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Sport and the Law

LECTURE NINE : DISPUTE RESOLUTION AND SPORT

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DISPUTE RESOLUTION AND SPORT

WHAT IS ADR ?

ADR is short for alternative dispute resolution. ADR provides a voluntary alternative to the accepted practice of using the courts to settle civil disputes. The principle forms of ADR are adjudication, arbitration, conciliation and mediation. The best known and most commonly used forms of ADR in the UK are arbitration and mediation but adjudication is also rapidly becoming established as a valued method of settling disputes quickly, fairly and cheaply.

It has become popular in some quarters, in particular for lawyers and mediation service providers, to regard conciliation, negotiation and mediation alone as ADR. For these people a negotiated settlement is an alternative to having a dispute brought to an end by a third party such as an adjudicator, an arbitrator or a judge. This narrow definition ignores the significance of the voluntary aspect of private dispute settlement and the role that is played in all forms of ADR processes by experts and professionals outside the legal profession.

Civil Disputes : These are disputes between private individuals and or organisations in respect of differences about the parties' respective legal rights and interests. Some legal rights are inherent, such as personal safety, ownership of property, personal integrity and reputation whilst other rights arise out of agreements. The difference or dispute is likely to centre around a failure by one person to perform legal duties owed to another which result in harm to the legal interests of that other person.

The principal categories of civil dispute involve claims founded in the law of contract, the law of tort which is concerned in particular with accidents and professional negligence, breaches of trust and the redistribution of shared property following the break up of relationships. Insurance, the construction and maritime industries and employers are the most common users of ADR processes.

Where ADR is not applicable : ADR is not available for criminal cases which are dealt with by and on behalf of the State before the Criminal Courts. Public Law disputes between individuals and the State, for example a complaint that an application for planning permission has not been dealt with properly by a planning and development licensing authority, are normally dealt with by specialist decision making bodies such as administrative tribunals which whilst distinct from the courts remain part of the State Judicial Machinery. Often the decision making body may be called an adjudicator or an arbitrator but since the decision making process is not voluntary, despite the similarity in name, the process is not part ADR. However, where the organs of state engage in the same type of activities as ordinary people and organisations, such as driving vehicles and business agreements, resultant disputes are civil and can be disposed of by either the civil courts or ADR.

WHAT IS THE SIGNIFICANCE OF ADR ?

Amongst other things, "Going to Law" to settle disputes is often

1 an intimidating experience for the parties

2 expensive – especially in respect of legal costs and fees,

3 time consuming with lengthy meetings between the parties and lawyers and in preparing evidence and discussing strategies'

4 long winded and protracted as correspondence flows back and forth between the parties and their lawyers and in waiting for court hearings. It may take 2 or more years to get to court.

5 damaging to business interests. Court hearings result in private business being aired in public, jeopardising public confidence in ones business affairs

6 harmful to relationships since the win/lose adversarial aspect of litigation tends to further alienate the parties making it difficult to maintain business relations after the dispute has been brought to a judicial conclusion.

7 considered to result in unfair and illogical outcomes which do not reflect commercial realities. Lawyers and judges are perceived by many as being out of touch and as having little empathy for the concerns and the needs of clients and the people who appear before them in court.

By contrast, to varying degrees, ADR processes are likely to be :-

1 Less formal and far more consumer friendly than attending court hearings.

2 Less expensive than going to law.

3 Less demanding on personal time in respect of preparation for the process.

4 Much quicker, enabling parties to get on with business sooner.

5 Conducted in private, protecting business confidentiality and reputation.

6 Less divisive and assists reconciliation between the parties.

7 Conducted by individuals with commercial and industrial experience.

It is hardly surprising therefore that many people and organisations choose to settle their disputes in private, bypassing the judicial system. Arbitration has been used in the United Kingdom and internationally for going on for 400 years. Adjudication is now a significant part of the dispute resolution process in the United Kingdom. Conciliation has played a significant role in employer / trade union dispute settlement for almost half a century. Many large employers today operate an internal grievance procedure which helps to keep disputes out of industrial tribunals and the courts.

Modern Developments : Starting in the United States in the late 1970'ies and spreading out into the global community in the 1990'ies there was a significant return to negotiated dispute settlement processes as business became disenchanted with the cost and delay associated with the judicial process. Whilst negotiation has always been central to dispute resolution (most court cases settle at the courthouse door) it was not treated as a professional skill. The degree of expertise possessed by modern ADR practitioners has led to ADR Practice taking on professional status in its own right. Today's industry specialists are encouraged to develop sophisticated decision making and negotiation skills enabling them to play an active role in ADR processes.

Litigation and ADR Contrasted : A crucial distinction between litigation and ADR is that whilst many legal practitioners engage in ADR processes, there is no legal or professional requirement for either the ADR practitioner or for party representatives at ADR processes to be legally qualified or to be members of legal professions such as the bar or the law society. Many of those who engage in ADR practice are first and foremost experts in particular fields such as architects, builders, civil engineers, mariners, scientists and social workers, albeit with a thorough understanding of ADR processes and some knowledge and understanding of law. In house legal experts in large corporate organisations can take part in the entire ADR process without engaging professional lawyers thus cutting costs further, both in terms of time lost through communicating with the professionals and in respect of legal fees and costs.

It is also the practical knowledge and understanding of industry and commerce which assures the parties to ADR processes that the people responsible for settling their dispute or assisting them to reach a settlement understand their business and their concerns. It further assures them that the outcome will not be based purely on legal technicalities but will take into account commercial practicalities and technical details which lawyers may not fully comprehend.

Time & Cost Savings : Adjudication and mediation processes take only about a month to conclude from start to finish. Arbitration processes tended to take between 6 months to a year to conduct but the advent of fast track arbitrations has cut this time scale radically in recent times. By contrast it is not unusual for it to take up to a year for a major case to be heard by the courts. It is attractive for commerce to settle disputes quickly and put an end to uncertainty about future financial commitments. This enables business men to settle their affairs and get on with business without having to ring fence funds to meet potential liabilities. Payments into court and guarantees for security of costs can also have adverse effects on cash flow.

The interest that may accrue over a two year period between the commission of a wrong and the court decision can far exceed the cost of ADR processes. The losing party is likely to be ordered to repay this interest to the winning party. If interest is taken into account it may in reality cost nothing at all to settle a dispute using an ADR process since the interest that accrues over a short period is relatively little.

