺金牌的体育馆，当时，这一意料之外的胜利让整个日本为之振奋。对一些人来说，东京申奥成功的意外性丝毫不亚于 49 年前日本女排夺

魁，尽管东京一直被认为具有压倒性优势。在体育场中庆祝申奥成功的 Shingo Hayashi 是一名 32 岁的商人，他说：我原以为福岛核灾难会让东京申奥成功的希望变得渺茫。

东京本次申奥主打安全牌。与其他申办国不同，日本国内此次对申办 2020 年夏季奥运会普遍报以热情，没有听到明显的有组织的反对声，这与东京申办 2016 年奥运会时在国内遇到的普遍质疑形成对比。2009 年的民意调查显示，只有略超过 50% 的东京居民支持举办奥运会，而近期进行的一些调查显示，支持奥运会的东京居民超过 90%。民众态度的转变与多个因素有关。一方面，日本政府正决心从 2011 年大地震、海啸与核事故的阴影中走出来；同时，与 2009 年日本内阁对申办奥运会持袖手旁观的态度不同，安倍晋三此次是亲自出马力挺申奥。日本政府的财政状况并不乐观，这与其他申办国并无不同。事实上，日本的公共债务规模是日本经济总量的两倍以上，在所有发达国家中最高。不过日本国债主要由国内投资者持有，债市比较平稳，融资成本不高，没有发现再融资困难的迹象。在申奥宣传中，东京强调其财政的稳定性，称已拥有 45 亿美元储备金。

托马斯-巴赫当选国际奥委会第九任主席

2013年9月10日，国际奥委会第125次全会在阿根廷布宜诺斯艾利斯举行，新任国际奥委会主席候选人6选1，德国人托马斯-巴赫当选第九任国际奥委会主席，任期八年，如果连任可以再加四年。

现任国际奥委会主席比利时的罗格先生结束了长达12年的任期，六名候选人竞争新任国际奥委会主席，这也是史上竞争最激烈的一次主席选举，六人分别是托马斯-巴赫、塞尔盖-布勃卡、里查德-卡里昂、黄思绵、丹尼斯-奥斯瓦尔德、吴经国。、

德国人巴赫59岁，是国际奥委会副主席，他的人脉极广，曾经是一名击剑选手，罗格钦点巴赫为接班人：“我相信，巴赫先生不会是惟一的候选人，但我想他是一个最合适的人选。”巴赫也很重视与中国交好，还曾参加过郭晶晶和霍启刚(微博) 的婚礼。

波多黎各的卡里翁60岁，是国际奥委会财务委员会主席，他的优势是理财，过去10年将奥委会资金储备大幅增加，劣势是没有当过运动员的履历。乌克兰的撑杆跳巨星布勃卡49岁是最年轻的竞争者，他有辉煌的运动员生涯，但2008年才成为奥委会委员，

资历浅是最大死穴。瑞士的奥斯瓦尔德66岁，是前奥委会执委会委员，他一直反对罗格，被看做“少数派”。

历史上八位奥委会主席，有一个来自美国，七个来自欧洲。故而两位亚洲竞选者引人关注，新加坡的黄思绵64岁，是国际奥委会第一副主席，是他一手促成2010年首届青奥会在新加坡举行，在促进年轻人从事体育方面，有独到之处。中华台北的吴经国66岁，是国际奥委会执委会委员，对业余拳击贡献很大，但年龄是他的劣势。

国际奥委会主席比利时的雅格-罗格71岁，2001年他接替西班牙的萨马兰奇成为第八任主席。经过投票选举，德国的巴赫接替了罗格，成为了国际奥委会第九位主席。

国际奥委会提供的巴赫个人资料简介如下：

托马斯·巴赫：1953年12月29日出生于德国巴伐利亚州的维尔茨堡，德国人。法学博士，曾是一名律师，后在多家公司担任董事会主席或成员。

作为击剑运动员参加了1976年蒙特利尔奥运会并获得花剑团体金牌，1976年、1977年两获世界击剑锦标赛花剑团体冠军，此外还多次获得欧洲和德国各项击剑比赛冠军。

1981年至1988年担任国际奥委会运动员委员会委员。1991年担任国际奥委会委员。1996年当选国际奥委会执委。2002年起担任国际奥委会体育与法律委员会和司法委员会主席。

2000年起，长期担任国际奥委会副主席。2013年9月10日，巴赫在国际奥委会第125次全会上当选国际奥委会主席，任期8年至2021年。

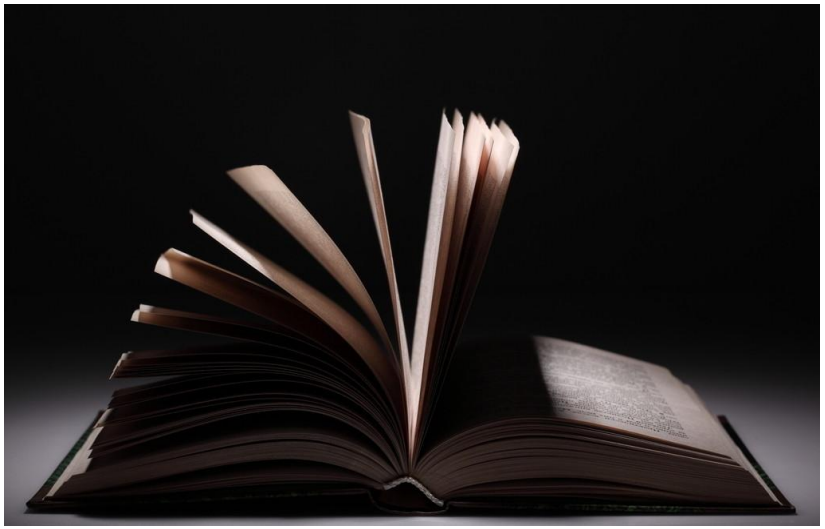
【经典体育法律案例】

澳大利亚柔道运动员之间的参赛资格案

案例名称：：Arbitration CAS 2000/A/284 Raguz v. Sullivan/The Judo Federation of Australia Inc.

仲裁机构：国际体育仲裁院(CAS)

涉诉法院：澳大利亚新南威尔士州上诉法院



【涉及的主要法律问题】

1．一旦运动员拿到了参加奥运会所得的积分并且通过了审查和确认，修改选拔规则的权力就应当受到限制，并且这种权力没有溯及以往的效力。

2．几个相互交叉的文件可以证明或者构成一个有多方当事人的合同，而在单独的仲裁协议中以及体育仲裁规则中同意仲裁的条款都含有多方当事人的互相承诺的意思。这种互相承诺的意思表示有时并没有予以明确，但是它对于构成一个有效的包括仲裁条款在内的合同并不存在法律上的障碍。

【基本案情】

苏利文Sullivan（国际体育仲裁院仲裁中的申请人，法院审理中的被告）和拉古慈Raguz（国际体育仲裁院仲裁中的被申请人，法院审理中的原告）都是澳大利亚柔道协会女子52公斤以下级的队员。在2000年悉尼奥运会之前，澳大利亚奥委会决定将参加奥运会的柔道队的选拔标准公开，而根据澳大利亚奥委会和澳大利亚柔道协会之间于1999年9月27日签署的协议也表达了双方有意将队员的选拔标准公开和透明化。这个协议实际上是一个提名、选拔和参加奥运会的参赛队员的一个标准，其第5条第3款规定参加奥运代表队的运动员的选拔要经过澳大利亚奥委会确认其已符合该协议附件F所规定的所有的奥运代表参赛队员的提名和选拔标准。

澳大利亚柔道协会承认苏利文符合澳大利亚奥委会选拔悉尼奥运会的代表的提名标准，但是拉古慈是她入选奥运代表队的同级别竞争对手。根据前述协定要进行的涉及积分的选拔比赛分别是1999年10月初的世界锦标赛、1999年10月底的美国公开赛以及2000年3月的大洋洲柔道锦标赛。苏利文参加了所有的比赛，而拉古慈只参加了后两项比赛。在这些比赛过后苏利文认为她没有得到入选奥运

代表队的提名，因为她没有参加2000年3月的一个有关会议。

2000年4月10日苏利文就澳大利亚柔道协会提名奥运参赛代表的时间以及什么时候能够知道自己是否被提名的情况向澳大利亚柔道协会写信进行了询问，该信还暗示可能将未获提名的情况向澳大利亚柔道协会申诉委员会提起申诉。2000年5月14日澳大利亚柔道协会管理委员会一致同意提名拉古慈为女子52公斤以下级的代表队员，苏利文是该级别的替补队员，同时建议苏利文将其申诉提交大洋洲柔道联合会进行解决。6月24日，苏利文就澳大利亚柔道协会没有提名其入选奥运代表队的决定向该协会的申诉机构提起申诉，该组织作出了有利于拉古兹的裁决。

