

THE OLYMPIC LEGAL LEGACY

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I INTRODUCTION

The Sydney 2000 Olympic Games left Australia with a legacy that extends beyond the sporting, cultural and artistic boundaries that are commonly assumed to arise as a result of a nation hosting the Olympic Games. The Games saw a greater number of disputes over selection to national teams than had occurred for any previous sporting event.¹ The resolution of these disputes between competitors and their associations is conducted according to a set of distinct legal rules, dictated by the International Olympic Committee, which may not bear any relationship to domestic legislation. Given the traditional hostility of the courts to the infringement of their sovereignty,² the expectation of immunity for international federations from interference by domestic courts has the potential to cause great tension.³ This tension is best illustrated by a situation where domestic competitors seek to challenge their non-selection for Olympic teams

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¹ See, eg, Louise Evans, 'Gang of Six Appealing Games Selection', *Sydney Morning Herald* (Sydney, Australia), 22 August 2000, 32; Allison Jackson, 'Court Throws out Judo Appeal' *Sydney Morning Herald* (Sydney, Australia), 24 August 2000, 6.

² See, eg, *Natoli v Walker* (Unreported, Supreme Court of New South Wales, Court of Appeal, Kirby P, Mahony and Meagher JJA, 26 May 1994).

³ See, eg, Russell Weintraub, *International Litigation and Arbitration* (2nd ed, 1997) 516: 'A State must strike the proper balance between granting arbitration proceedings independence and autonomy and policing against gross abuses of the arbitration process.' For a discussion of choice of law and choice of forum clauses in Australian law, see generally Martin Davies, Sam Ricketson and Geoffrey Lindell, *Conflict of Laws: Cases and Materials* (1997) 474–86.

and yet are denied recourse to their domestic courts to have their disputes decided.

In August 2000, the New South Wales Court of Appeal handed down the first Australian judgment in relation to an appeal from the Court of Arbitration for Sport ('CAS').⁴ The threshold issue in the appeal was whether or not the Supreme Court had jurisdiction under the *Commercial Arbitration Act 1984* (NSW) ('the Act') to entertain the appeal. The answer to this hinged on the application of s 38 of the Act, which sets out the circumstances in which leave to appeal from an arbitral award may be granted, and s 40 of the Act, which sets out the circumstances in which the court's jurisdiction may be excluded.⁵

II BACKGROUND TO THE DISPUTE

The case centred on a dispute between two 'judokas' (judo competitors) — Angela Raguz and Rebecca Sullivan — both vying for the position of Australian representative at the Olympic Games in the women's under 52kg judo category.

In May 2000 the Judo Federation of Australia ('JFA') nominated Raguz for selection as a member of the Australian Olympic Team in the women's under 52kg judo category. Raguz signed various documents, the key document being a 'Selection Agreement', which formed a binding agreement to submit any nomination disputes exclusively to arbitration, including appellate arbitration before the CAS in accordance with the *Code of Sports-Related Arbitration* ('Code').

Sullivan, one of the other potential nominees for the team, alleged that the nomination criteria had not been properly followed and/or implemented and that, as she ranked higher than Raguz, she should have been the nominated athlete. Sullivan had also signed the same documentation as Raguz. Sullivan challenged Raguz's nomination by appealing to the JFA's Appeal Tribunal⁶ on 24 June 2000. The Tribunal found in favour of Raguz on 12 July 2000. Sullivan then appealed this decision to the CAS.

Sullivan lodged her application for appeal at the Oceania Registry in Sydney, on 19 July 2000. A panel was appointed and a preliminary conference held, also in Sydney. An Order of Procedure, made pursuant to this conference, stated that the seat of arbitration was Switzerland and that the substantive law of the dispute was the law of New South Wales.

⁴ *Raguz v Sullivan* [2000] NSWCA 240 (Unreported, Spigelman CJ, Mason P, Priestley JA, 1 September 2000) <<http://www.austlii.edu.au/au/cases/nsw/NSWCA/2000/240.html>> at 31 May 2001 (copy on file with author). The CAS is a judicial body established under Swiss law in 1984 governed by the *Code of Sports-Related Arbitration*.