HOW TO GET TO ADR INSTEAD OF GOING TO COURT ?

ADR service providers have standard forms to enable parties to a dispute to refer that dispute to ADR. The forms can often be downloaded from the net. Many lawyers' offices hold copies. ADR service providers will supply forms upon request.

1 TERMS IN A CONTRACT PROVIDING FOR ADR IF NEEDED.

An ADR provision may be built into an agreement. The Construction and Maritime Industries frequently make use of ADR clauses. It is wise when concluding an international agreement to provide for the law of the state that applies to the contract. Once the parties have put their minds to this matter they often go one step further and provide for ADR at the same time, eg English Law and London Arbitration. It is even better if the clause specifies the ADR service provider and the rules governing the ADR process. This ensures that there is no need agree these details later. Frequently the parties to an open agreement fail to agree on the details after a dispute arises and are forced to go to court to ask a judge to decide for them.

If an ADR provision is built into a contract the parties are obliged to exhaust that process before attempting to go to law. Submission to the ADR process then becomes a mandatory pre-requisite of court action. It is too late, once a dispute arises, to change one's mind and decide to go to court instead. The voluntary aspect of ADR lies in that the parties choose to adopt the ADR clause in the first place. However, even after a dispute has arisen, the parties can reach a mutual agreement to dispense with ADR and go to court instead.

Many contracts do not make any provision for dispute settlement mechanisms because it is not something that the parties think about at the time. No one stops to consider what will happen if something goes wrong, how the dispute might be settled, how much time and money it might take to settle the dispute or what adverse effects a protracted dispute might have on their businesses and their relationship.

2 AGREEMENTS TO SUBMIT A DISPUTE TO ADR.

Even if there is no ADR provision in a contract, once a dispute arises, the parties are free to agree to refer the dispute to an ADR process rather than go to law. Disputes which have nothing to do with contracts, such as accidents, can likewise be referred to an ADR process if the parties wish. However, in these circumstances both parties have to agree to the reference. If only one party wishes to use an ADR process the other party can ignore that wish and go to law instead.

Under the new Civil Procedure Rules 1998 your lawyer must advise you of the benefits of ADR and where a judge thinks ADR is advantageous the court may recommend that the parties try out ADR first. A party can ask the court to give them time to go to ADR. The court has the power to adjourn court hearings pending an attempt at settlement using ADR.

WHAT IS INVOLVED IN ADR ?

What follows is a brief explanation of what the principal forms of ADR are, highlighting the relative advantages and disadvantages of each, to enable the reader to choose a dispute resolution process suitable for his or her social and business needs out of the wide range of available services.

ARBITRATION

Arbitration represents the principal alternative to the court system and is widely used by the construction industry and international commerce. Arbitration provides an attractive second stage in the event of the break down of negotiated settlement.

Arbitration offers the concept of party autonomy. This means that the parties have the right and power to decide many of the procedures that will govern the conduct of their arbitration. Default systems for the conduct of arbitrations are provided by arbitral organisations and by international and domestic arbitration codes. However, the parties can chose to derogate from the default provisions. The parties can decide on the degree of formality they desire, how much time will be allocated to various aspects of the process and how documentation, discovery and the taking of evidence will be handled. Arbitration therefore offers the possibility of informality, speed, cost savings and privacy. Speed and informality are encouraged by the Arbitration Act 1996. Whilst arbitration is often less expensive than litigation it can be more expensive on times especially if the parties engage in protracted hearings and chose to adopt cumbersome procedures

Arbitration emulates the courts in some respects and has been described as a private court dispute settlement system. It is therefore a more formal procedure than mediation. There are significant differences between arbitration and litigation. Arbitration in the UK under the auspices of NADR, The Chartered Institute of Arbitrators and the London Court of International Arbitration offers disputing parties considerable benefits especially since the Arbitration Act 1996 became law.

The courts support the arbitral process in a number of ways, in particular in respect of orders for disclosure of information and in the preservation of funds that may be needed to finance an arbitral award. The courts are less likely to interfere with the arbitral process than was the case before the 1996 Act was passed.

Although arbitration is one of the best methods to settle commercial disputes the parties to such proceedings often fail to maintain a commercial relationship following the award. Arbitration is essentially adversarial and judicial in nature and leads to a winner takes all result. In this respect arbitration differs little from litigation.

The New York Convention on Enforcement of Arbitral Awards allows for international enforcement of awards. This is a major advantage compared to the court system.

STEPS IN THE ARBITRATION PROCESS

1 Dispute arises (Start)
2 Request for and submission of dispute to arbitration (This may be to a specific arbitrator or to an arbitral institution. Choices may be predicated by a pre-contractual term in an agreement which has given rise to the dispute.
3 Parties agree on an arbitrator or an arbitrator is appointed by an arbitral institution or a court.
4 Arbitrator accepts appointment.
5 Preliminary meeting at arbitrator's request. This may be a joint session with everyone present or may be conducted by telephone conference.
6 Arrangements for the arbitration including hire of venue and travel arrangements, usually done by the parties with or without the assistance of an arbitral institution.
7 Arbitrator issues directions.
8 Preliminary hearings and interim awards possible in respect of security of costs, scope of arbitration agreement etc.
9 Submission of pleadings: claims / counterclaims and response to counterclaim.
10 Discovery and preparation of agreed documents
11 Preparation of expert reports
12 Hearing (all parties, representatives, witnesses and experts and arbitrator)
13 Award : decision and costs (The End)
14 If non compliance – action for enforcement or challenge of or to award.

REQUIREMENTS OF AN EFFECTIVE FAIR ARBITRATION PROCESS

1 An arbitration agreement
2 The arbitration agreement must apply to the issue in dispute.
3 Appointment of a qualified & skilled expert arbitrator.
4 Clarification of the jurisdiction of the arbitrator and the applicable law.
5 Party representation.
6 Co-operation between parties and arbitrator to make the process run smoothly.
7 An effective and fair arbitration process with rules of conduct and procedure.

ADJUDICATION.

To adjudicate means to decide the outcome of a dispute between other people. Hence arbitrators, judges, tribunal panels and ombudsmen are all adjudicators. However, the Housing Grants, Construction and Regeneration Act 1996 introduced a specific form of adjudication, for the settlement of disputes between commercial parties to construction contracts. Adjudication has now started to become a term of art.

