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Articles

1 **Olympic-related Sports Dispute Resolution**
So Miyamoto

2 **Latest Developments in the Japanese Patent Practice**
Shinji Ishizu

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Olympic-related Sports Dispute Resolution

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1. Overview

This past summer, the Tokyo Olympic Games were finally held without spectators at the stadiums after a year-long postponement. News coverage of the games did not only focus on the impressive performances and highlights of the Olympic athletes, but also the disputes that arose in connection with their eligibility, the disciplinary measures levied against them, and the decisions made by referees during the games. As such, it bears discussing what kind of remedy was made available to those athletes who were dissatisfied with the penalties, sanctions or decisions imposed on them, including for example, being declared ineligible immediately before the games.

In actuality, 15 cases of Olympic-related disputes were accepted by the ad hoc division of the Court of Arbitration for Sport ("**CAS Ad Hoc Division**") in Tokyo.

This article will explain the unique procedural rules of the Court of Arbitration for Sport ("**CAS**"), specifically, those of the CAS Ad Hoc Division, to resolve the Olympic-related disputes at the Tokyo Olympic Games under special circumstances due to the widespread infection of Covid-19.[1]

2. General Information about CAS

CAS is an institution independent of any sports organization, and is headquartered in Lausanne, Switzerland. It provides services to facilitate the settlement of sports-related disputes through arbitration or mediation by means of procedural rules adapted to the specific needs of the sports world.

CAS has accepted several hundred cases every year between 2001 and 2020, and, in recent years, the number of cases has soared. In fact, the number of cases in 2020 was 957, the highest since its establishment.[2]

CAS appoints one or more arbitrators to arbitrate disputes arising among international athletes and sports organizations. A list of candidates for arbitrators, including lawyers and professors from around the world, is disclosed on its website.

During the course of an Olympic season, CAS establishes an ad hoc division in the host country to promptly resolve disputes arising immediately before and during the games. This division, known as the CAS Ad Hoc Division, has been established for both the Summer and Winter Olympic Games since the Atlanta Olympic Games in 1996. Recently, the CAS Ad Hoc

1. The Paralympic Games are governed separately by the International Paralympic Committee.
2. https://www.tas-cas.org/fileadmin/user_upload/CAS_statistics_2020.pdf.

Division has also been established for regional international competitions such as the Asian Games.

3. What is the CAS Ad Hoc Division?

The CAS Ad Hoc Division adjudicates cases pertaining to various Olympic-related disputes, including athlete eligibility, field of play decisions, doping violations, disciplinary measures levied against athletes, and other issues.

The CAS arbitrates challenges to field of play decisions only in exceptional cases, such as when a petitioner can demonstrate circumstances that a field of play decision was made arbitrarily or in bad faith.

As further described below, the CAS Ad Hoc Division applies speedy and flexible procedures to resolve disputes arising immediately before and during the Olympic Games in a timely manner. Its jurisdiction is limited to such disputes, and specifically, such disputes must meet the following conditions:

a. they must be covered by Rule 61 of the Olympic Charter; and
b. they must have arisen during the Olympic Games, or within ten days prior to the opening ceremony of the Olympic Games.[3]

Disputes between athletes, national Olympic committees and sports organizations can usually meet the first condition listed above. It is practically important, however, to meet the second condition to file for arbitration with the CAS Ad Hoc Division, otherwise, the dispute will be deemed out of its jurisdiction and subsequently dismissed or rejected.

4. Speedy Arbitration Process of the CAS Ad Hoc Division

Some disputes filed with the CAS Ad Hoc Division, for instance, eligibility disputes, should be resolved by the competition day the applicant was originally scheduled to attend, otherwise, the applicant will not have an effective remedy to protect his or her interest or right. To this end, a speedy arbitration process is crucial for the CAS Ad Hoc Division. For this reason, it applies special procedural rules that differ from the normal procedures of CAS.

The following are some unique characteristics of the procedures of the CAS Ad Hoc Division:

a. Appointment of arbitrators

In sports arbitration proceedings at the CAS, a panel usually consists of three arbitrators. In the absence of an agreement, first, both the applicant and the respondent have a right to nominate their respective arbitrators. Thereafter, the two arbitrators must select the president of the panel by mutual agreement within the time limit set by the CAS office.[4]

However, at the CAS Ad Hoc Division, its president both constitutes the panel composed of three arbitrators based on a special list, and appoints the president of the panel.[5] The parties do not have a right to nominate an arbitrator.

b. Language of arbitration

The arbitration must be conducted in English, French or Spanish, as determined by the president of the CAS Ad Hoc Division.[6] Spanish was added as an official language in July 2021.

