MANDATORY CONSENT ISSUES UNDER INTERNATIONAL ARBITRATION: THE CASE OF SPORTS AND CONSUMER ARBITRATION

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ABSTRACT

Arbitration has a long and honoured tradition in the resolution of commercial disputes to a great extent because of the stark differences from the rules and procedures by which judges resolve legal disputes under law in the traditional courts. The primary reason to its increasing popularity is its adjustability to the interests to the contracting parties. However, it has become controversial in its application to certain specific arena such as sports and consumer disputes when the arbitration clause and the rules of the process are imposed by more powerful bodies on individuals entering into the contract, and often without their voluntary or explicit consent. The impediment is further aggravated by the Courts upholding the validity of compulsory arbitration agreements.

In this light, the paper seeks to analyze the approach of courts both in civil and common law countries to the mandatory consent clause in pre dispute arbitration agreements from a comparative perspective. Through this research paper, the cardinal role of judiciary in determining the validity of compulsory arbitration agreement has been explored. Finally, the paper suggests recommendations and remedial measures to bring about transparency and fair administration of justice in the existing system. This research paper has used secondary research methodology. Analysis is made by interpreting books, laws, journals, articles, websites etc. The sanctity of arbitration as an independent and impartial method of dispute resolution must be protected by implementing necessary measures.

The foundation of arbitration process lies in complete party autonomy where both the parties voluntarily in an independent and unbiased manner, agree to resolve their disputes outside the traditional court mechanism by approaching an independently appointed tribunal that is

presided by an arbitrator or several arbitrators. However, the choice and freedom of parties is not always absolute, as in theory. The foundation of any contract is based on the mutual agreement and free choice on the part of the parties that should remain unhampered by any government interference or by any external force. In the 20th century, scholars such as Russell and Redfern unequivocally held the element of consent to be indispensible for the validity of an arbitration agreement. However, the 'Hybrid Theory' that was formulated later laid emphasis on the supremacy of the arbitration agreements and the relevance of the interest of the state. [1]This approach has been followed by various national courts in a majority of decisions favouring the existence of a valid arbitration agreement even in the presence of evidence to the contrary thus validating the mandatory arbitration clauses.

At the outset, the title of this article appears to be contradictory since it is an established principle of law that all parties to a dispute must consent to waive their rights to a judicial determination in order to opt for an ADR mechanism. However, the concept of arbitration, over a period of time, has undergone considerable changes, thereby resulting in mandatory arbitration clauses in several contracts. While it is acceptable in case parties to the contract are at an equal bargaining power, it becomes particularly problematic in case of certain contracts because one party to the contract may be at a disadvantage owing to several factors. Over the years, this matter has gained considerable light and disputes have arisen regarding the concept of 'consent' in arbitration.

MANDATORY CONSENT CLAUSE IN SPORTS ARBITRATION

With the significant increase in the amount of funding that has been invested in sports in the recent years, there has been a natural increase in the legal disputes that arise out of organizing, auctioning, funding and even out of participation in sport events. Given that majority of these conflicts are not restricted to a territory, imposing a specific civil law or a common law on them becomes difficult and impractical as problems relating to enforceability of those decisions shall then arise. It is in the light of the same that sports arbitration has gained significance over the years as a flexible, neutral, economical and a speedy process that has been resorted to for resolution of conflicts arising between the sports organization and the athletes participating in the event. However the matter in controversy is whether the athletes have complete freedom in

[1] Girish Deepak et al., Compulsary consent in Sports Arbitration: Essential or Auxiliary (April 12, 2016) http://arbitrationblog.kluwerarbitration.com/2016/04/12/compulsory-consent-in-sports-arbitration-essential-or-auxiliary/

selecting the mode of dispute resolution or is their consent to arbitration proceedings mandatory?

The contracts entered between sports governing bodies and athletes generally encompass an arbitration clause that places the athletes in a dilemmatic situation of either accepting the arbitration or refrain from participating in the relevant sport. The roadblock in sports arbitration is premised on the unilateral nature of consent which puts serious strain on the much celebrated party autonomy doctrine. The organizations generally choose the Court of Arbitration for Sports (CAS) as the forum for resolution of disputes due to the Court's expertise in dealing with such matters and the same is imposed on the athletes who have no choice but to accept the forum for conflict resolution.[2]The question this paper attempts to answer is whether the substantial validity of sports contracts should be upheld to the extent of making consent of one party a foregone conclusion and whether the arbitration proceedings are held on the basis of a forced or mandatory agreement between the parties.

CIVIL LAW COUTNRIES APPROACH IN SPORTS ARBITRATION DISPUTES

The approach of countries regarding the indispensability of consent in sports arbitration can be better understood by differentiating in the stance taken by civil law and common law countries in the arbitration matter. The civil law countries characterized by a codified system of its core principles as a primary source of law has developed a rather liberal but firm approach towards the validity of sports contracts that reflect mandatory consent.