Adjudication is a quick and inexpensive method of dispute resolution resulting in an immediately enforceable, non-binding dispute settlement, by a third person, known as the Adjudicator. The Adjudicator

is likely to be an expert first and foremost but may also be a qualified lawyer. Most construction adjudicators are qualified builders such as architects, civil engineers and quantity surveyors. This helps the process because the adjudicator will not need to hear or read large quantities of expert evidence to help him understand how the industry operates. This keeps time down to a minimum and avoids much unnecessary expense.

The time scale for adjudication depends either on the 28 day statutory provision in the Housing Grants Act 1996, or on an agreed time frame in an adjudication clause incorporated into a contract. Voluntary adjudication clauses can be inserted into any contract and are not limited to the construction industry. The only difference is that instead of being governed by the statute the adjudication is governed by the contractual provisions and the rules of the ADR provider. Adjudication proceedings may be conducted with or without a hearing.

Adjudication proceedings with hearings. The process is very similar to a fast track arbitral hearing with strict time limits imposed on submissions and cross questioning.

Paper only Adjudication. The parties submit written claims, defences, counterclaims and legal submissions to the adjudicator along with expert reports and supporting evidence, having engaged in the usual exchanges of documentation. At an appointed time, the adjudicator goes through all the paperwork, makes a decision and publishes it. Whilst there is no opportunity at a paper only adjudication to make oral pleading and to engage in cross-questioning, the low cost of such adjudication proceedings is attractive. It is an ideal process for the settlement of disputes involving technical issues and straight forward differences of opinion between the parties.

Immediately enforceable. The adjudicator is given the authority by the parties to a dispute (or by Statute if applicable) to make a determination which is immediately enforceable, subject to the terms of the award. Typically the losing party is ordered to pay the winning party a sum of money within a specific period of time. The settlement of the dispute at an early stage enables the parties to get on with business.

Non-binding. The decision is non-binding in that having complied with the order, the losing party is free to commence arbitration or litigation. Judging from the UK experience so far, it is rare for the parties to so dissatisfied with the adjudication decision that they decide to continue the dispute. Assuming that both parties are completely satisfied with the decision the dispute is at an end. Even if one of the parties is dissatisfied with the decision award the parties are able to continue their business relationship, on the basis of the decision, pending arbitration or litigation.

Arbitration / Litigation and Adjudication. The arbitrator / judge will be aware that an adjudication has taken place and inevitably will be aware that the claimant / plaintiff was not satisfied with the outcome of the adjudication. The arbitrator / judge will not know the details of the adjudication decision until he has made his final award or ruling and turns his attention to the award of costs. The reason for the adjudicator's decision therefore has no impact on the subsequent decision and from this perspective the subsequent hearings differ significantly from an appeal from a previous finding of an arbitrator or lower court.

If the claimant wins the arbitration or court case he will recover the monies paid out complying with the adjudication decision and the costs of the claim. If he fails the adjudication decision is undisturbed and the claimant covers the cost of the failed claim. If the arbitration award or court judgement is less than the adjudication decision the claimant will have to pay the costs of the action. There is therefore considerable risk involved in deciding to take the claim to arbitration or to court. In the two years since adjudication came into being there have been very few subsequent challenges. To all intents and purposes therefore for most people adjudication ends up being the final stage of the dispute resolution process.

The great value of adjudication is that the parties quickly get a decision which enables them to get on with business and put the dispute behind them. Even if one of the parties decides to proceed further the parties have a firm basis upon which to proceed in the interim period. Prior to the introduction of construction adjudication it was common for building sites to grind to a halt until a dispute was settled. This is no longer the case. Projects are completed quickly and the industry has saved a great deal of money by avoiding unnecessary disruption. The same benefits can be enjoyed by parties to contractual, as opposed to statutory based, adjudication processes

COMMON REQUIREMENTS FOR ADJUDICATION AND ARBITRATION

1 Party confidence in the professionalism of the Arbitrator or Adjudicator
2 Party confidence in the rules governing the process.
3 A well administered process.

MEDIATION

Mediation is regarded as being the most flexible and fastest of the ADR techniques as well as being the most cost-effective. It is a proven means of dispute resolution which can generate a settlement equitable to both parties at an affordable price.

Mediation is a voluntary, non-binding, without prejudice process. Trained third party mediators attempt through negotiation techniques to bring the parties to a dispute together in a binding or non-binding settlement agreement. Where the mediation process ends with a binding agreement between the parties, that agreement can be enforced simply and quickly, by the courts should the need arise.

If any of the parties to the mediation process, including the mediator, are dissatisfied with the process at any time, that party can terminate the process. The claimant may then proceed to assert his legal rights through the court system or through arbitration.

The problem with the court system is that it is adversarial and leads to a ***winner takes all*** outcome. Often the court's decision is the result of a very fine distinction drawn on the basis of a mere ***balance of probabilities.*** There is little room for compromise and the parties may be left with a feeling that justice has not been done. The system guarantees that at least one of the parties may be disgruntled with the judicial decision. ***Mediation avoids these problems.*** In mediation the parties are in charge of the dispute resolution process.

STEPS IN A MEDIATION

There are many different ways of conducting a mediation. However, the model to be adopted should reflect the needs of the industry and or the parties it is serving. The mediation commences with a request for mediation, to a mediator or an ADR service provider, by one of the parties. Once the other party consents to the mediation the parties may exchange relevant information and provide the mediator with information. Arrangements for the mediation may be made by the parties, the mediator or the ADR service provider. The mediation may be held in one of the party's premises, at one of the party's legal representatives offices, an independent venue such as a hotel or at the ADR service provider's mediation suite.

Most mediations will commence with a joint session with all the parties and the mediator present where the mediation process is explained to the parties. The parties are given an opportunity in the joint session to outline their position explaining how they feel, what they need and what they hope to achieve out of the process. This sets the parameters for subsequent negotiations. In exceptional circumstances joint session may not be adopted if there is so much animosity present that the joint session might result in an irreconcilable confrontation between the parties. To avoid confrontation, it is possible to brief the parties separately or to show them a video explaining the process.

After the opening joint session the mediator will often conduct a series of sequential private meetings (sometimes known as caucuses) with each of the parties and their respective representatives. Private sessions are used to explore each party's situation and possible solutions to the problem as the mediator attempts to help the parties reach an agreement, playing ***"devil's advocate"*** and asking searching questions about the strengths and weaknesses of the case.. The mediator will use as many private sessions as circumstances require to broker a settlement. Meetings are entirely confidential. No information will be given to the other party unless expressly agreed.