苏利文随后向国际体育仲裁院提起了仲裁请求。苏利文在向国际体育仲裁院提起的仲裁申请书中指明澳大利亚柔道协会及其裁判机构作为被申请人，拉古兹是“有利害关系的当事人。”

【诉辩主张】

苏利文向国际体育仲裁院提起的仲裁请求是：裁定自己是悉尼奥运会澳大利亚代表队的一员。

【程序性问题】

最初澳大利亚柔道协会提名拉古兹作为奥运代表团的一员并将其提名报送到了澳大利亚奥委会。为此拉古兹签署了一个提名表，规定根据澳大利亚奥委会和柔道协会的有关提名协议，拉古兹应将有关的因为提名或者入选奥运代表队的争议提交国际体育仲裁院仲裁。

仲裁庭指出仲裁地是在瑞士洛桑，根据《体育仲裁规则》第R45条的相关规定，适用于争议事实的法律依据是新南威尔士州的实体法。

【事实和证据】

有关事实问题涉及的主要是对澳大利亚奥委会和澳大利亚柔道协会之间签署的协议的恰当解释和效力问题。如果苏利文的观点是正确（即该协议规定的参赛资格标准和提名标准是有冲突的并导致不同的积分），那么她将获得的积分是23分，另一当事人拉古慈是21分，其结果是苏利文应当获得提名。而按照澳大利亚柔道协会的看法两人的积分是相同的即都是21分，只不过拉古慈在2000年大洋洲柔道锦标赛的表现较好而获得了提名。仲裁庭不需要对当事人的竞技状况以及积分标准进行评价，其所决定的唯一问题就是澳大利亚奥委会和澳大利亚柔道协会之间签署的协议的恰当解释和效力问题，因此有必要详细分析该协议的条款和其附件的内容。

仲裁庭认为该协议及其附件所使用的语言以及运用标准表明它们之间是相互联结的，理应放在一起进行理解，也即应当从整体上来考虑在选拔运动员的过程中是否存在有违该协议规定的提名标准的情况。从该协议所使用的语言来看该协议赋予了有关的运动员一定的权利和合法的期待权益，它成了提名和选拔有关运动员的一个综合参考准则，运动员有权根据该协议来作出某些行为。仲裁庭的意见是竞争2000年奥运会柔道

比赛的参赛资格的运动员自从1999年9月27日起就一直有一个合法的期待权益，即该协议的规定应当得到严格执行。

随后的问题是否也要要求澳大利亚柔道协会遵守该协议及其附件所规定的积分表。其中的用语是明确的，即一旦出现不一致的情况，在协议的条款及其各个附件之间的规定的适用是有先有后的，先前的不一致或者非正式的讨论都是无关紧要的。仲裁庭的意见是不管澳大利亚柔道协会修改有关积分的客观目的何在，其建议在有关的选拔赛举行之后是没有任何效力的。一旦运动员拿到了参加奥运会所得的积分并且通过了审查和确认，修改选拔规则的权力就应当受到限制，并且这种权力没有溯及以往的效力。

至于本争议而言，所有的运动员都对自从1999年9月27日起开始适用并在大洋洲柔道协会选拔赛之前不得修改的澳大利亚奥委会所制定的选拔标准有合法的期待权益，即该文件应确保1999年世界锦标赛的第八名获得8个积分。仲裁庭的观点是澳大利亚柔道协会选拔参加奥运会的运动员的程序并没有适当遵守有关的选拔标准，而且澳大利亚柔道协会申诉机构的裁决程序也是有错误的，因此维持申请人苏利文的申请，澳大利亚柔道协会应当让苏利文取代拉古慈的参赛资格。

【仲裁裁决】

仲裁庭在2000年8月15日作出的书面裁决中指出，提名标准没有得到恰当地适用和履行，如果正确地适用提名标准，苏利文将是被提名的运动员，因此裁定支持苏利文的仲裁请求，撤销澳大利亚柔道协会向澳大利亚奥委会作出的提名拉古慈入选奥运代表队的提名；建议澳大利亚柔道协会向澳大利亚奥委会提名苏利文以代替拉古兹。

【定案】

拉古慈不服国际体育仲裁院的裁决，随向澳大利亚新南威尔士上诉法院提起了撤销国际体育仲裁院裁决的上诉，并把苏利文、澳大利亚柔道协会及其裁判机构以及国际体育仲裁院作为共同的被告。原告声称根据该裁决她应当是仲裁协议的一方当事人。此外她没有对国际体育仲裁院的管辖权提出质疑。

澳大利亚柔道协会支持原告提出的并不存在一个排外的仲裁协议的观点，而苏利文和国际体育仲裁院则指出根据生效的排外仲裁协议的规定法院对此争议没有管辖权。换句话讲，苏利文认为根据有关的法律规定法院不能受理此上诉争议，故首先的问题是上诉法院对原告的申请是否具有管辖权。原告指出如果某仲裁协议的所有当事人都同意或者上诉法院准许，法院可以对因仲裁裁决而引起的法律问题行使管辖权，对该观点没有引起任何争议。但是如果当事人之间的仲裁协议排除申诉权，则上诉法院就没有批准的权力。上诉法院是否对该上诉具有管辖权也应从有关条文的规定去理解，而且应当以一种中立的观点去考虑是否存在所谓的排外的仲裁协议。

法院指出，已有的资料显示当事人之间的仲裁协议排除了有关当事人的上诉权，在该仲裁协议缔结的同时不可能再缔结一个排外的仲裁协议。如果有一个书面的排外的仲裁协议，并且相关的仲裁协议不是一个“国内仲裁协议”，或者该排外的仲裁协议是在仲裁程序开始后缔结的，那么就可以排除法院的管辖权。尽管有关的规定允许在不同仲裁协议的当事人之间再缔结排外的仲裁协议，但是这并不意味着在本案件中有一个排外的仲裁协议。法院认为为了确定在拉古兹、苏利文和澳大利亚柔道协会之间是否有一个排外的仲裁协议，有必要裁定的是在这些当事人之间是否存在有一个相关的仲裁协议。

拉古兹提出，她是向国际体育仲裁院提起仲裁的仲裁协议的一方当事人，据此法院应有管辖权，并且强调直到在她决定参与国际体育仲裁院的仲裁程序的时候她才成为仲裁当事人的。国际体育仲裁院的程序只承认苏利文和澳大利亚柔道协会为当事人。然而，拉古兹却被应邀提交了意见和参加了仲裁程序。在国际体育仲裁院的裁决中，拉古兹是“第三人”。

苏利文认为参与国际体育仲裁院的仲裁程序就证明有一个单独的仲裁协议。而拉古兹的意见是并不存在一个排外的仲裁协议，并且指出因为其参加的仲裁的地点是在悉尼故是一个国内仲裁。两者的分歧就在于这两方面。

法院指出，在澳大利亚奥委会和柔道协会之间的单独仲裁协议涉及到向澳大利亚柔道协会设立的裁决机构行使申诉权和向国际体育仲裁院提起仲裁的规定。有关法律承认几个相互交叉的文件可以证明或者构成一个有多方当事人的合同。而在单独的仲裁协议中以及体育仲裁规则中同意仲裁的条款都含有多方当事人的互相承诺的意思。这种互相承诺的意思表示并没有予以明确，但是它对于构成一个有效的合同并不存在法律上的障碍。首先该协议的当事人是澳大利亚奥委会和柔道协会。然而，在有关的运动员被选为候选人员之后，通过填写提名表以及代表队的管理协议这些运动员也应遵守澳大利亚奥委会和柔道协会之间的单独仲裁协议的规定。通过这种方法每一个遵守单独仲裁协议的当事人都要对其他人承诺遵守其条款的规定，譬如入选奥运会的代表的提名和选拔。这种多方当事人协议是可以强制执行的，而不用考虑传统的合同法上的要约和承诺的概念。

因此法院的意见是在澳大利亚奥委会、柔道协会和运动员之间有单独的但又是互相交叉的契约性的协议，故相关的仲裁协议也是有多方当事人的仲裁协议。排外的仲裁协议也是如此。当事人通过其行为或者签字成为两个仲裁协议的当事人，而其中位置最高的是澳大利亚奥委会和柔道协会之间的仲裁协议，根据该协议澳大利亚奥委会、柔道协会以及这两个运动员都承诺遵守单独仲裁协议第七条规定的仲裁制度和国际体育仲裁院的仲裁。该承诺使得苏利文到国际体育仲裁院申请了仲裁。