The notion of mandatory consent in arbitration matters has found its basis in Article 6 of the European Convention of Human Rights (ECHR) that allows for restrictions' on access to courts only under in limited case in the pursuance of a legitimate aim that stands in a reasonable relationship of proportionality with the means employed.[3] The European Court in the landmark case of *Waite and Kennedy v. Germany*[4] in further deliberation held that the pre-requisite condition to qualify as a restriction is that this must be done in pursuance of a legitimate aim. The pertinent question to be considered herein is whether enforcing arbitration as a process of dispute settlement through mandatory consent is in pursuance of a legitimate aim. While on one hand, speedy resolution of disputes may stand as a legitimate justification, the position of

[2]*Supra* at 1.
[3]EUROPEAN CONVENTION OF HUMAN RIGHTS. Art.6.
[4] *Waite and Kennedy v. Germany*,30 EHRR 261 (2000).

power and influence held by the sport organizations in imposing arbitration upon the athletes that may render such a contract illegitimate and invalid.[5]

In the year 2007, The Switzerland Federal Supreme Court explicitly acknowledged the reality of sports contracts in the Canas decision that decided upon the validity of waiver of the athlete's right of access to justice. The bone of contention in the Canas decision was whether a professional tennis player who has entered into a contract of waiver with the Association of Tennis Professionals (ATP) that was mandatory for participating in the ATP World Tour has to waive (i) his or her right to bring an action on the merits before state courts in favour of CAS jurisdiction; and (ii) her or his right to bring setting aside proceedings against the arbitral award rendered by the CAS.[6] The dispute arose regarding the second issue of setting aside the arbitral award. The Supreme Court in this matter upholding the validity of the arbitration held that the athletes' right to challenge the CAS award in setting aside the proceedings would be unaffected irrespective of any waiver.[7]

Other countries having a codified system of laws have also held similar views. The Tribunal de Grande Paris recognized the right of a person to access the state courts as a matter of public policy which cannot be deprived by issued regulations of the sport governing bodies thus protecting every party's right to have access to justice.[8] Another Landmark decision in this direction was rendered by the German Supreme Court in the Pechstein case.[9]

THE DECISION IN PECHSTEIN CASE

The German Supreme Court in this matter observed that the even in the traditional court system, the vertically integrated nature of any professional sport gives the athletes no choice but to accept the rules contained in the regulations issued by the sports goveming bodies and the same would be applicable to arbitral agreements.[10] Furthermore, the Court declared that the issue of

[5] *Supra* at 1.
[6] Antonio Rigozzi & Fabrice Robert-Tissot, *Consent in Sports Arbitration: Its Multiple Aspect,* in SPORTS ARBITRATION AS A COACH FOR OTHER PLAYERS, 59-94, (ASA Special Series, 2015).
[7] X [Guillermo Canas] v. ATP Tour [TAS], ATF 133 III , 235,244 (2007).
[8] *Supra* at 5.
[9] ATP Tour, ATF 133 III , 235,244 (2007).

[10]Pechstein v. International Skating Union, McArdle D (2013) CAS 2009/A/1912.

validity of the arbitration agreement is to be treated in a different way to that of the waiver of the rights to bring setting aside the arbitral proceedings.[11]

The court held that a clause requiring players charged with anti-doping rule violations to submit to the jurisdiction of the CAS and exclude the jurisdiction of the national courts was considered consensual and lawful despite the fact that the consent of the athlete may or may not be voluntary. [12] The Court then laid down reasons to uphold the validity of Sports arbitration.

The primary reason was the suitability of CAS arbitration that ensures that sports specific disputes are decided in a single forum on a level playing field without being affected by national laws' idiosyncrasies. [13]In the pursuance of this, the compulsory nature of consent to a great extent was considered acceptable. However, the courts kept in mind that balance had to be maintained between practising a prompt system for settlement of sport disputes and waiving the right of professional athletes to challenge the arbitral awards before the highest court of the country. The secondary reason mentioned confirmed the decision laid down in the Canas case[14] which stated that the validity of arbitration agreements can be upheld simultaneously while ensuring that the action to set aside the award is always available.[15] The court moved on to state that the arbitration agreement does not contain a waiver of stricto sensu and hence, the two questions of validity and setting aside of the proceedings could be dealt with independently.[16]

GENERAL APPROACH OF COMMON LAW COUNTRIES

The common law countries that refer to judgments and precedents as a primary source of law, have adopted a slightly different approach regarding the mandatory consent of Sport Arbitration matters. In statutory regimes followed in common law countries, mutual consent has been adopted a core principle on which any contract is founded upon. The Arbitration Act 1996, which regulates all arbitrations that have their seat in England and Wales or Northern

[11] ATP Tour, ATF 133 III , 235,245 (2007).
[12] Nick De Marco et al., Compelled consent: Pechstein & the Dichotomy and future of Sports Arbitration https://www.sportslawbulletin.org/compelled-consent-pechstein-dichotomy-and-future-sports-arbitration/
[13] Laurent Lévy & Fabrice Robert-Tissot, L'interprétation arbitrale, RE v. ARB. 861, 946 (2013).
[14] Id at 7.