The mediation will end with a joint session where the agreement is finalised, committed to paper and signed by the parties.

WHY MEDIATION WORKS AND ADVANTAGES OF MEDIATION

Mediation allows the parties to a dispute to air their views in an informal setting. The mediator explores potential ways of settling the dispute with each party, guiding the parties to a more realistic view of their situation by highlighting the strengths and weaknesses of their case the risks inherent in failing to reach a settlement. The parties are in control of the process and the outcome.

Even where a mediation fails the parties often narrow down the scope of the dispute to a single issue which can then be dispensed with quickly by the court.

The advantages of mediation are :-

1. speed of dispute resolution (usually 3-4 weeks with a 1 day mediation)
2. cost savings – both for the process and in respect of the extent of legal fees
3. improvement in communication between the parties
4. a flexible informal procedure
5. addresses unreasonable claims and expectations. Should produce a fair outcome.

CONCILIATION AND MEDIATION CONTRASTED

The main differences between mediation and conciliation are that the conciliator often formulates and sells his or her proposed solution to the parties and the outcome is a non binding agreement, that is to say an agreement binding in honour only. Conciliation is used extensively for negotiations between large employers and trade unions. Unlike commercial mediations which can often be concluded, even in respect of highly complex matters involving large sums of money, within a single one day mediation session, employment conciliation will often involve many sessions conducted over several days or even weeks. The same is true of international mediations between governments as epitomised by the Camp David negotiations.

GROUND RULES FOR SUCCESSFUL MEDIATION

1. **Party Co-operation.** Mediation is a voluntary, non-binding, without prejudice process which will not take place or succeed unless the parties enter into the process in a spirit of co-operation and with a commitment to try their best to attain a settlement or at the very least to enter the process with an open mind.
2. **The dispute must be a suitable case for mediation.** The parties must have the legal right to reach a settlement so disputes about issues in which the state or society has an interest may not be suitable for mediation. Criminal and divorce cases are examples of this since it is a court that will punish criminals and grant divorce petitions.
3. **The parties must have scope for and a preparedness to compromise.** Where the validity of a claim is not in doubt and there is no reason to compromise the case should go to court, as with an undisputed claim for a non payment of a debt. Even in these circumstances the parties may be able to negotiate a rescheduling of the debt. If a party is totally opposed to compromise a court hearing needed.
4. **Professionally mediator.** The mediator must be trained and skilled in the art of mediation. The negotiation and communication skills of the mediator are central to the success of the process.
5. **Independent expertise.** The mediator should be an expert in the field of the matter in dispute. Unlike a court the party representatives are not advocates, so the representatives will not set out and argue all the legal issues of the case and present expert evidence and cross question witnesses so it is essential that the mediator has a firm grasp of the customs and practices relevant to the dispute in order to assist the parties in reaching a realistic settlement.
6. **Party Confidence in the mediator.** The mediator must assure the parties that he is not biased and will act in an even handed manner. The mediator is not there to judge the merits of the case. The mediator help the parties to make a realistic assessment of their expectations based on their legal rights and practical realities leading to an agreement which is fair and acceptable to both parties. A mediator

should not give either party legal advice. The mediator will give an indication of what the other party is prepared to settle for and may ask a party to consider whether what that party wishes to achieve is in fact realistically achievable. A mediator should not express an opinion about the merits of an offer or coerce the parties into a settlement. A coerced agreement is no agreement.

7. **Party Confidence in the process.** The process should be efficiently organised and governed by a strict code of conduct and ethics.
8. **Party Representation.** It is not strictly necessary for the parties to be represented at mediation but it is highly desirable.

THE SPREAD OF ADR FROM THE US TO THE GLOBAL COMMUNITY

The Problem : Pursuing actions through the courts for breaches of international commercial obligations fails to meet the needs of the parties involved, both financially and emotionally. One solution is to include the concept of ADR, in particular adjudication, arbitration and mediation in the "contract" between the parties. Any difficulties and problems which occur will be provided with an outlet to release frustrations and emotions at a forum away from the confrontational atmosphere of the court room. The beauty of the mediation process in particular is that no lawyers are needed to represent the clients.

Recent developments in the UK : In the UK, the Government's primary concerns have been to minimise the role played by the courts in dispute settlement in order to save money, to reduce the burden of work on the judicial system and to prevent disputes disrupting commercial relations and economic development. The chancelleries of several of the member states of the European Union are currently addressing the same problems. The second concern is with speed of dispute settlement and consumer satisfaction. The UK Government has introduced a compulsory adjudication process for preliminary dispute settlement in the construction industry. The amended UK Civil Procedure Rules 1998 introduced by Lord Woolf demonstrate that ADR is to play a central role in dispute resolution. Although the reforms fell short of introducing USA style; Court Ordered Mediation, the case management powers of the court allow judges to delay a case to enable parties to go to mediation and failure to mediate will lead to cost penalties. Lord Woolf also make it compulsory for lawyers to advise clients of the benefits of ADR.

It is likely that any industry or profession that does not address the problems of speedy, cost-effective dispute resolution could find Governments imposing a compulsory system on them. If the new UK systems result in significant savings and commercial advantages it is very likely that other European states will emulate it. Indeed, in the spirit of harmonisation and consumer satisfaction, the European Union might well choose to impose the UK model on the whole of the community.

THE COURT OF ARBITRATION FOR SPORT

By Matthieu Reeb, CAS Secretary General

Since the 1980s, the astonishing speed with which professional sport and high level sport in general have developed means that athletes, sports clubs, federations, sponsors, sports event organisers and other people or bodies involved in sport become much more demanding when it comes to legal matters. The logical result of this situation is a higher number of potential sources of disputes, given the growth in the economic issues at stake. Today, the attitude of state courts in relation to sporting issues has changed, and intervention by state judges is on the increase.

It was in this context that the CAS was created. For even if sports-legal disputes can always be settled by the ordinary courts, an international court like the CAS, which can offer specialist knowledge, low cost and rapid action, provides a means of resolving sports disputes adapted to the specific needs of the international sporting community.

HISTORY OF THE CAS

1. Origins

At the beginning of the 1980s, the regular increase in the number of international sports-related disputes and the absence of any independent authority specialising in sports-related problems and authorised to pronounce binding decisions led the top sports organisations to reflect on the question of sports dispute resolution.