拉古兹和苏利文两个人签署的两个报名表涉及提名方面的任何争议的规定使得它们合成一个单独的协议，每个人都通过其行为成为相关协议的当事人。仲裁协议的当事人也是所谓的排外的仲裁协议的当事人。法院认为，在这些当事人之间，并不存在一个单独的“仲裁协议”或者一个单独的“排外仲裁协议。”在所有的当事人之间只存在一个由不同协议组成的一个单独的协议。

至于国内仲裁协议问题，被告方以仲裁协议是非国内仲裁为由来反对法院的管辖权，因为国际体育仲裁院和仲裁庭的所在地是瑞士洛桑。原告指出“不在澳大利亚进行的仲裁”涉及的是一个不同的概念，即是一个特定的在外国作出的仲裁裁决。法院认为应当接受被告方的观点。法院在对美国、英国以及国际商事仲裁示范法的有关规定进行分析并征求了特别仲裁分院院长的意见后指出，仲裁地和裁决作出地是两个不同的概念，有关法律涉及的是仲裁地，而不是实际的裁决作出地。而且根据国际体育仲裁院体育仲裁规则的规定，国际体育仲裁院进行的仲裁其仲裁地是在瑞士洛桑，这是毫无疑问的，因此相关的仲裁协议也不是所谓的国内仲裁协议。最终法院判决对该争议没有管辖权，驳回原告的上诉。

【评析】

该案件涉及的是参赛资格选拔标准的修改以及仲裁协议的形式问题。对于参赛资格标准的修改，原则上不得违反当事人据以所获得的期待权益，而且程序上不得违规。至于法院的判决则遵循了瑞士法院以往对待国际体育仲裁院裁决的态度，也即国际体育仲裁院

是中立的，只要国际体育仲裁院所作出的裁决不存在程序上和公共政策方面的重大问题，原则上都是承认国际体育仲裁院的裁决的。

【日本体育仲裁制度介绍】

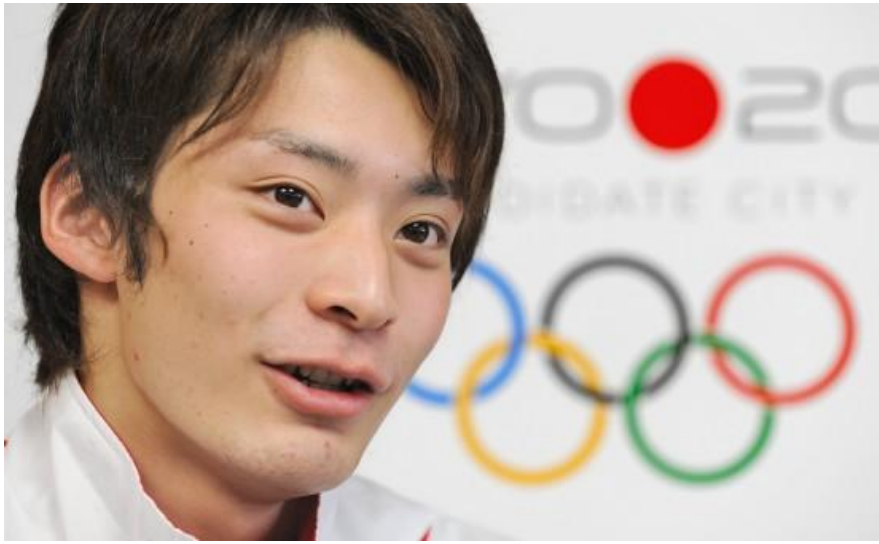
【摘 要】

日本在2003年建立了自己的体育仲裁组织——日本体育仲裁机构（JSAA）。JSAA制定了自己的章程和仲裁规则，在实践中，JSAA已经受理了几个案件，形成了自己的特色。JSAA的制度设计和运作值得我国在建立自己的体育仲裁制度时学习和借鉴。

【关键词】

日本；体育纠纷；仲裁

体育仲裁是一种解决体育行业纠纷的法律制度，在这个制度的框架内，有关争端的双方当事人自愿将纠纷提交具有独立地位的体育仲裁机构解决，体育仲裁机构组成仲裁庭，依照法律（包括程序法和实体法），根据事实，进行审理后，做出对双方当事人均有拘束力的终局裁决。[1]国际奥委会于1983年建立了专门性的体育仲裁机构——国际体育仲裁院（Court of Arbitration for Sports，以下简称CAS），对体育仲裁在世界的发展起到了重要的作用，日本是一个亚洲体育大国，参照 CAS，它于2003年4月7日正式建立了自己的体育仲裁组织——日本体育仲裁机构（The Japanese Sports Arbitration Agency，以下简称JSAA），作为邻邦，我国与日本同属大陆法系国家，而且在法律文化上也有较多的相同之处，我们有必要关注该机构的组织和实践。本文首先就日本的体育仲裁制度作一个简单的描述，然后对该制度进行简单的评析，希望对我国正在建立的体育仲裁制度有一定的借鉴和启示。



1　日本体育仲裁制度建立的背景

日本的体育法律制度并不完善，目前还没有一部单独的体育法典，而只有1961年颁布的《日本体育运动振兴法》，但该法主要是规范如何促进日本体育发展的立法，其中大部分是宣示性条款，没有具体的有关体育纠纷解决条款。对体育运动的法律规制主要是依赖于其它的部门法，特别是与体育运动的商业化和职业化有关的法

律条款。JSAA 能在2003年建立并正式进入运转主要有如下几个原因：

1.1　司法不愿意介入体育社会团体的内部纠纷

根据日本1947年《司法法》第3条第1款的规定，法院仅负责处理“法律纠纷”。即能适用日本法律来解决各方权利和义务的纠纷。而有关体育社会团体决定的纠纷往往是诸如运动员选拔、纪律处罚等。因此，这些纠纷的处理适用的是各体育社会团体的内部规则，无须适用日本的法律，因此，日本法院在处理类似纠纷往往以程序原因驳回诉讼，而根本不审查有关实体问题。日本各级法院也表明了他们的观点：法院是用纳税人的钱来维持运转的，因而不能用有限的司法资源去处理各团体的内部纠纷，各团体的内部纠纷应由自己处理，国家公权力不应干预。典型的一个案例发生在东京地方法院，1994年，一名赛车运动员在一次比赛中受到了裁判委员会的处罚，在向赛车运动管理机构上诉被驳回后，他向东京地方法院提起了诉讼，要求撤消处罚决定，但东京地方法院没有审查该案的实体问题就根据《司法法》第3条驳回了该诉讼。法院指出：民事诉讼体系的目标是通过解决私主体之间的纠纷来维持社会的秩序，但法院不会为了这个目标而包揽解决所有日常生活中的纠纷。

事实上，除了司法权不愿介入之外，司法解决体育纠纷的另外两个不足之处在于：诉讼时间的漫长和费用的昂贵。这对于仅有有限运动生命的运动员来说是耗费不起的。

1.2　体育社会团体和体育法学术界的推动

日本在1992年就成立了“日本体育法协会”，而体育纠纷的解决一直是该协会的研究课题之一。1999年11月，日本奥委会组建了

一个研究小组，具体负责研究在日本建立体育仲裁机构的相关问题。研究小组考察了国际体育仲裁院（CAS）的相关实践，还考察了美国仲裁协会的体育仲裁，甚至还研究了商业仲裁对体育仲裁的可借鉴之处。研究小组还进行了相关的调查。2001年，研究小组发布了研究报告，2002年，日本奥委会（the Japanese Olympic Committee，以下简称JOC）、日本业余体育协会（the Japanese Amateur Sports Association，以下简称JASA）和日本残疾人体育协会（the Japanese Sports Association for the Disabled，以下简称JSAD）根据该报告联合成立了一个筹备委员会，具体负责日本体育仲裁机构的建立。

1.3 反兴奋剂斗争的需要

日本体育仲裁机构的建立与日本的反兴奋剂运动发展密切相关，2001年9月，日本反兴奋剂机构正式成立。反兴奋剂机构执行的严格规则毫无疑问会引发大量的相关纠纷，如何较好的处理这些纠纷，建立一个体育仲裁机构是一个较好的选择。