⁵ Note that parallel provisions exist in all Australian jurisdictions: see *Commercial Arbitration Act 1986* (SA) ss 38, 40; *Commercial Arbitration Act 1985* (WA) ss 38, 40; *Commercial Arbitration Act 1990* (Qld) ss 38, 40; *Commercial Arbitration Act 1984* (Vic) ss 38, 40; *Commercial Arbitration Act 1986* (Tas) ss 38, 40; *Commercial Arbitration Act 1985* (NT) ss 38, 40; *Commercial Arbitration Act 1986* (ACT) ss 38, 40.

⁶ The tribunal was set up by the JFA to deal with selection disputes and was explicitly acknowledged as the first point of appeal in the Selection Agreements.

The CAS upheld Sullivan's appeal, finding that the nomination criteria had not been properly followed and/or implemented. Accordingly, the JFA was ordered to nominate her to the Australian Olympic Committee instead of Raguz. Raguz then sought leave to appeal the CAS award to the Supreme Court of New South Wales.

III THE LEGISLATIVE SCHEME

Section 38 of the *Act* confers jurisdiction on the Supreme Court to entertain an appeal on a question of law arising out of an award if all the parties to the arbitration agreement consent, or, if the Supreme Court grants leave. The relevant paragraphs of s 38 provide:

- (2) Subject to subsection (4), an appeal shall lie to the Supreme Court on any question of law arising out of an award ...
- (4) An appeal under subsection (2) may be brought by any of the parties to an arbitration agreement:
 - (a) with the consent of all the other parties to the arbitration agreement; or
 - (b) subject to section 40, with the leave of the Supreme Court.
- (5) The Supreme Court shall not grant leave under subsection (4)(b) unless it considers that:
 - (a) having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more parties to the arbitration agreement; and
 - (b) there is:
 - (i) a manifest error of law on the face of the award; or
 - (ii) strong evidence that the arbitrator or umpire made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of commercial law.

Raguz asserted that, under s 38(4)(b) of the *Act*, she was a party to the arbitration agreement pursuant to which the award was made. Without such an assertion, Raguz had no standing to invoke the Court's jurisdiction, as the power to grant leave under s 38(4)(b) is expressly subject to s 40 of the *Act*. Section 40 states:

- (1) Subject to this section and section 41:
 - (a) the Supreme Court shall not, under s 38(4)(b) grant leave to appeal with respect to a question of law arising out of an award; and
 - (b) no application may be made under s 39(1)(a) with respect to a question of law

if there is in force an agreement in writing (in this section and section 41 referred to as an exclusion agreement) between the parties to the arbitration agreement which excludes the right of appeal under s 38(2) in relation to the award or, in a case falling within paragraph (b), in relation to an award to which the determination of the question of law is material.

Section 40 further stipulates that the exclusion agreement need not be entered into at the same time as the arbitration agreement. However, different conditions

apply depending on whether or not the agreement is a ‘domestic arbitration agreement’. Section 40(6) provides that:

An exclusion agreement shall be of no effect in relation to an award made on, or a question of law arising in the course of, an arbitration under an arbitration agreement which is a domestic arbitration agreement unless the exclusion agreement is entered into after the commencement of the arbitration in which the award is made or, as the case requires, in which the question of law arises.

Section 40(7) then defines a ‘domestic arbitration agreement’ as follows:

In this section, domestic arbitration agreement means an arbitration agreement which does not provide, expressly or by implication, for arbitration in a country other than Australia and to which neither:

- (a) an individual who is a national of, or habitually resident in, any country other than Australia; nor
- (b) a body corporate which is incorporated in, or whose central management and control is exercised in, any country other than Australia, is a party at the time the arbitration agreement is entered into.

In other words, if there is a ‘domestic arbitration agreement’, an exclusion clause will be ineffective unless it was entered into after the arbitration started. However, this is not the case for an agreement which is not a ‘domestic arbitration agreement’.

IV THE ISSUES

Raguz challenged the CAS award in the Supreme Court by seeking leave to appeal on a question of law arising out of the award, under s 38 of the *Act*.⁷ Raguz named Sullivan, the JFA Appeal Tribunal and the CAS as defendants. The proceedings were removed to the Court of Appeal.

Sullivan and the CAS objected to the appeal on the ground that any jurisdiction of the Supreme Court was precluded by an ‘exclusion agreement’ taking effect pursuant to s 40, and that the agreement was not a ‘domestic arbitration agreement’. Raguz argued that there was no such ‘exclusion agreement’.