[15] Id at 10.
[16] Supra at 6.

Ireland, provides emphasize on party autonomy while determining the nature of the contract.[17] Although not much has been deliberated in the UK and England regarding Sports contracts, their approach can be understood by looking at the emphasis laid on consent in case of Employment contracts. The Employment Rights Act 1996 that has been implemented in England, Wales and Scotland prevents parties to an employment agreement from excluding the provisions of the Act and precluding a person from bringing proceedings under the Act before an employment tribunal.[18] Although the US and UK Courts have frequently upheld mandatory arbitration agreements, recent discussions have favoured the idea of working on the suitability of arbitration to the resolution of employment disputes.[19] In the light of the same, the Equality and Human Rights Commission and other such commissions have now been acting as a redressal forum for parties who have suffered damages due to the mandatory consent clause of arbitral agreements. These commissions are empowered to represent the aggrieved parties in domestic courts in matters of infringement of fundamental rights.[20] It can thus be inferred that the fundamental rights of the parties are given due consideration while upholding the validity of arbitration agreements.

MANDATORY CONSENT CLAUSE IN CONSUMER ARBITRATION

The concept of mandatory arbitration clause that has been prevalent for a considerable period of time is gaining momentum in the recent years. This particularly has become a matter of concern because the consumers are always at a disadvantage as compared to the business organisations, especially in terms of their monetary power and availability of resources. It is pertinent to note that there is a striking difference between the approaches adopted by common law and civil law countries towards resolution of this dispute. On one hand, countries observing the EU arbitration regime agree that "there is one requirement that is universal: only parties that have actually agreed to arbitrate their disputes can be compelled to arbitration proceedings".[21] Whereas despite having acknowledged the role of 'consent' in arbitration, the US courts have moved away from the

[17] ARBITRATION ACT 1996, §1(b).
[18] Clyde & Co LLP v. Bates van Winkelhof [2011] EWHC 668 (QB).
[19] P Goulding & P Frost, Arbitration of employment disputes in ELA Briefing (May 2014) pp.13-15 http://www.blackstonechambers.com/news/publications/arbitration.html
[20] *Supra* at 12.
[21] Gabrielle Nater-Bass, *Class Arbitration: A New Challenge?,* New Developments in International Commercial Arbitration, 734-736(2008).

traditional definition of waiver and have redefined 'consent' as any evidence of assent to arbitration; irrespective of whether the pre-dispute arbitration provision was negotiated and irrespective of whether the particular provision is prohibited by state law.

EUROPEAN SCENARIO

Nations following the EU laws so far have refused to make attempts to make arbitration compulsory. Most countries have adopted domestic rules to ensure that contracting parties are not forced into a proceeding that is beyond the scope of their pre-dispute arbitration agreement. Parties with little bargaining power such as consumers are generally exempt from arbitrating their disputes with businesses. Domestic arbitration in countries of Europe is generally governed by the national laws of the respective countries. However, while each country's law is a different from another, certain broad themes emerge from the various national approaches.

When it comes to adjudicating on consumer claims, European statutory schemes are more intrusive in defining what is arbitrable and what is not arbitrable as compared to their US counterparts. The European Union Council Directive 93/13 on Unfair Terms in Consumer Contracts creates a rebuttable presumption that pre-dispute arbitration clauses in consumer contracts are invalid, primary reason being the unequal bargaining power between the contracting parties in consumer contracts. Compliance with the Directive is mandatory, thereby empowering the consumer to challenge an allegedly unfair arbitration provision at any time.[22]Thus, arbitrators and the reviewing courts in Europe have been entrusted with the duty to address possible unfairness of provisions, in cases of consumer disputes where the parties have disproportionate bargaining power or the availability of resources.[23]

Some EU member states go even further than the Directive in protecting consumers. For example, in the UK, arbitration clauses are presumed unfair if the amount at issue is less than £5000[24].France prohibits consumer arbitrations all together in purely domestic disputes.[25] In Sweden, arbitration clauses are prohibited generally in contracts concerning the sale of goods or services for private use.[26]Germany won't enforce a consumer arbitration clause unless it is

[22] *Mostaza Claro v. Movil*, ECJ, C-168/05, 26 Oct 2006.
[23]*Id.*
[24] Amy H. Schmitz, *American Exceptionalism in Consumer Arbitration,* 10 Chicago L. Rev. 81, 98 (2013).
[25] *Id.* at 95, 96.
[26] *Id.* at § 3.2.2.2.