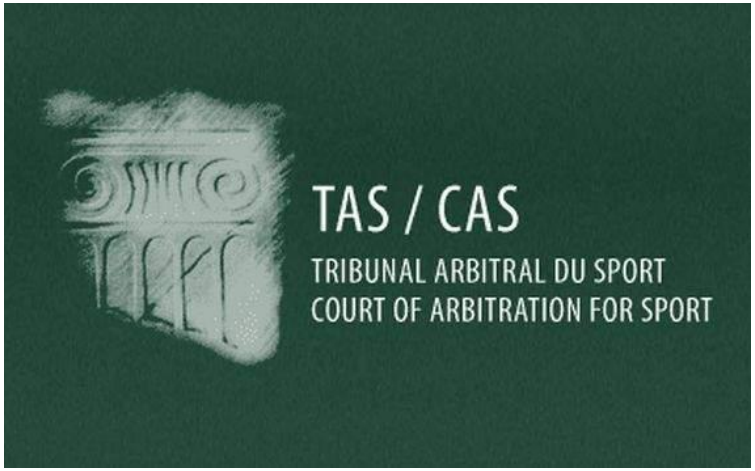
1.4 国际体育仲裁机制的压力

2000年发生的日本CAS第一案是建立JSAA的导火索。千叶铃是一名游泳运动员，日本业余游泳联合会在负责选拔悉尼奥运会游泳选手时，千叶铃的成绩虽然超过了奥运会最低参赛资格的A级标准记录，但没能进入日本游泳奥运队，千叶铃将此争议上诉至CAS，基于大众传媒的压力，日本泳联被迫应诉。在奥运会开幕前一个月，CAS做出了裁决，在裁决中虽然驳回了千叶铃的请求，但因为日本泳联没有明确的选拔标准，仲裁庭裁决其赔偿千叶铃656500日元。本次事件后，日本泳联便明确公布了其选拔标准。这一案件使日本的运动员和各体育协会均意识到建立一个适当的日本国内的体育纠纷解决机制是非常必要的。

2　日本体育仲裁制度概况

2.1　JSAA的章程

JSAA章程第3条明确指出，JSAA的目标是：通过仲裁有效的解决运动员及其他个人与体育协会之间的纠纷，支持体育事业的进步。为保证该机构的中立和独立性，JSAA 建立了一个由九人组成的理事会，理事会是该机构的最高决策机构，负责该机构重大事项的决策。理事会成员的组成有着严格的规定。



九名成员来自三个不同的领域，其中至少有三名理事是体育协会的官员，其余三名和JSAD 共同组建的，因此这三个机构可一名是或曾经是运动员。然后由这六名理事来任命其余三位中立理事。JSAA 还任命了两名审计人员。理事会的表决机制是多数制，这样能够避免理事会中的主席由理事会成员任命，JSAA 理事会由一个机构任命的理事独断专权，而必须与其它理事合作，取得至少两名其他理事的支持才能决定某些事项。JSAA 还建立了一个由律师和学者组成的33人仲裁候补委员会，仲裁员的产生办法是由理事会主持面向全日本公开招聘，要求应聘者在法律和体育两方面均应有较高的造诣。

JSAA 的资金来源除了向当事人收取仲裁费用外，主要由负责组建JSAA 的三个机构承担，目前的额度为每个机构一年承担5万日元的费用。

JSAA目前的办公地点在东京的奥林匹克纪念馆内。由于案件较少，目前 JSAA只有两名临时工作人员，每周工作日的14：00—17：

00对外办公。目前JSAA的主席为道恒内正人教授。 JSAA还建立有自己的网站，网址为http://www.jsaa.jp。网站上有绝大部分 JSAA的资料。但遗憾的是网站只有日文版，而没有其他语种的版本。

2.2 JSAA的仲裁规则

JSAA 的仲裁规则比较特别，JSAA从该机构的实际情况出发，建立了两套仲裁规则，《体育仲裁规则》和《基于特别仲裁协议的个案仲裁规则》（又称《特别体育仲裁规则》），前者于2003年7月1日生效，共53条，后者于2004年9月10日生效，共62条。这两种仲裁规则的最大不同之处在于适用范围的不同，前者仅限于JOC、JASA和JSAD所属各协会的运动员提起的仲裁，而后者适用于所有的体育纠纷，包括体育商业纠纷。这两种仲裁方式收取的仲裁费用也是不同的，前者为5万日元，而后者的费用则比照商业仲裁按照标的额收取。下面分别对这两种仲裁规则作一个简单介绍。

2.2.1 体育仲裁规则

仲裁范围：人们一般都希望 JSAA 能仲裁所有的体育纠纷，但考虑到JSAA有限的工作人员和经费， JSAA必须限定自己的仲裁范围。因而，它只负责仲裁运动员对JOC、JASA和JSAD或者它们所属的体育协会提起的上诉。另外，各大运动会期间裁判所作出的裁决也不在 JSAA的仲裁范围之内。因此，诸如奥运会、残奥会和日本体育节的运动员选拔所产生的纠纷，JSAA 都无权仲裁。

仲裁协议：仲裁存在的基础是当事人双方之间存在仲裁协议。JSAA一直在呼吁日本的各体育协会在它们的章程中加入仲裁条款，

承诺将它们与运动员之间的纠纷提交 JSAA进行仲裁。截止2005年9月30日，已经有38个日本体育协会在章程中写入了仲裁条款，承诺接受 JSAA的管辖。

仲裁庭的组成和仲裁员的选择：在一般的案件中，仲裁庭由三名仲裁员组成，当事人双方 JSAA各选择一名仲裁员，然后由这两名仲裁员选择另一名仲裁员。这名仲裁员为首席仲裁员。但在紧急案件中，为节省时间，也可以由一名仲裁员仲裁案件。这些仲裁员需从JSAA的一份仲裁员名单中选择，这些仲裁员均是法律专家，对体育法有着自己的见解，他们还需参加JSAA每年举行的体育法研讨会，提高自己的业务水平，从而保证JSAA仲裁的公正和权威。

仲裁程序：在体育案件中，由于运动员运动生命的短暂性，快速而公正的仲裁对运动员是至关重要的。根据《体育制裁规则》，运动员应在知道体育协会决定的六个月之内或者决定做出的一年之内提起仲裁。这一时效是强制性的，必须遵守。在仲裁过程中，仲裁庭至少要开庭一次，一般情况下，制裁裁决应在开庭结束后的三周之内做出，但是这一时间限制不是强制性的，而是JSAA为仲裁庭提出的一个目标。

仲裁费用：JSAA成立的初衷是为了保护运动员的权益，使他们免受各种体育协会不公平决定的对待，因而 JSAA在仲裁费用上明显有利于运动员，仅要求运动员支付5万日元的费用，而由 JSAA承担在仲裁过程中的其他费用，但由于JSAA 每年的预算费用有限，因而JSAA只能限制其可仲裁案件的范围。

仲裁裁决书：JSAA的仲裁裁决书一般由三部分组成：首部，正文和尾部。正文是裁决书最重要的部分，其中包括仲裁的程序，仲裁庭认定的事实，裁决的理由，裁决的结果等。

2.2.2 特别体育仲裁规则

特别体育仲裁规则的特别之处在于，各体育协会的仲裁条款并没有直接要求按此规则仲裁案件，而是由双方达成一个特别的仲裁协议，同意将案件按此规则进行仲裁，按照《特别体育仲裁规则》，此类案件的收费是完全按照商业仲裁的标准来收取的，目前是比照日本商业仲裁协会的标准收取的。这也是JSAA的尴尬之处，JSAA成立的初衷是为了更好的解决所有的体育领域的纠纷，但由于其工作人员和经费的有限性，其不得不对体育纠纷实行双重的收费。对第一类案件仅收取象征性的5万日元，而对第二类案件，收费则极其昂贵，因而此类案件一般为商业性体育纠纷，如广播公司与比赛组织者之间的纠纷。

2.3 JSAA的其它业务

除仲裁案件之外，JSAA还有其它一些业务，包括每年举办三次全国性的体育仲裁研讨会，研究日本体育仲裁制度的发展。负责对仲裁员名单的更新，根据情况及时修订仲裁规则，还有非常重要的一点是说服各体育协会对JSAA的认可和对体育仲裁规则的采纳。