In 1981, soon after his election as IOC President, H.E. Juan Antonio Samaranch had the idea of creating a sports-specific jurisdiction. The following year at the IOC Session held in Rome, IOC member H.E. Judge Kéba Mbaye, who was then a judge at the International Court of Justice in The Hague, chaired a working group tasked with preparing the statutes of what would quickly become the "Court of Arbitration for Sport".

The idea of creating an arbitral jurisdiction devoted to resolving disputes directly or indirectly related to sport had thus firmly been launched. Another reason for setting up such an arbitral institution was the need to create a specialised authority capable of settling international disputes and offering a flexible, quick and inexpensive procedure.

The initial outlines for the concept contained provision for the arbitration procedure to include an attempt to reach a settlement beforehand. It was also intended that the IOC should bear all the operating costs of the court. Right from the outset, it was established that the jurisdiction of the CAS should in no way be imposed on athletes or federations, but remain freely available to the parties.

In 1983, the IOC officially ratified the statutes of the CAS, which came into force on 30 June 1984. The Court of Arbitration for Sport became operational as of that time, under the leadership of President Mbaye and the Secretary General, Mr Gilbert Schwaar.

2. Organisation of the CAS from its creation until 1994

The CAS Statute of 1984 was accompanied by a set of procedural Regulations. Both were modified slightly in 1990. Under these rules, the CAS was composed of 60 members appointed by the IOC, the International Federations (IF), the National Olympic Committees (NOC) and the IOC President (15 members each). The IOC President had to choose those 15 members from outside the other three groups. In addition, all the operating costs of the CAS were borne by the IOC. In principle, the proceedings were free of charge, except for disputes of a financial nature, when the parties could be required to pay a share of the costs. The annual budget was approved by the CAS President alone. What is more, the CAS Statute could be modified only by the IOC Session, at the proposal of the IOC Executive Board.

The CAS Statute and Regulations provided for just one type of contentious proceedings whatever the nature of the dispute. The claimant lodged his request with the CAS, accompanied by the arbitration agreement. The request was then examined by a "Requests' panel" which ruled on the admissibility of the request, subject to a final decision by the panel of arbitrators which would then be called on to hear and rule on the dispute, if necessary. The parties thus remained free to continue their action in spite of a rejection decision by the Requests' panel.

The proceedings could then begin with an attempt at achieving conciliation, either at the proposal of the parties, or pursuant to a decision by the CAS President if he judged that the dispute was suitable for conciliation to be attempted. If this failed, the arbitration procedure itself was started.

Alongside this contentious procedure there was also an advisory procedure open to any interested sports body or individual. Through this procedure, the CAS could give an opinion on a legal question concerning any activity related to sport in general. The advisory procedure still exists, but it has been modified somewhat, and access to it restricted (see below).

In 1991, the CAS published a Guide to arbitration which included several model arbitration clauses. Among these was one for inclusion in the statutes or regulations of sports federations or clubs. This clause read as follows: *"Any dispute arising from the present Statutes and Regulations of the ... Federation which cannot be settled amicably shall be settled finally by a tribunal composed in accordance with the Statute and Regulations of the Court of Arbitration for Sport to the exclusion of any recourse to the ordinary courts. The parties undertake to comply with the said Statute and Regulations, and to accept in good faith the award rendered and in no way hinder its execution."*

This clause prefigured the subsequent creation of special rules to settle disputes related to decisions taken by sports federations or associations (appeals procedure).

The International Equestrian Federation (FEI) was the first sports body to adopt this clause. This was the starting point for several "appeals" procedures even if, in formal terms, such a procedure did not yet exist. After that, other national and international sports federations adopted this appeals arbitration clause, which meant a significant increase in the workload of the CAS.

Up to 1991-1992, a wide variety of cases were submitted to the CAS involving issues such as the nationality of athletes and contracts concerning employment, television rights, sponsorship and licensing. With the appearance of the appeals arbitration clause, numerous doping cases were subsequently brought before the CAS, and it was as the result of, or thanks to one such case that the structure of the CAS would have to evolve.

3. The 1994 reform

In February 1992, a horse rider named Elmar Gundel lodged an appeal for arbitration with the CAS on the basis of the arbitration clause in the FEI statutes, challenging a decision pronounced by the federation. This decision, which followed a horse doping case, disqualified the rider, and imposed a suspension and fine upon him. The award rendered by the CAS on 15 October 1992 found partly in favour of the rider (the suspension was reduced from three months to one month: see arbitration CAS 92/63 G. v/ FEI in *Digest of CAS Awards 1986-1998*). Unhappy with the CAS decision, Elmar Gundel filed a public law appeal with the Swiss Federal Tribunal. The appellant primarily disputed the validity of the award, which he claimed was rendered by a court which did not meet the conditions of impartiality and independence needed to be considered as a proper arbitration court.

In its judgement of 15 March 1993 (published in the *Recueil Officiel des Arrêts du Tribunal Fédéral* [Official Digest of Federal Tribunal Judgements] 119 II 271), the Federal Tribunal (FT) recognised the CAS as a true court of arbitration. The supreme court noted, *inter alia*, that the CAS was not an organ of the FEI, that it did not receive instructions from this federation and retained sufficient personal autonomy with regard to it, in that it placed at the disposal of the CAS only three arbitrators out of the maximum of 60 members of which the CAS was composed. However, in its judgement the FT drew attention to the numerous links which existed between the CAS and the IOC: the fact that the CAS was financed almost exclusively by the IOC; the fact that the IOC was competent to modify the CAS Statute; and the considerable power given to the IOC and its President to appoint the members of the CAS. In the view of the FT, such links would have been sufficient seriously to call into question the independence of the CAS in the event of the IOC's being a party to proceedings before it. The FT's message was thus perfectly clear: the CAS had to be made more independent of the IOC both organisationally and financially.

This Gundel judgement led to a major reform of the Court of Arbitration for Sport. First of all, the CAS Statute and Regulations were completely revised to make them more efficient and to modify the structure of the institution, to make it definitively independent of the IOC which had sponsored it since its creation. The biggest change resulting from this reform was the creation of an "International Council of Arbitration for Sport" (ICAS) to look after the running and financing of the CAS, thereby taking the place of the IOC.