3. Arbitration Rules applicable to the CAS Ad Hoc Division for the Olympic Games (the "**Arbitration Rules**"), art. 1.
4. Code of Sports-related Arbitration, rule 40.2.
5. Arbitration Rules, art. 11.
6. *Id.*, art. 6.

c. The opportunity to make claims and present evidence

Parties are summoned to a hearing on short notice. Due to the Covid-19 pandemic and the state of emergency declaration in Japan, the ordinary procedure was amended for the Tokyo Olympic Games. In particular, unless the panel decides otherwise in compliance with the sanitary measures then in force, the hearing must be held by video or telephone conference. In actuality, many hearings were held by the CAS Ad Hoc Division in a mixed format of video-conference and in-person attendance. There were several cases where the arbitrator attended the hearing by video or telephone conference.

In some cases, a party who was summoned on short notice may not be able to attend. Even in such cases, the arbitrators may nevertheless proceed.

At the hearing, the parties may be questioned, and, depending on the matter, witnesses may be examined. The panel decides on how exactly the hearing will proceed.

Furthermore, any defense of lack of jurisdiction must be raised, at the latest, by the start of the CAS Ad Hoc Division hearing.[7]

d. Decision rendered within 24 hours from the application (basic principle)

A decision must be rendered within 24 hours from the lodging of the application.[8] However, there are cases where the decision is not delivered within this timeframe. In some cases, it may take several days before a decision is given.

For matters that require a speedy resolution (e.g., an eligibility dispute that arises two or three days before the scheduled competition), a decision may be made within 24 hours, or, when such is impractical, an attempt at a speedy arbitration would be made.

e. Enforceability

The decision is enforceable immediately upon being communicated to the parties (by email or any other means). Arbitrators may decide to communicate the operative portion of the decision to the parties prior to the reasons therefor[9] since this arbitration process prioritizes promptness.

An appeal against the decision of the panel may be made to the Federal Supreme Court of Switzerland within 30 days from notice thereof.[10] However, since it may take several months for the Supreme Court to make a decision, and considering that the grounds for appeal are limited, the decisions of the CAS Ad Hoc Division have great significance—they are often considered to be final.[11]

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7. *Id.*, art. 15.
8. *Id.*, art. 18
9. *Id.*, art. 19.
10. *Id.*, art. 21.
11. Sun Yang, a world record holder in swimming, and a multiple gold medalist in consecutive Olympic Games, was subject to an eight-year ineligibility by the CAS in February 2020. He requested the arbitral award to be set aside on the ground of evidence of bias of the arbitrator. In December 2020, his petition was accepted and the award was consequently annulled by the Federal Supreme Court of Switzerland. In June 2021, he was subject to ineligibility for four years and three months by the second CAS panel (CAS 2019/A/6148 *World Anti-Doping Agency v. Mr. Sun Yang & Fédération Internationale de Natation (FINA)*). Although his sanction was lower than the first one, he was ineligible to attend the Tokyo Olympic Games as a result of the decision of the second CAS panel.

f. Costs

In general, in sports arbitration proceedings at the CAS, parties must pay for several costs, including the application fee.[12] On the contrary, the facilities and services of the CAS Ad Hoc Division are free of charge, except for the parties' own costs of legal representation, experts, witnesses and interpreters.[13] In particular, an applicant does not need to pay any application fee for arbitration before the said division.

5. Conclusion

The CAS Ad Hoc Division provides speedy dispute resolution customized for the Olympic Games, one that offers athletes and sports organizations an effective remedy for the settlement of their Olympic-related disputes. Since the Olympic Games are a once-in-a-lifetime event for many athletes, hopefully this article will enlighten both athletes and sports organizations alike on the unique procedures of the CAS Ad Hoc Division, and serve as a practical guide for the speedy and effective resolution of their disputes in future international or regional games.

12. Code of Sports-related Arbitration, rule 64.1.
13. Arbitration Rules, art. 22.

Back to List of Articles

Latest Developments in the Japanese Patent Practice

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A. Introduction

There have been some recent major developments in the Japanese patent practice, including those brought about by the amendments to the Patent Act of Japan[1] in 2021 (as amended, the "**Patent Act**"). The said legislative amendments have (and will have) a significant impact on the patent practice in Japan. Thus, parties and practitioners in the patent field are advised to bear these changes in mind.