3. JSAA已经裁决的案件简介

由于JSAA处于初创阶段，且受其仲裁范围限制，因而所受理的案件较少，2003年为两起，2004年为3起，2005年仅为1起。下面对其主要案件作一简述。

3.1 举重案

在本案中，上诉者是一位大学女子举重教练员，在他执教期间，一位男子举重运动员因藏有违禁药品而触犯了日本刑法。日本举重协会决定给此大学的举重队负责人以处罚。该教练被认为应负责维持该校举重队的纪律。于是，举重协会给予该教练取消教练资格6个月的处罚。该教练不服处罚，向JSAA提起上诉。该教练辩称，他不应对男子举重队中的运动员负责，因为该校男子和女子举重队并不在同一地方训练，而且该教练员还提出了另一个问题，即一名教练员是否应该对其运动员的个人生活承担责任，特别是在该运动员触犯了刑法的时候。日本举重协会虽然没有在其章程中明确接受JSAA的管辖，但仍然同意参加仲裁。仲裁庭经审查后发现，日本举重协会在处罚过程中违反了许多基本的程序规则，如没有给上诉者为自己辩解的机会，没有直接向上诉者通告处罚决定。因此，仲裁庭没有继续审查实体问题就以处罚程序不合理而撤消了该决定，并要求该协会负担上诉者5万日元的仲裁费用。

3.2　跆拳道案

在日本有两个协会负责跆拳道运动，为选拔跆拳道运动员参加世界大学生运动会，JOC要求这两个协会考虑合并从而推举出合适的跆拳道运动员，但遭到了两个协会的拒绝。于是JOC自己推举了一名运动员和两名教练员参加世界大学生运动会。一名落选的教练员不服JSAA的决定，认为如果有三个参赛名额，至少有两名运动员应该被推举去参加运动会，于是将此争议上诉至JSAA，JOC已经同意接受JSAA的管辖，由于时间紧迫，JSAA按照《体育仲裁规则》中的紧急条款来处理该争议，为此任命了一名法律工作者作为独任仲裁员。仲裁庭在开庭后很快做出了决定，驳回了上诉人的请求，认为JOC的决定没有任何过错，之所以推举了两名教练员是因为该运动员在被选拔出来后转会至另一家俱乐部，因而新俱乐部的教练也一并被推举了。

3.3　残疾游泳运动员案

一名曾经参加过悉尼残疾人奥运会的女游泳运动员，因为其身体状况而失去了意识，从而没有能参加一些比赛，于是日本残疾人游泳协会没有将其列为培养对象。对此该运动员向JSAA提起上诉，该协会接受了JSAA的仲裁管辖并参加了仲裁程序。在仲裁过程中，双方均提出了专家意见来支持自己的观点。仲裁庭没有考察这些观点的真实性，而是从法律的角度去考察该协会的决定。仲裁庭认为，该协会的决定不存在违法的情形。因而驳回了上诉人的请求。

3.4　马术案

此案发生在2004年日本的马术奥运选手选拔过程中。根据日本马术协会的选拔标准，马术运动员取得参加奥运会的资格，必须参加指定的欧洲国家的马术比赛。当时，马术协会的一名官员被派往欧洲去考察日本选手的情况，其后，该官员向马术协会下属的奥运选拔委员会提交了一份报告。根据该报告，奥运会选手被选拔出来，但上诉者没有能被选拔上，对此上诉者不服，向JSAA提起上诉，上诉者称，这份报告不能作为选拔的标准，因为起草该报告的官员与一些已经被选拔上的运动员有私人之间的关系。马术协会接受了JSAA的管辖。仲裁庭经过审理后认为，马术协会的选拔标准确实比较主观且并没有得到

所有运动员的支持，但是这一不适当的选拔过程还不足以影响选拔结果的有效性，特别是该协会拥有一定的自由裁量权，因而仲裁庭驳回了上诉人的请求，但是考虑到选拔程序上的瑕疵，仲裁庭要求马术协会负担上诉人5万日元的仲裁费用和部分律师费用。

3.5　残疾田径运动员案

上诉人是一名盲人三级跳运动员。他曾经参加了悉尼残疾人奥运会并取得了第六名的成绩。但是，在2004年雅典残疾人奥运会的选拔过程中他未被选拔上，于是，他将日本残疾人田径协会告上了JSAA，该协会接受了JSAA的管辖，上诉人称，选拔标准违背了国际残疾人奥委会出版的田径运动相关官方规则，因为负责选拔的裁判和官员对这些规则并不熟悉。仲裁庭认为，根据《体育仲裁规则》第2条第1款的规定，在运动会期间裁判员错误适用相关规则不属于JSAA的仲裁范围，因而，仲裁庭驳回了上诉人的请求。

4　结论和启示

从上面对JSAA成立背景、组织机构、章程、仲裁规则和案例的简单介绍，我们可以得出以下结论。首先，JSAA的成立是符合当前体育纠纷解决的世界潮流的，仲裁解决体育纠纷具有独立性、中立性、公正性、快捷性等特点。特别是CAS在世界范围内的影响越来越大，许多国家纷纷建立了自己的体育仲裁机构，如英国、加拿大、澳大利亚等，[8]我国目前也正在准备建立自己的体育仲裁机构。JSAA的建立走在了亚洲的前列。有助于日本体育事业的健康发展。其次，JSAA虽然迄今为止仅裁决了几个案件，但从这几个案件来看，JSAA能够公正快

速的做出裁决，从而维护了JSAA的权威。而且我们也可以从中看出，JSAA倾向于最大程度的维护运动员的利益。在其中的两个案件中，由应诉者承担了本应有上诉人承担的仲裁费用。在马术案中，虽然上诉人的请求没有得到支持，但上诉人的部分律师费用经JSAA裁决由应诉者承担。再次，JSAA也正在试图通过裁决的案例来形成自己的判例法。比如在对体育协会规则的审查上，可以看出，JSAA存在如下的几条规则：体育协会的规则不能违反法律或者明显偏离合理标准，体育协会不能违反已经制定的规则，依据规则做出的决定不能在程序上有明显的瑕疵。

但是，另一方面，我们也要看到，JSAA仍然存在许多不足之处。首先是机构设置存在瑕疵。作为一个全国性的体育仲裁机构，理应配备足够的工作人员并拥有充足的工作经费。而JSAA在人事和财务这两个方面均显稚嫩。这固然与JSAA的组建机构有相当的关系，但笔者认为最关键的还在于JSAA的定位，没有将自己定位于一个处理全国体育纠纷的中心机构，而将自己的注意力重点关注于与 JOC、JASA和JSAD相关的纠纷，这使得大众会对JSAA产生一种错觉，认为JSAA是仅处理JOC、JASA和JSAD内部纠纷的仲裁机构，并导致了如今JSAA的实践与其成立初衷不相称的情形。一个很显著的例证是JSAA还没有按照其《特别体育仲裁规则》处理过案件。其次是其仲裁规则存在缺陷。作为一个中立的仲裁机构，却存在着两个仲裁规则，区别对待不同的仲裁提起人，这极大的损害了JSAA的形象。特别是在仲裁费用的收取上，虽然其出发点是照顾运动员的经济能力，但很容易给人以差别待遇的印象。

我国目前正在制定自己的《体育仲裁条例》并筹建自己的体育仲裁机构。从日本的实践来看，笔者认为，除了借鉴JSAA许多有益

的经验之外，我们还有以下几点值得注意。首先是仲裁机构的设置应一步到位，在对我国的体育纠纷的种类和数量有充分把握的前提下，体育仲裁机构应配备足够的工作人员和经费。而不能像JSAA那样，其“名”与“实”严重分离。其次是在仲裁规则的制定上，不能有差别待遇，否则将会严重损害仲裁机构中立和公正的形象。总之，通过对其他国家体育仲裁制度的充分比较和借鉴的基础上，我们一定可以设计适合出我国国情的体育仲裁制度。

【体育法律业务组介绍】

○ 体育法服务范围

1、为各类体育俱乐部的组成和结构提供法律咨询服务；

2、起草赞助协议、商品化协议和许可协议；

3、就传统和新兴的传播、数字和数据的商业化利用提供法律咨询服务；

4、就赛事和体育活动的组织和管理提供法律咨询服务；

5、就体育品牌特别是有关体育用品和服饰的品牌的知识产权保护提供法律服务；

6、就运动员的签约、入会和转会提供法律意见；

7、就体育场馆的建设、融资、开发和相关事项提供法律咨询服务；

8、代表职业运动员、教练员、体育俱乐部、体育经纪人、体育行业主管部门、体育用品和服装制造商参加相关的争议纠纷的解决；

9、代表体育用品和服装制作商处理产品责任纠纷和知识产权纠纷；

10、为体育运动队和体育活动的主办方、承办方和赞助商协商和起草各类相关合同。

○ 服务方式

. 1、担任专项法律顾问：就各项业务提供全过程、全面、深入的专项服务，办理相关具体事务。

. 2、担任常年法律顾问：就各项业务提供日常法律咨询，处理日常法律事务。

○ 微信平台

2013年5月，上海大成体育法业务组正式创建了“体育法”微信公众账号。

微信号：sportslaw

历经三个月的发展，“体育法”微信公众账号已经成长为一个具有广泛影响力的体育法资讯平台，我们致力于体育法律理论研究、体育热点新闻共享、体育合作信息交流三大领域，力图通过微信公共平台的影响力，为大家提供专业、高效的服务。欢迎大家支持并关注 “体育法”！

非常感谢您的阅读，

本资讯由上海大成体育法业务组编辑，仅供参考。

如有任何问题，请通过电邮 zhang.bing@dachenglaw.com 联系我们。

内部文件，仅供交流

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Sports Law Periodical

5th, 2013 Editor: Zhang Bing

Previe

★ Hotspot in Sports News

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Hotspot in Sports News

Monitor announces delivery of annual report to Penn State, the NCAA and the Big Ten Conference

Senator George J. Mitchell and his law firm, DLA Piper LLP (US), announced on the 10th September 2013 that he has delivered his first annual report as the independent athletics integrity monitor under the Athletics Integrity

Agreement ("AIA") among The Pennsylvania State University, the National Collegiate Athletics Association, and the Big Ten Conference.