Other major changes were to create two arbitration divisions (Ordinary arbitration division and Appeals arbitration division) in order to make a clear distinction between disputes of sole instance and those arising from a decision taken by a sports body. Finally, the CAS reforms were definitively enshrined in a new "Code of Sports-related Arbitration", which came into force on 22 November 1994.

4. The Paris Agreement

The creation of the ICAS and the new structure of the CAS were approved in Paris, on 22 June 1994, with the signing of the "Agreement concerning the constitution of the International Council of Arbitration for Sport", known as the "Paris Agreement". This was signed by the highest authorities representing the sports world, viz. the presidents of the IOC, the Association of Summer Olympic International Federations (ASOIF), the Association of International Winter Sports Federations (AIWF) and the Association of National Olympic Committees (ANOC).

The preamble of the Agreement states that *"with the aim of facilitating the resolution of disputes in the field of sport, an arbitration institution entitled the "Court of Arbitration for Sport" (hereinafter the CAS) has been created, and that, with the aim of ensuring the protection of the rights of the parties before the CAS and the absolute independence of this institution, the parties have decided by mutual agreement to create a Foundation for international sports-related arbitration, called the "International Council of Arbitration for Sport" (hereinafter the ICAS), under the aegis of which the CAS will henceforth be placed."*

The Agreement determined the appointment of the initial members of the ICAS and the funding of the CAS. In 2000, the ICAS/CAS budget totalled CHF 1.8 million.

Since the Paris Agreement was signed, all Olympic International Federations but one and many National Olympic Committees have recognised the jurisdiction of the CAS and included in their statutes an arbitration clause referring disputes to the CAS.

ORGANISATION AND STRUCTURE OF THE ICAS AND CAS

1. The Code of Sports-related Arbitration of 22 November 1994

Since 22 November 1994, the Code of Sports-related Arbitration (hereinafter the Code) has governed the organisation and arbitration procedures of the CAS. As such, the 69-article Code is divided into two parts: the Statutes of bodies working for the settlement of sports-related disputes (articles S1 to S26), and the Procedural Rules (articles R27 to R69). Since 1999, the Code has also contained a set of mediation rules instituting a non-binding, informal procedure which offers parties the option of negotiating, with the help of a mediator, an agreement to settle their dispute.

The Code thus establishes rules for four distinct procedures:

- the ordinary arbitration procedure;
- the appeals arbitration procedure;
- the advisory procedure, which is non-contentious and allows certain sports bodies to seek advisory opinions from the CAS;
- the mediation procedure.

There are two classic phases to arbitration proceedings: written proceedings, with an exchange of statements of case, and oral proceedings, where the parties are heard by the arbitrators, generally at the seat of the CAS in Lausanne.

The mediation procedure follows the pattern decided by the parties. Failing agreement on this, the CAS mediator decides the procedure to be followed.

2. The International Council of Arbitration for Sport (ICAS)

The ICAS is the supreme organ of the CAS. The main task of the ICAS is to safeguard the independence of the CAS and the rights of the parties. To this end, it looks after the administration and financing of the CAS.

The ICAS is composed of 20 members who must all be high-level jurists well-acquainted with the issues of arbitration and sports law.

Upon their appointment, the ICAS members must sign a declaration undertaking to exercise their function in a personal capacity, with total objectivity and independence. This obviously means that in no circumstances can a member play a part in proceedings before the CAS, either as an arbitrator or as counsel to a party.

The ICAS exercises several functions which are listed under article S6 of the Code. It does so either itself, or through the intermediary of its Board, made up of the ICAS President and two vice-presidents, plus the two presidents of the CAS Divisions. There are, however, certain functions which the ICAS may not delegate. Any changes to the Code of Sports-related Arbitration can be decided only by a full meeting of the ICAS and, more specifically, a majority of two-thirds of its members. In other cases, a simple majority is sufficient, provided that at least half the ICAS members are present when the decision is taken. The ICAS elects its own President, who is also the CAS President, plus its two Vice-presidents, the President of the Ordinary Arbitration Division, the President of the Appeals Arbitration Division and the deputies of these divisions. It also appoints the CAS arbitrators and approves the budget and accounts of the CAS.

3. The Court of Arbitration for Sport (CAS)

The CAS performs its functions through the intermediary of arbitrators, of whom there are at least 150, with the aid of its court office, which is headed by the Secretary General. One of the major new features following the reform of the CAS was the creation of two divisions: an "Ordinary Arbitration Division", for sole-instance disputes submitted to the CAS, and an "Appeals Arbitration Division", for disputes resulting from final-instance decisions taken by sports organisations. Each division is headed by a president.

The role of the division presidents is to take charge of the first arbitration operations once the procedure is under way and before the panels of arbitrators are appointed. The presidents are often called upon to issue

orders on requests for interim relief or for suspensive effect, and intervene in the framework of constituting the panels of arbitrators. Once nominated, the arbitrators subsequently take charge of the procedure.

The 186 CAS arbitrators (2000 figure) are appointed by the ICAS for a renewable term of four years. The Code stipulates that the ICAS must call upon "personalities with a legal training and who possess recognised competence with regard to sport". The appointment of arbitrators follows more-or-less the same pattern as for the ICAS members. The CAS arbitrators are appointed at the proposal of the IOC, the IFs and the NOCs. The ICAS also appoints arbitrators "with a view to safeguarding the interests of the athletes" (article S14 of the Code), as well as arbitrators chosen from among personalities independent of sports organisations.

Even when the CAS arbitrators are proposed by sports organisations, the fact remains that they must carry out their functions with total objectivity and independence. When they are appointed, they have to sign a declaration to this effect.

The arbitrators are not attached to a particular CAS division, and can sit on panels called upon to rule under the ordinary procedure as well as those ruling under the appeals procedure. CAS panels are composed either of a single arbitrator or of three. All arbitrators are bound by the duty of confidentiality and may not reveal any information connected with the parties, the dispute or the proceedings themselves.

TYPES OF DISPUTES SUBMITTED TO THE CAS

Generally speaking, a dispute may be submitted to the Court of Arbitration for Sport only if there is an arbitration agreement between the parties which specifies recourse to the CAS. Article R27 of the Code stipulates that the CAS has jurisdiction solely to rule on disputes connected with sport. Since its creation, the CAS has never declared itself to lack jurisdiction on the grounds of a dispute's not being related to sport (see in this regard the award delivered in the arbitration TAS 92/81 in the *Digest of CAS Awards 1986-1998*).