This article will first describe the amendment to the Patent Act that introduced online oral proceedings for patent invalidation trials at the Japan Patent Office ("**JPO**"). Thereafter, the new third-party comments system in patent litigation before the Japanese courts will be discussed. Finally, this article will conclude with an explanation of the effects of the above amendments on foreign companies.

B. Amendments to the Patent Act in 2021

1. Online Oral Proceedings for Patent Invalidation Trials at the JPO

The amendment that introduced online oral proceedings for patent invalidation trials at the JPO took effect on **October 1, 2021**. This amendment was made mainly due to the COVID-19 situation. In particular, this amendment added provisions that will allow parties to attend online oral proceedings upon a party's petition or upon the initiative of the chief administrative judge.[2]

To invalidate a Japanese patent, a claimant must file a request for a patent invalidation trial with the JPO. The patent invalidation trial is conducted by three administrative judges of the JPO. An oral proceeding will take place after the submission of the written request for a patent invalidation by the claimant[3] and the written answer by the respondent (i.e., a right holder),[4] and if necessary, additional documents by the parties[5] (usually not more than one document for each

1. Tokkyoho [Patent Act], Act No. 121 of April 13, 1959, as amended. *See* the amendments at https://www.jpo.go.jp/system/laws/rule/hokaisei/tokkyo/tokkyohoutou_kaiei_r030521.html (in Japanese). An English outline of the amendments is available at https://www.jpo.go.jp/e/system/laws/rule/hokaisei/document/tokkyohoutou_kaiei_20190521/outline.pdf.
2. Patent Act, art. 145, paras. 6 and 7.
3. *Id.*, art. 123, para. 1, and art. 131, paras. 1 and 2.
4. *Id.*, art. 134, para. 1.
5. Tokkyoho Seko Kisoku [Regulation for Enforcement of Patent Act], Ordinance of the Ministry of International Trade and Industry No. 10 of March 8, 1960, as amended, art. 47-2 para. 1, and art. 47-3, para. 1.

party). Thereafter, in general, two or three months before the oral proceeding, the administrative judges will notify the parties of the matters to be examined in such oral proceeding, and both parties must submit their briefs to respond to the inquiries of the administrative judges until about three weeks before the oral proceeding. In the oral proceeding, the administrative judges would usually allow both parties to explain their arguments by using PowerPoint slides if the parties wish to do so, and then time for questions and answers between the administrative judges and both parties will follow. In practice, the oral proceeding is held only once before the decision is rendered by the administrative judges. Thus, among the procedures in a patent invalidation trial, the oral proceeding is quite an important opportunity for the parties to understand the thoughts of the administrative judges, and predict whether they will win or lose the case.

Compared to the above new online oral proceedings for patent invalidation trials at the JPO, the Japanese courts have already started online procedures (via Teams) in patent cases for preparatory proceedings, written preparatory proceedings, scheduling conferences, etc. Moreover, although parties engaged in Japanese litigation currently have to submit their briefs on paper or via facsimile, the Japanese courts plan to introduce the electronic submission system of parties' briefs, especially in patent litigation, from around **next summer or autumn**. Thus, the new online oral proceedings for patent invalidation trials at the JPO are considered as one of the latest changes in the Japanese patent practice toward online procedures.

These changes are welcome moves for parties and practitioners because online procedures and e-filing systems will ease their burden. When it comes to online procedures, however, whether or not participation from overseas (e.g., witness testimonies, service via an online system, etc.) will be allowed is still controversial in Japan.[6] If permitted in the future, then the difficulties being experienced by foreign companies or entities will be considerably alleviated.

2. Third-Party Comments in Japanese Patent Litigation

The amendment, which will introduce a system of third-party comments in patent litigation before the Japanese courts, will take effect on **April 1, 2022**. This amendment will add provisions that will allow the submission of third-party comments in a court of first instance and/or second instance (i.e., the Japanese Intellectual Property High Court ("**IP High Court**")) if the court finds such submission to be necessary upon petition by a party.[7] This amendment originated from the experience of allowing third-party comments to be sought in a Grand Panel case before the IP High Court in 2014 (*Apple Japan LLC v. Samsung Electronics Co., Ltd.*).[8]