The report describes Penn State's efforts during the most recent 90-day period to fulfill its obligations under the AIA and the Consent Decree and serves as Senator Mitchell's first annual account of the University's progress in implementing the recommendations made in the July 2012 report by Freeh Sporkin & Sullivan LLP pursuant to his separate role as the external monitor designated pursuant to Recommendation 8.2 of the Freeh Report.

"*As of this first anniversary of my appointment as Monitor, Penn State has substantially completed the initial implementation of all of the Freeh Report recommendations and of its annual obligations under the AIA,*" Senator Mitchell said. During this most recent quarter, Penn State trained and received certifications from "Covered Persons" as to their responsibilities with respect to athletics compliance; the athletic director certified the Athletics Department's efforts to comply with the NCAA Constitution and Bylaws and Big Ten Conference Handbook, including the

principles of institutional control, responsibility, ethical conduct, and integrity; Penn State's Director of University Ethics and Compliance continued to staff that new department by hiring a new compliance specialist for youth programs; Penn State approved a new policy addressing financial conflicts of interest and introduced a crisis management plan; an electronic platform was launched to track completion of mandatory training sessions; and the Athletics Department, the Office of Physical Plant, and the University Police continued to lead various ongoing projects to enhance security at University facilities used by minors.

"*While much has been accomplished, important work remains to be done,*" Senator Mitchell continued. "*Penn State must maintain its focus on these ongoing initiatives while also fostering an environment in which its many undertakings will take root and thrive. By all indications thus far, the University has positioned itself well to meet this challenge,*" Senator Mitchell concluded.

The AIA implements provisions of the binding consent decree between the NCAA and Penn State on July 23, 2012. Senator Mitchell was named the independent athletics integrity monitor after the consent decree was finalized. The monitor performs an independent role and is

not an agent of Penn State, the NCAA, or the Big Ten Conference. The monitor will provide quarterly written reports to Penn State, the NCAA and the Big Ten Conference during his tenure.

Senator Mitchell is the chairman emeritus of DLA Piper, an international business law firm with 4,200 lawyers located in more than 30 countries throughout the Americas, Asia Pacific, Europe, and the Middle East.

US cycling athlete accepts two year ban after testing positive for Phentermine

USADA announced on the 5 September 2013 that Yoelkis Aira, of Miami, Fla., an athlete in the sport of cycling, has tested positive for a prohibited substance and has accepted a two-year sanction for his anti-doping rule violation.

Aira, 41, tested positive for Phentermine as the result of an in-competition urine sample collected on June 8, 2013 at the FRBA Stuart in Port St. Lucie, Florida. Phentermine is a prohibited Stimulant under the USADA Protocol for

Olympic and Paralympic Movement Testing and the rules of the International Cycling Union (UCI), both of which have adopted the World Anti-Doping Code and the World Anti-Doping Agency Prohibited List.

Aira accepted a two-year period of ineligibility, which began on July 7, 2013, the date he last competed. As a result of the sanction, Aira is also disqualified from all competitive results obtained on and subsequent to June 8, 2013, the date his sample was collected, including forfeiture of any medals, points, and prizes.

In an effort to aid athletes, as well as all support team members such as parents and coaches, in understanding the rules applicable to them, USADA provides comprehensive instruction on its website on the testing process and prohibited substances, how to obtain permission to use a necessary medication, and the risks and dangers of taking supplements as well as performance-enhancing and recreational

drugs. In addition, the agency manages a drug reference hotline, Drug Reference Online, conducts educational sessions with National Governing Bodies and their athletes, and proactively distributes a multitude of educational materials, such as the Prohibited List, easy-reference wallet cards, periodic newsletters, and protocol and policy reference documentation.

USADA is responsible for the testing and results management process for athletes in the U.S. Olympic and Paralympic Movement, and is equally dedicated to preserving the integrity of sport through research initiatives and educational programs.

Sponsor conflicts in football - the pitfalls of pre-season tours

The issue of conflicting sponsors is one I come across quite frequently in my practice and extends to all sports where commercial rights have been bought and sold. The latest example of this involved Manchester United on their preseason tour in Australia. This shows how important it is to correctly manage the interplay between major sponsors and for clubs (especially those on tour) to do their due diligence in a thorough manner.

Many people will pick this story up and place it within the "commercialisation of sport" debate on the basis that it should not be right that the staging of a football match is threatened by monetary interests. A very valid (if rather sensationalist) view, but one that omits to reference the huge and somewhat irrevocable role that sponsorship

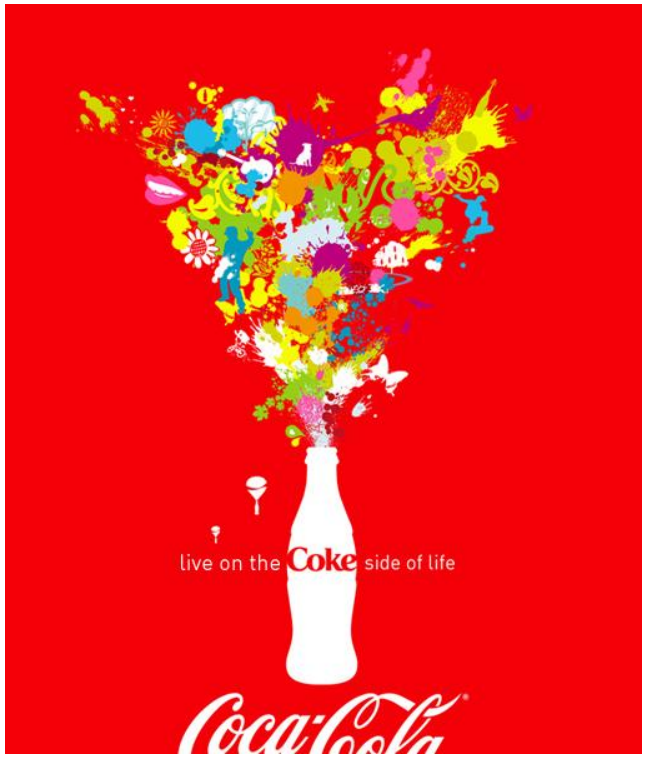
monies now play in top level sport. Acquisition of rights for money naturally brings with it restrictions, and unsurprisingly, that usually includes avoiding any situation where it appears that a competing brand also has some form of commercial arrangement with the sponsored party. Contractually, it may be incumbent on the sponsored party to ensure that the rights are not diminished in any way, for example through restrictions on association with defined competitors, or some form of reputational clause.

Football has had a number of high profile sponsor conflict issues in recent memory. If, for example, you wonder why the world's two leading sportswear manufacturers have not used exact images of Andres Iniesta's 2010 World Cup winning goal in their advertising to date, then you need look no further than the fact that he wore the boots of one manufacturer whilst wearing the kit of another. First-world problems perhaps, but the dilution of sponsorship value is not to be underestimated. As you might expect, the issue of conflicting sponsors in football mostly occurs as a by-product of the player/club relationship, rather than between two different clubs. The Premier League model player contract (Form 26) contains provisions which obliges players to take part in official club events and promotional activities

and attempts to anticipate how that should interact with the player's own private endorsements. The position *ought* to be that when on club business a player wears club and club sponsored clothing (excluding boots or goalkeeping gloves) and outside of this the player is free to fulfil their own commercial arrangements. Reality, inevitably, is slightly less helpful – consider where a sports brand sponsors a club and uses the club images as part of the brand's advertising campaign (as it might freely be entitled to do) and how this then conflicts with the personal endorsement deals of those club players contracted to other sports brands. Only a team photo? Well imagine the effect of a known world-wide brand ambassador appearing in a trophy winning team shot used as part of a direct competitor's advertising campaign (minus the endorsing brand's products) and one can see how damaging this practice can be. That is not to say that it does not occur, and resolving the ensuing brand v brand dispute is not easy whichever party one acts for (especially as in some cases neither the club nor the player will actually be in breach of contract) especially as whilst consumer perception is all important, it is notoriously difficult to quantify.