V THE DECISION

The Court of Appeal held that the Selection Agreements, signed by both Raguz and Sullivan, contained an ‘exclusion agreement’ as defined by s 40 of the *Act* and that the Supreme Court therefore did not have jurisdiction to grant leave to appeal under s 38(4) of the *Act*. The Court further held that the exclusion agreement did not relate to a ‘domestic arbitration agreement’ because the agreed juridical ‘seat’ or place of arbitration was Switzerland.

⁷ For a discussion of s 38(5), the meaning of ‘error of law’ and the *Commercial Arbitration Act 1990* (Qld), see *Independent State of Papua New Guinea v Sandline International Inc* (Unreported, Supreme Court of Queensland, Ambrose J, 30 March 1999).

A *Interpretation of Sections 38 and 40*1 *Legislative Scheme*

In examining the application of ss 38 and 40, Spigelman CJ and Mason P (Priestley JA concurring) considered the legislative scheme in which these sections operate. The plaintiffs argued that there was a longstanding tradition of common law distrust of and opposition to arbitration, and that the Court should accordingly adopt a stringent approach to its interpretation of the *Act*:

In his very able submissions, counsel for the plaintiff urged the Court to take a stringent approach to the interpretation of s 40 and the documents said by the opposing defendants to constitute an exclusion agreement. We were reminded of the common law's hostility to private arbitration agreements that purport to exclude the jurisdiction of the courts.⁸

Spigelman CJ and Mason P acknowledged this tradition, but pointed out that despite this entrenched hostility 'the commercial community has continued to support arbitration', and that as a result 'legislatures and latterly judges have belatedly sat up and listened.'⁹ Their Honours concluded that

these considerations mean no more or less than that sections 38 and 40 of the Act should be construed fairly, according to the natural meaning of the words used. The power to entertain an appeal under section 38 (absent consent) is expressly subject to section 40, which is clear in its general intent if not in all of its detail.¹⁰

2 *Existence of an Arbitration Agreement*

In order to invoke s 40, two conditions need to be established:

- an arbitration agreement — defined in s 4(1) of the *Act* as 'an agreement in writing to refer to present or future disputes to arbitration'; and
- an exclusion agreement — defined in s 40(1) to be 'an agreement in writing between the parties to the arbitration agreement which excludes the right of appeal under section 38(2)'.¹¹

The defendants accepted that Raguz was a party to an arbitration agreement and was accordingly entitled to seek leave to appeal under s 38(4). The parties did not agree, however, on the precise identification of the arbitration agreement to which Raguz was a party.

The Court of Appeal held that an arbitration agreement need not be constituted by a single document. The law recognises that several interlocking documents may evidence or constitute a multipartite contract.¹² Spigelman CJ

⁸ *Raguz v Sullivan* [2000] NSWCA 240 (Unreported, Spigelman CJ, Mason P, Priestley JA, 1 September 2000) <<http://www.austlii.edu.au/au/cases/nsw/NSWCA/2000/240.html>> at 31 May 2001 (copy on file with author) [45].

⁹ *Ibid* [50].

¹⁰ *Ibid* [52].

¹¹ *Ibid* [56].

¹² *Ibid* [65], [69].

and Mason P found that there was a ‘framework of mutual promises’¹³ contained in clause 7 of the Selection Agreement, and those parts of the *Code* which embodied an agreement to arbitrate or stipulated its vital terms. Their Honours concluded that, by the various documents signed by them, the two athletes, the JFA and the Australian Olympic Committee severally committed themselves to the arbitral regime provided for in clause 7 of the Selection Agreement and the *Code*.¹⁴ That commitment preceded Sullivan’s invocation of the appellate jurisdiction of the CAS.

3 *Existence of an Exclusion Agreement*

The exclusion agreement was ‘in writing’ as required by s 40(4), because its terms could be found in ‘documents adopted and incorporated by the respective participants through the various instruments which they had individually signed.’¹⁵ The Court found that the parties to the arbitration agreement and the exclusion agreement were the same.¹⁶ Further, the exclusion agreement was manifest in the same documents as those which constituted the arbitration agreement.¹⁷

Spigelman CJ and Mason P then examined the particular wording of exclusion agreements. The Court rejected the proposition that an exclusion agreement need expressly refer to the right of appeal under s 38.¹⁸ They stated, however, that a mere agreement that an award shall be ‘final and binding’ is not an exclusion agreement.¹⁹ In this case, in addition to stating that the CAS decision by way of appeal would itself be ‘final and binding on the parties’, the agreement also stated that ‘neither party will institute or maintain proceedings in any court or tribunal other than the said court.’²⁰ These words demonstrated a clear intention to oust the Court’s appellate jurisdiction.