in a separate, signed document or part of a fully notarized contract.[27]It is notable in this context that such protections are afforded to parties only in case of domestic arbitrations. In case of international arbitrations, owing to the New York Convention, arbitration procedures are more akin to the US. However, countries such as France and Switzerland have gone to the extent of enacting separate statutory schemes to govern each kind of proceeding.[28] For example, business/consumer arbitrations are not allowed domestically in France whereas they have been permitted in the international context.[29]

THE UNITED STATES' APPROACH

The concept of mandatory arbitration clauses in consumer contracts has been the subject of articles, litigation, and legislation for over two decades. With the exception of the Supreme Court, which routinely upholds the validity of consumer arbitration pursuant to the Federal Arbitration Act, most others disagree about when and if such clauses are valid and enforceable, and whether consumer arbitration is fair, efficient, or inexpensive[30].

The concept of mandatory arbitration in the United States began when federal courts started refusing enforcement of pre-dispute arbitration agreements. Courts routinely struck down such agreements on the ground that they invaded the judiciary's constitutional prerogatives. Congress passed the Federal Arbitration Act to overcome this judicial hostility and thereby facilitate business transactions[31]. The national policy in favor of arbitrating business disputes was settled with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). This Convention obligates the signatories to enforce arbitration awards under most circumstances, although it does contain certain exceptions permitting nations to refuse enforcement based on non-arbitrability of the subject matter, or when enforcement would be contrary to the public policy of the enforcing country.

[27] *Id.* at 97.
[28] Theodore Theofrastous, *International Commercial Arbitration in Europe: Subsidiary and Supremacy in Light of the De-Localization Debate*, 31 Case W. Res. J. Int'l Law, 455, 479 & 481 (1999).
[29] *Supra* note 4, at 96; Jeremy Fluxman, *Could Consumer Contracts Contain Arbitration Clauses?*, Association of Corporate Counsel (March 5, 2014).
[30] Richard M. Alderman, *What's Really Wrong with Forced Consumer Arbitratio*n?, Business Law Today, 1,2, (2010) .
[31] The Federal Arbitration Act, 9 U.S.C. §1 (1947).

One of the significant milestones in the journey towards mandatory arbitration has been the judiciary's expansive interpretation of the scope of particular arbitration provisions. Most notable example in this context that the U.S judiciary's persistent denial of the well-established principle that ambiguous contractual provisions are construed against the drafter. This rule of construction should be of utmost relevance when addressing arbitration provisions inserted into consumer documents. However, the courts consistently have held that the strong national policy in favor of arbitration overrides this principle of state contract law[32].

The basic dispute with pre-dispute arbitration agreements lies in the fact that the two parties in a consumer parties are not on an equal footing, in terms of their monetary power as well as the availability of resources and in such cases using arbitration to effectively vindicate consumers' rights is more challenging. To be effective, arbitration needs to be both cost-effective and accessible. Moreover, to be an effective deterrent, the results of arbitration would need to be transparent. Yet they are typically confidential thereby making it difficult for affected consumers to recognize common problems that a company may have already resolved for other customers. While the lack of transparency makes it difficult to pinpoint outcomes, there is some evidence that consumers are also less likely to win in arbitration than in class actions.

Mandatory arbitration clauses, which are increasingly upheld by the federal courts, have in many cases tipped the scales of justice away from consumers and workers by making it more difficult for them to successfully challenge wrongdoing. Taking matters to court often results not only in better outcomes for victims, but in deterring future bad behavior. By limiting the use of these clauses in contracts, regulators and policymakers can reverse a trend of restricting legal remedies and thereby encourage accountability in the marketplace through the realignment of incentives.

CONCLUSION

Alternative dispute resolution has evolved as an effective method of resolving disputes over the years. However, the role of the civil justice system as the primary mode of conflict resolution cannot be denied. Although arbitration can provide some benefits over litigation in

[32] *McKee v. Home Buyers Warranty Corp*. 45 F3d 981, 984-85 (5th Cir. 1995).

a variety of commercial contexts, the inclusion of mandatory consent clause has caused significant obstructions to the interest of the parties .The issue is further aggravated by the nature of the arbitral tribunals and the method of appointment adopted for its panel of arbitrators, which seems to be heavily biased in favour of the stronger parties such as sport governing bodies and the corporate giants, at least from the perspective of athletes and consumers who constitute the weaker party.

The proposed solution to overcome the obstructions is twofold: Firstly, parties that wish to enter into post-dispute arbitration agreements should be encouraged to do so, but compelling them to agree to a pre dispute resolution mechanism infringes their fundamental right of choice. Furthermore, reforms need to be brought to the existing arbitration system by changing the method of appointment of arbitrators so as to ensure higher degree of transparency and fair administration of justice.