The Manchester United example from the link is actually slightly different and, at least from a legal and commercial perspective, easier to justify. Whilst the match in question took place before the deal with Pepsi was announced, it was presumably during the time that negotiations for the deal were coming to a head. Acknowledging that we don't know the terms of the Pepsi deal or any pre-deal negotiations, it is certainly likely that Manchester

United would have been under few (if any) legal obligations to Pepsi in terms of associating with competing brands. Like any commercial arrangement then, and especially those where being "seen" to be on board with the deal is as important as the actual terms, in my view this episode simply reflects a desire to successfully conclude an important partnership for Manchester United the business and is probably best viewed in that context, rather than any wider debate on monetisation of sport. The terms of the deal have not been announced in full, although we do know that it is restricted to the Asia-Pacific region. That the club was unwilling to show any association with a competing brand even outside of the territory of the deal suggests that the financials involved are significant and it is not surprising that the commercial team were unwilling to jeopardise completion of the deal.



Pre-season tours are a challenge for football clubs, not least in terms of the increased exposure to new markets and prevalence of different rules around marketing and promotion, however one wonders whether this particular story might have been avoided with a little relevant forethought. Organising a pre-season tour for a club like Manchester

United is a lengthy (and, one would imagine, costly) exercise. If (as in this case) it is a major commercial concern as to the identity of the host club, stadium or association's sponsors, then necessarily a big part of the organisational process ought to be taken up with a due diligence exercise on the identity of the sponsors and the likelihood of a clash. At least then clubs can give themselves the best chance of appeasing sponsors, associations and visiting fans alike – arguably as much of a commercial "must have" as getting the cash on board in the first place. Simple stuff, but something that appears to have been overlooked in this case, and particularly embarrassing given Manchester United's attendance at the same stadium three days previously.

Of course, the other view is that this was a special case and largely unavoidable. The pre-season, non-competitive nature of the match in question meant that Manchester United had a far greater influence, or potential influence at least, over the method of staging of the game (contrast this with their usual competitive away matches during the regular season). Couple this with the looming Pepsi deal and one begins to understand (but perhaps not agree with) why this episode played out as it did.

I would be interested to know your thoughts or experiences on these issues and whether you feel that the sponsorship landscape for certain sports is becoming so saturated that this is likely to be a recurring issue.

International Sportslaw Practice

Financial Fair Play and the ability of European football clubs to raise finance - Part 2

Common methods by which football clubs raise finance

Deloitte has noted that, whilst clubs have sought to utilise various mechanisms (including stock market listings, securitisation, bank loans and benefactor support) to help fund increased expenditure, commercial reality, in the form of limited availability of such funding opportunities, may finally bring about a change in behaviour 1. That being said, UEFA has made clear that it is not "anti-debt", as long as the debt is being serviced (i.e. the club's profit is covering the debt interest payments) 2 . If the effect of the Regulations (and any equivalent regulations adopted by the Premier League and the Football League) is to improve the credit and financial sustainability of football clubs, financiers may in fact become more willing to provide finance to those clubs in the future, and perhaps on better terms.

The second part of this article will focus on three mechanisms commonly used by football clubs to raise finance and examine in-depth the effect the Regulations may have.

There are three methods most commonly used by football clubs to raise finance:

1. obtaining a loan in exchange for the provision of security - for example, by way of assignment of receivables, a debenture, or a guarantee;
2. selling or discounting receivables to a financier - for example, a club's entitlement to prize money or broadcasting revenue (i.e. "Central Funds", in the case of the Premier League), or a transfer fee owed to it; or

3. financing of transfer fees by means of the transfer (indorsement) of promissory notes to a financier.

Loan and security

In consideration of a financier providing a loan facility (the "Facility") to a club under a loan agreement (the "Loan Agreement"), a financier will usually require the club to grant security to it over certain of the club's assets.

Typically, the Facility is secured by an assignment of the right to certain amounts due from the Premier League or the Football League in respect of match broadcasting fees (the Assignment"). Even though the Assignment is stated to be enforceable only following a default by the borrower, the Notice of Assignment may direct the Premier League or the Football League (as applicable) to pay the amounts due to the borrowing club (the "Borrower") in respect of the assigned receivables on or around each repayment date under the Loan Agreement to the financier. Those amounts may then be applied by the financier towards satisfaction of the relevant repayment amount under the Loan Agreement (or, in certain instances, the financier may hold such amounts on account).

The security granted by the Borrower in favour of the financier, to secure its obligations under the Loan Agreement, may also take the form of:

a. a debenture, including a floating charge over all of the assets and undertakings of the Borrower, as well as a fixed charge over certain specific assets of the Borrower; and/or

b. a guarantee (usually from a director of the Borrower or the Borrower's parent company), guaranteeing the obligations of the Borrower under the Loan Agreement and any security documents; and/or
c. security over the shares in the Borrower.

Sales of receivables

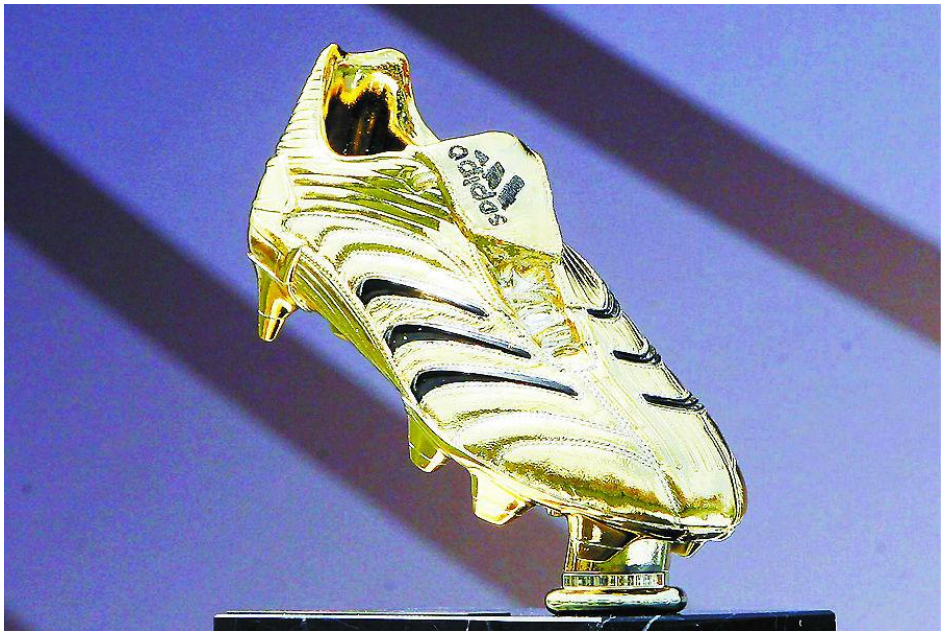
Instead of taking security over a club's income, a financier may instead enter into an arrangement for the outright sale of receivables by means of a receivables sale agreement (the "RSA"). In consideration of the financier paying a "purchase price" equivalent to the expected receivables discounted at an agreed amount to a club, the club assigns to the financier its rights, title and interest in and to a specific receivable (such as the right to certain distributions of UK broadcasting monies from the Premier League or the Football League or the right to transfer fee instalments).

The main difference between an RSA and a security assignment is that, under the RSA, the financier becomes the legal owner of the receivables at the date of the initial assignment. Under a security assignment, it is merely entitled to exercise its rights as

assignee of the receivables as one means of enforcing its security.

Financing of transfer fees by means of promissory notes

It is typical for amounts due from one club to another under a transfer agreement to be paid in instalments, especially if the purchasing club is not particularly cash rich, as it will seek to spread the purchase price instalments over a longer period of time (and may also try to negotiate for a higher proportion of the transfer fee to be performance-related). Cash rich clubs, on the other hand, may prefer to make up-front payments, especially when purchasing from abroad, so as to minimise the risk of adverse exchange rate fluctuations. Where the purchasing club has negotiated to spread the instalments of the purchase price over a period of time (typically two to three years), the selling club may wish to realise all of its expected income early and to sell the future receivables. This could be done by a sale of receivables (as outlined above). Alternatively the selling club (to whom the money is owed) may request that the buying club (who owes the money) may issue a promissory note to it in respect of the remaining transfer instalments. This will allow the selling club to transfer such promissory note (by way of "indorsement") to a financier, in exchange for which the financier would pay a discounted amount representing the present value of the future cash flow (as well as the financier's margin or fee) to the selling club.