In principle, two types of dispute may be submitted to the CAS: those of a commercial nature, and those of a disciplinary nature.

The first category essentially involves disputes relating to the execution of contracts, such as those relating to sponsorship, the sale of television rights, the staging of sports events, player transfers and relations between players or coaches and clubs and/or agents (employment contracts and agency contracts). Disputes relating to civil liability issues also come under this category (e.g. an accident to an athlete during a sports competition). These so-called commercial disputes are handled by the CAS acting as a court of sole instance.

Disciplinary cases represent the second group of disputes submitted to the CAS, of which a large number are doping-related. In addition to doping cases, the CAS is called upon to rule on disciplinary cases following violence on the field of play, abuse of a referee or ill treatment of horses.

Such disciplinary cases are generally dealt with in the first instance by the competent sports authorities, and subsequently become the subject of an appeal to the CAS, which then acts as a court of last instance. In 2000, disciplinary cases accounted for 65% of the total number of cases handled by the CAS.

THE DECENTRALISED CAS OFFICES AND THE AD HOC DIVISIONS

In 1996, the ICAS created two permanent decentralised offices, the first in Sydney in Australia, and the second in Denver, in the United States of America. In December 1999, the Denver office was transferred to New York. These offices are attached to the CAS court office in Lausanne, and are competent to receive and notify all procedural acts. Creating them made it easier for parties domiciled in Oceania and North America to have access to the CAS.

Later in 1996, the ICAS created a CAS ad hoc division with the task of settling finally and within a 24-hour time-limit any disputes arising during the Olympic Games in Atlanta. This ad hoc division was composed of two co-presidents and 12 arbitrators who were in the Olympic city throughout the Games. To ensure easy access to the ad hoc division for all those taking part in the Olympic Games (athletes, officials, coaches, federations, etc.), a special procedure was created for the occasion, which was simple, flexible and free of charge. A total of six cases were submitted to the CAS ad hoc division in Atlanta.

In 1998, two new CAS ad hoc divisions were set up by the ICAS. The first was created for the Olympic Winter Games in Nagano, and the second for the Commonwealth Games in Kuala Lumpur. Both of these

divisions were organised in much the same way as for Atlanta (but the number of arbitrators was reduced to six), and the applicable procedure also remained virtually identical.

The CAS was also approached by the European Football Union (UEFA) with a view to setting up an ad hoc division for the European Championships held in Belgium and the Netherlands in June and July 2000. Later in the year, another ad hoc division was constituted for the Olympic Games in Sydney, based on the structure used for the Games in Atlanta. This division was much in demand during the Games, with 15 cases - or nearly one a day - submitted to it.

The success of these ad hoc divisions has played a large part in making the Court of Arbitration for Sport known among athletes, sports organisations and the media all over the world. The creation of this ad hoc structure is unquestionably a key point in the history of the CAS.

CAS OBJECTIVES AND THE FUTURE OF THE INSTITUTION

In more than 15 years of existence, the CAS has evolved constantly. It gave itself a new structure with the creation of the ICAS; the number of arbitrators has grown progressively (60 in 1986, 186 in 2000); the CAS has also opened offices in North America and Oceania; its volume of work has greatly increased; and it has given rise to ad hoc divisions capable of resolving disputes arising during specific sports events.

Nevertheless, the CAS has not finished growing. Although almost all the Olympic International Federations and several non-Olympic federations recognise the jurisdiction of the CAS, it seems that the international sports community as a whole does not yet know enough about the role and work of the CAS to make optimum use of its services. The CAS thus needs to publish its decisions more regularly and continue its awareness-raising efforts. It appears that the CAS is known chiefly as an appeals authority for disciplinary cases. This is due notably to the fact that the CAS appeals procedures are not, as a rule, confidential. And people sometimes forget that the CAS also acts as a court of sole instance for settling sports-related contractual disputes, thanks to an arbitration procedure which is adapted to this.

In the future, it is probable that the ICAS will seek to facilitate access to CAS jurisdiction still further, for example by creating new decentralised offices or new ad hoc divisions, while maintaining the principle of not charging for appeals proceedings.

DISPUTE PREVENTION AND RESOLUTION MATRIX

Dispute Prevention / Resolution Process	Autonomy in Appointment and Process	Formality Of Hearings And Process	Effectiveness Enforceability Of Remedy	Flexibility Of Process	Privacy of Process	Speed of Process From submission to Resolution / Remedy	Cost of Process and Representation	Legal / Self Representation (if allowed)
Self Help (actions must be lawful)	Yes	Informal	Sometimes	Very	Maybe	Yes	Low	n/a
Negotiation / Partnering	Yes	Informal	Sometimes	Very	Yes	Can be + Prevention	Low	Either
Pre-trail Negotiations	Yes [1]	Informal	Sometimes	Very	Yes	Can be	Standard rates	Legal
Conciliation (Binding)	Perhaps [2]	Variable [9]	Yes [13]	Very	Maybe	Can be	Variable	Either
Conciliation (Non-Binding)	Perhaps [3]	Informal	Maybe [14]	Very	Yes	Can be	Variable	Either
Mediation (Binding /Non Binding)	Yes [4a]	Informal	Sometimes	Very	Yes	Quick	Variable [32]	Either
DRevB / DArbB / DAdjB	Yes [4b]	Informal	Sometimes	Very	Yes	Quick + Prevention	Relative	Either
Courts (Domestic / Supra National)	No	Formal	Yes [15]	No	No	Slow	High	Legal
Tribunals / Disciplinary Boards	No	Semi-formal	Yes	No	No	Reasonable	Variable	Either
Ombudsmen / Regulators	No	Not applicable	Possibly	No	No	Variable	None	None
Adjudication Statutory HGCRA	Yes [5]	Informal [10]	Yes [16]	Very [21]	Yes [25]	28 days [28]	Low [33]	Either [37]
Adjudication Voluntary FIDIC	Yes [6]	Informal [11]	Yes [17]	Very [22]	Yes [26]	28 days upwards [29]	Low [34]	Either [38]
Expert Determination	Yes/No [7]	Not applicable	Yes [18]	Yes [23]	Yes	Yes [30]	Low [35]	None [39]
Arbitration (Private not State)	Yes [8]	Variable [12]	Yes [19]	Yes [24]	Yes [27]	Reasonably quick [31]	Variable [36]	Either [40]
Judicial Review	No	Formal	Yes [20]	No	No	Yes	Reasonable	Legal