In the above *Apple Japan v. Samsung* case, based on the consent of both parties, the IP High Court allowed the parties to call for both local and foreign public opinions regarding "*whether an owner of a patent essential for a standard developed by a standardization body, for which a (F)RAND declaration (a declaration to grant a license under (fair), reasonable and non-discriminatory conditions) is made, should be restricted from exercising the right to seek an injunction or the right to seek damages.*"[9]

6. *See* https://www.moj.go.jp/content/001346048.pdf (in Japanese).
7. Patent Act, art. 105-2-11, paras. 1 and 2 (effective from April 1, 2022).
8. IP High Court (en banc), May 16, 2014, Hei 25 (ne) No. 10043, Saibansho Web, https://www.ip.courts.go.jp/vc-files/ip/file/H25ne10043_zen1.pdf (in Japanese). An English translation of the judgment is available at https://www.ip.courts.go.jp/eng/vc-files/eng/file/25ne10043full.pdf.
9. *See* https://www.ip.courts.go.jp/eng/vc-files/eng/file/25ne10043full.pdf, at 139.

As a result, 58 opinions were submitted to the parties from eight countries, and all of them were submitted to the IP High Court upon mutual agreement and were found to be quite useful for the judgment.[10] However, despite this successful experience in the *Apple Japan v. Samsung* case, the option of calling for public opinions has not been utilized in any other case. Thus, it has been discussed that clear grounds for the collection by Japanese courts of third-party comments are still needed.

With regard to the new third-party comments system in Japan, the following points should be noted:

a. Differences with the US system of filing *amicus curiae* briefs with US courts

In contrast to the US system where US courts can consider all of the briefs submitted to them in deciding cases, the Japanese system is considered to be one where the evidence collection process is done under the responsibility of each party. In particular, each party will check all of the briefs submitted to a Japanese court, and then select and submit only those that are favorable to them. Since a Japanese court can only base its decision on the evidence submitted by both parties, it is likely that not all of the briefs that were submitted to the court would be considered by it in deciding a case. In other words, not all third-party comments will be considered by the Japanese court.

b. Matters that can be the subject of the new third-party comments system

The following examples have been mentioned in the discussions concerning the new third-party comments system:[11]

i. A patent infringement case between private parties, which relates to an agreement or business practice concerning a patent, such as a standard-essential patent ("**SEP**"), and which would have a significant impact not only on the industry to which the parties belong, but also on companies of other industries, would be suitable for the third-party comments system.

ii. A patent infringement case, which relates to a technology that is widely used in various types of products, such as high technology in the AI/IoT field, and which has a significant impact not only on the industry to which the parties belong, but also on companies of other industries, would also be suitable for the third-party comments system.

iii. With respect to the examples in items (i) and/or (ii) above, if the patent infringement case is one where the Japanese court should take into account international litigation and business practices in rendering its judgment, then it would be especially suitable for the third-party comments system.

C. Conclusion

From the viewpoint of foreign companies or entities interested or involved in international complex patent issues, such as SEP/FRAND and high technology in the AI/IoT field, they will be able to use the newly introduced third-party comments system in Japan as an effective way of asserting their arguments if a Japanese court decides to call for public opinions regarding

10. *Id.*, at 139-141; *see also* Patent System Subcommittee of the Intellectual Property Committee of the Industrial Structure Council at the JPO, "*Amicus Brief seido ni tsuite*" (About the Amicus Brief System) (2020), at 11 (available at https://www.jpo.go.jp/resources/shingikai/sangyo-kouzou/shousai/tokkyo_shoi/document/34-shiryou/03.pdf (in Japanese)).
11. Patent System Subcommittee of the Intellectual Property Committee of the Industrial Structure Council at the JPO, "*Daisanshaikenboshuseido (Nihonban Amicus Brief Seido)*" (Third-Party Comments System (Japanese Amicus Brief System)) (2020), at 2 (available at https://www.jpo.go.jp/resources/shingikai/sangyo-kouzou/shousai/tokkyo_shoi/document/44-shiryou/03.pdf (in Japanese)).

specific issues in the litigation pending before it. Moreover, in such a case, in order for the parties to such litigation to call for and submit the opinions of foreign companies to the Japanese court as evidence, careful analyses of the specific issues and the interests of both parties should be made.

As to online procedures, if further legislative amendments make them more available, even if the parties (and/or their witnesses) are located in a foreign country, then foreign companies will be able to have easier access to Japanese patent litigation and patent invalidation trials.

Back to List of Articles