As previously stated, if the agreement is found to be a ‘domestic arbitration agreement’ and an exclusion agreement has been entered into before the commencement of the arbitration, s 40 states that the exclusion clause will have no effect. Section 40(7) defines ‘domestic arbitration agreement’. The definition expressly excludes an arbitration agreement which, expressly or impliedly, provides for arbitration ‘in a country other than Australia’. This is the case even if all the parties to the arbitration are Australian nationals. Therefore Sullivan and the other defendants had to show that the exclusion agreement did not relate to a ‘domestic arbitration agreement’ within the meaning of s 40(7) or, if it did, that the exclusion agreement was entered into after the commencement of the arbitration.

¹³ *Ibid* [66].

¹⁴ *Ibid* [66]–[77].

¹⁵ *Ibid* [84].

¹⁶ *Ibid* [79].

¹⁷ *Ibid* [79], [83].

¹⁸ *Ibid* [88].

¹⁹ *Ibid* [87].

²⁰ *Ibid* [87]–[89].

4 *Nature of the Agreement: Domestic v International*

The defendants argued, in opposing the court's jurisdiction, that the arbitration agreement was a non-domestic one because the 'seat' of the CAS and of its Arbitration panel was Lausanne, Switzerland. In contrast, Raguz argued that the reference to 'arbitration in a country other than Australia' referred to the stipulated place of hearing of the arbitration.²¹ In rejecting the plaintiff's submission, the Court explained that there is a vital distinction between the legal place (or seat) of arbitration and the physical place or places where the arbitral tribunal may hold hearings, consultations or other meetings.²²

The Court found that the unqualified choice of Lausanne as the seat of all CAS arbitrations was sufficient to render this arbitration agreement a 'foreign arbitration agreement', notwithstanding the fact that the parties, the dispute and even the agreement were all closely tied to Australia.²³

It is interesting to hypothesise what the Court's conclusion may have been if the parties' choice of the seat of arbitration had had no connection with the circumstances of the dispute. In these circumstances a court might be likely to maintain its traditional objection to the infringement of its sovereignty and characterise the arbitration agreement as domestic.

VI CONCLUSION

The New South Wales Court of Appeal held that in the circumstances the Supreme Court did not have jurisdiction and leave to appeal was denied.²⁴ The Court made some important comments on the interpretation of ss 38 and 40 of the *Act* which have implications for future disputes that may arise under the *Act*:

- In order to exclude the jurisdiction of the Court under s 40, a party must prove the existence of both an arbitration agreement and an exclusion agreement, as defined within the *Act*.²⁵
 - The agreement may be constituted by a multipartite contract, and need not be a single document.²⁶
 - A mere agreement that an award shall be 'final and binding' is not necessarily an exclusion agreement.²⁷
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- In determining whether or not an exclusion agreement is effective, it is necessary to consider first whether there is a 'domestic arbitration agreement' under s 40(7).²⁸

²¹ Ibid [91].

²² Ibid [93]–[105].

²³ Ibid [109]–[111], [122].

²⁴ Ibid [111].

²⁵ Ibid [56].

²⁶ Ibid [65], [69].

²⁷ Ibid [87].

- There is a distinction between the legal ‘seat’ of arbitration and the physical place in which an arbitration may be conducted or managed. The legal ‘seat’ of arbitration is the relevant location in determining whether an arbitration agreement is a ‘domestic arbitration agreement’.²⁹

The international and domestic laws applicable to disputes arising in international sporting events may not always be compatible. This case illustrates the tension that arises when international arbitral bodies, such as the CAS, attempt to make themselves immune from interference by domestic courts, which may themselves be vehemently opposed to any impediment to their sovereignty. The rules that govern disputes arising between competitors and their associations may be substantially different to the domestic rules applicable in the place where the sporting event is held. This is an important issue in an era when international sporting events such as the Olympic Games attract so much global attention and will undoubtedly be the source of a number of future disputes.

²⁸ *Ibid* [90].

²⁹ *Ibid* [93]–[109], [122].