In addition to the promissory note, the parties to this type of financing arrangement would typically enter into a side agreement which sets out the terms and conditions on which the indorsee (the "purchaser" of the promissory note) has agreed to purchase the promissory note from the selling club. The side agreement would typically include various representations and warranties from the buying club in favour of the financier relating to the promissory note or the underlying transfer agreement, but would not typically include the more general representations, warranties or undertakings provided for in a Loan Agreement or an RSA.

Take, for example, a player who has been sold by a selling club (Club A) to a purchasing club (Club B) for £20m, with the instalments of the purchase price being payable in four equal instalments, £5m on signing and £5m on the anniversary of the date of signing for three years thereafter. Club A is owed £20m in four instalments. Club B's debt to Club A is £20m. One month after signing, a bank may agree to discount the remaining £15m instalments by "purchasing" the right to receive those instalments (whether by means of a purchase of receivables or the indorsement of a promissory note) for a discounted amount which would take into account both the "time value of money" and the "margin" that the bank wishes to make from the transaction. The bank will pay the discounted amount to Club A and Club B will, in time, pay each of the relevant transfer fee instalments to the bank rather than Club A. Club B's debt remains the same (i.e. £20m). Club A may receive less but it benefits by receiving its money early and may transfer any credit risk to the financier.

Effect of the Regulations on financing documents

Given the sanctions (financial or otherwise) that can be imposed on clubs falling foul of the Regulations (or any equivalent domestic regulations (together, the "FFP Regulations")), financiers to European football clubs will need to consider the effect of the FFP Regulations on their financing documents. For example, a breach of the of the FFP Regulations may signify a more serious underlying financial problem for a club and the imposition of (potentially significant) fines or the withholding of revenue by the relevant authorities, may place that club in greater financial difficulty. A number of aspects of the financing documents will require careful consideration with the FFP Regulations in mind.

Undertakings regarding compliance with the FFP Regulations

Financiers may seek to require clubs to whom they are providing finance to comply with the FFP Regulations, either by relying on existing provisions of their financing documents (which may impose an obligation to comply generally with all laws and regulations) or by seeking to amend the financing documents to capture the FFP Regulations expressly.

In any case, should any of the FFP Regulations become applicable to a borrowing club, the financier should, at the very least, inform (or remind) the borrower that failure to comply with those FFP Regulations would, in addition to

the punishments referred to above, be considered a default of the loan or finance documents.

Financial covenants

Some financiers, in addition to the security referred to above, may have also required the borrowing club to comply with specific financial covenants in the finance documents to which they are a party. These covenants may be more lenient that the requirements of any relevant FFP Regulations and financiers may, perhaps as part of any default or loan extension negotiations, seek to require the borrower to agree to stricter financial covenants that are more in line with the requirements of those FFP Regulations. A financier may also seek to ensure that the borrower is required to provide it with copies of all reports, accounts or documents required to be given to UEFA or any other governing body or organisation as part of the club's financial fair play obligations.

MAC clauses

Many financiers insist on a material adverse change clause (a "MAC" clause) in their finance documents. A MAC clause is typically drafted so as to capture "any event or circumstance occurs which, in the opinion of the financier, has or is reasonably likely to have a Material Adverse Effect." "Material Adverse Effect" is typically defined to meana material adverse effect on, amongst other things, the business, operations, property, condition (financial or otherwise) or prospects of the borrower or, amongst other things, the ability of the borrower to perform its obligations under the financing documents.

To the extent such MAC clauses are included in the relevant documents, it is likely that a failure to comply with any of the FFP Regulations and any resulting sanctions would be considered (by the financier at least, based on a subjective MAC test which financiers typically insist upon) an event which has a material adverse effect on the business, operations, condition (financial or otherwise) or prospects of the borrower (or any member of the group of companies to which the borrower belongs) and which has a material negative impact on either (i) the ability of the borrower (or any guarantor or other obligor) to perform its obligations under the finance documents or (ii) the validity, enforceability, effectiveness or ranking of any transaction document.

However, financiers are typically unwilling to rely solely on a MAC clause to call a default under a loan or finance document, absent any other more specific default.

Shares security

Financiers should also be wary of the ability of club owners to inject equity as a means by which clubs can ensure compliance with the FFP Regulations in circumstances where they exceed the maximum aggregate break-even deficit. If a financier has taken security over the shares in the borrowing club, care will need to be taken to ensure that the shareholder complies with its obligations to ensure that the financier's security in the shareholding of the borrowing club is not diluted.

For example, a typical shares charge or shares security deed would include clauses restricting, without written consent of the finance provider, the issuance of further shares and the chargor (i.e. the shareholder) altering or charging the existing share capital.

As such, if a club is seeking to use an equity injection to comply with any relevant FFP Regulations as set out above, it may find that the consent of its financiers is

required for the issue of further shares. Further, it is likely that the financier would require any new shares issued as part of any equity injection to be charged to it, to avoid the value of its security in the share capital of the club being diluted.

Effects for clubs

Clubs themselves will also need to determine the extent to which their "break even" calculations are affected by their finance arrangements. For example:

a. whether, for the purposes of calculating a club's "Net Debt" (as defined in the Regulations), where a club has sold future receivables, that club's "accounts receivable" refers to the amount received from the financier or the amount which the club would have received from the purchasing club [3];

b. whether Article 49 (which requires clubs to prove that they have no overdue debts towards other football clubs with respect to transfer activities) includes an obligation on the purchasing club to prove that it has no outstanding debt to a financier who has "bought" a debt from the selling club with whom the purchasing club has transacted;

c. whether a club receiving money from a financier under a receivables sale arrangementhas to treat such money as "relevant income" (for the purposes of, and as defined in, Article 58), given that the payments made by the financiers will effectively be in lieu of the revenue in respect of broadcasting rights or player transfers/disposals of player registrations, which revenue will have been assigned to the financier by the "borrowing" club under those structures; and

d. whether income arising under a receivables purchase arrangement or promissory note falls within the "classes of financial liability"which are required to be disclosed by Annex VI(E)(f) of the Regulations. This is only likely to be the case to the extent of any recourse to the "borrowing" club, in the event of a shortfall in the payments expected by the financier.

Conclusion and comment

Clubs, financiers and lawyers will need to examine the regulations relevant to it or the transaction they are involved with. Clubs may seek to "soften" the impact of the "break-even result" and the interpretation of the concepts of "relevant income" and "relevant expenses" will be central to this. Financiers, in turn, will need to determine whether their existing financing documents provided sufficient protection from any adverse impact the regulations may have on the clubs they have transacted with. Such regulations may also impose an additional risk which financiers will need to consider as part of any credit underwriting of new transactions with football clubs. Much will depend on how the regulations are implemented in practice, in particular as to the severity of any punishments for breaching the regulations, so this is something which both clubs and financiers will need to keep an active eye on over the coming months and years.

Introduction of Sports Law Group

Sports Law Service Scope

1, Provide legal consulting service about the composition and structure of various sporting clubs;

2, Draft sponsorship agreements, commercial agreements and the license agreements;

3, Provide legal consulting service about traditional and emerging commercial cases;

4, Provide legal consulting service about events, sports organizations and management;

5, Provide legal advice of intellectual property protection in sports brands, especially for those that are related to sporting goods and clothing brands;

6, Provide legal opinions in signing contracts with athletes, their initiation and transfers;

7, Provide legal consulting service in the construction of sports venues, financing, development, and other related matters;

8, Solve disputes in the name of professional athletes, coaches and sports clubs, sports brokers, departments in

charge of sporting industries and sports goods, and apparel manufacturers;

9, Deal with product liability disputes and intellectual property disputes on behalf of sporting goods and apparel makers;

10, Draft various and inter-connected contracts for sports teams, sports organizers and sponsors.

Service mode

1, Served as special counsel: each business will provide the whole process, comprehensive, in-depth special services, and related specific issues.

2, Served as perennial legal counsel: each business will provide daily legal consultation dealing with daily legal affairs.

Thank you very much for your reading,

Edited by Shanghai dacheng sports business group, the information is for reference only.

If you have any question, please contact us via email at zhang.bing@dachenglaw.com.

Internal documents, only for communication.