Notes

1 But lawyers take the lead, seeking client's instructions as needed, hands off process by mail/phone usual.

2 Usually a pre-set format with a fixed / pre-determined Conciliator or Board.

3 Perhaps, usually pre-set, as in 2 above

4 Format in contract – both for appointment and degree of autonomy in process. (a) Court Appointed in USA. (b) compulsory in some US States & World Bank

5 For one party to appointment. Joint autonomy only for process subject to minimum statutory requirements

6 For appointment – agreed by parties in the contract. Joint autonomy only, for process : Institutional Role.

7 Yes for appointment, No for process. Independence variable eg ICE employer appoints

8 For appointment – format in contract unless ad hoc. Joint autonomy only, for process : NB Role of Institutions.

9 Depends on conciliator – likely to be informal

10 Hearing rare – 95% paper only – adjudicator decides what is needed.

11 Hearing rare – as in 10 above

12 Joint party autonomy over the process. Parties can choose – but invariably less formal than the courts.

13 No control over outcome

14 Not enforceable. Can be very coercive especially if outcome made public

15 No control over outcome, but beware bankruptcy.

16 Only temporarily binding. Immediate payment required. Challenge by Judicial Review. No control over outcome.

17 As in 16 above

18 Judicial Review Quashing, enforcement, prohibition. Appeal or challenge possible.

19 Binding award, but subject to both judicial review and to appeal or resistance during enforcement proceedings. Internationally enforceable. No control over outcome

20 But a review of process not merits –may send case back for reconsideration – not an automatic win.

21 Adjudicator chooses process and acts inquisitorially

22 Adjudicator chooses process and acts inquisitorially

23 For expert who is in charge of process – parties have no control – depends on nature of inquiry.

24 May be agreed in contract : subsequently joint autonomy only, over the process

25 Subject to later arbitration/court action for enforceability plus Judicial Review

26 Subject to later arbitration/court action for enforceability plus Judicial Review

27 But privacy may be jeopardised by enforcement proceedings or by appeal

28 Statutory Process with 7 day submission time and right to 14 day extension

29 As above – subject to terms of contract – likely to be quick – but FIDIC International 6 months.

30 Time scale set in contract

31 Fast track arbitration is normally pre-set to very short time schedules

32 Not always cheap, some are free / fixed price – commercial mediation best for larger disputes.

33 Normally restricted to scope of reference so there may be many adjudications related to a project : Rates range from £125 - £250 per hour.

34 Normally restricted to scope of reference so there may be many adjudications related to a project

35 Professional rates

36 Considerable party autonomy as to choice of procedure. Can be dearer than the courts if the parties require long hearings etc

37 Professional non legal representation common – mostly paperwork only

38 Professional non legal representation common – mostly paperwork only

39 Paper only – but expert may make site visits and act inquisitorially to discover facts

40 Professional non legal representation common

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DISPUTE PREVENTION AND RESOLUTION

There are three distinct and separate stages or elements to this topic:

1 Dispute Prevention.
2 Negotiated Settlement / Resolution
3 Third Party Determination / Resolution

1 Dispute Prevention. WIN/WIN

"Prevention is Better than Cure"

Disputes are disruptive, wasteful and expensive. The primary aim of all constructors should be to prevent disputes arising or to bring about closure rapidly before minor problem matures into a full blown dispute. There are a number of processes designed to achieve this :-

- **Self help**
- **Give up and concede defeat – not worth the hassle.**
- **Unassisted Negotiation**
- **Expert Determination** – contract administration – problem is the administrator is often the cause of disputes – lack of independence may be a problem.
- **Partnering –** post Latham
- **Contracted Mediation** – Resolex
- **Dispute Resolution Boards** – first stage is identification / prevention
- **Deterrents** – rapid justice prevents frivolous disputes – Adjudication may fulfil this role.

2 Negotiated Settlement / Resolution. WIN/WIN

"Jaw Jaw is Better than War War"

Where the parties have developed fixed views about their respective positions face to face negotiations may cease to be effective. An independent third party negotiation facilitator can help negate personal issues and bring about a return to objectivity, thereby guiding the parties to a realistic settlement of the dispute. Timely and relatively inexpensive, it helps maintain relationships, which is valuable if the parties need to continue to co-operate now and/or in the future.

3 Third Party Determination / Resolution. WIN/LOSE

"Justice Delayed is Justice Denied."

When the talking ends, the only way to end a dispute is to refer it to a third party determinator who will decide the outcome. This is a judicial role, played by adjudicators, arbitrators and judges. The primary questions here are about how quickly and inexpensively a dispute can be resolved, with the minimum of disruption to on-going projects where applicable.

- **Binding Conciliation** – rare in construction industry.
- **Adjudication** – 2 types Statutory and Voluntary. Informal, relatively quick and inexpensive – but only temporary finality.
- **Arbitration** – cost & speed depend on party autonomy.

A BRIEF OVERVIEW OF THE PROCESSES

- **Dispute Resolution Boards** – 4 types – Advisory recommendation, with or without subsequent admissibility : Mediation Board : Adjudication Board : Arbitration Board.
- **Litigation** – The courts are deemed to be formal, slow and expensive – though post CPR 1998 the courts are more efficient than previously and the case management revolution can eliminate frivolous claims and defences. ADR provides no alternatives to the Courts for Criminal Prosecutions – Breaches of Health and Safety and recourse to Tribunals is necessary for Planning and Environment issues.

Guardians of the Process

The Courts also act as the judicial inspectors of inferior judicial decision makers, providing Judicial Review and Appeals. Both Judicial Review and Appeal are difficult if no reasons are provided.

- **Judicial Review** – the courts review the process to ensure that the requirements of natural justice and due process have been complied with. They ensure the decision maker had jurisdiction, was not biased, considered all the facts and issues and afforded the parties an opportunity to present their case, hear the case against them and effectively challenge the other side.
- **Appeal** – available only in respect of questions of law – not facts which will be finally determined by the original decision maker.
- **Enforcement** – and other support to the private determination processes – such as subpoena of witnesses. Judicial Review of adjudication is often raised at this stage by the defence. Arbitration awards are enforceable world wide under the New York Convention on the Enforcement of Arbitral Awards providing an effective mechanism to chase the money.

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