

When Pash Comes to Shove – Lessons from “Deflategate”

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Even if you are not a football fan, you should be paying attention to “Deflategate”. The NFL’s most recent scandal is more than just the saga of Tom Brady’s persecution by the NFL and its Commissioner, Roger Goodell. For the United States District Court for the Southern District of New York, “Deflategate” was an opportunity to explore the line between the established deference due to arbitral decisions by the courts on the one hand, and ensuring the application of fairness and due process in an arbitration on the other. The Court also examined the limits to an arbitrator’s discretion and the prejudice that can result when an arbitrator cherry-picks which ADR principles to apply. Following Judge Berman’s decision in “Deflategate”, Brady is free, but the ADR community is better off too.

On September 3, 2015, Tom Brady finally had his day in Court. That very day, to the relief of Patriots fans worldwide, the United States District Court for the Southern District of New York granted Brady’s motion to vacate his suspension for the first four games of the 2015 regular season.

Due to Brady’s alleged role in the Patriots’ use of under-inflated footballs during the 2015 conference championship, Brady’s suspension was originally imposed by NFL Executive Vice President Troy Vincent pursuant to the NFL’s Competitive Integrity Policy. On appeal, the suspension was upheld by NFL Commissioner Roger Goodell in his capacity as arbitrator. Commissioner Goodell’s final decision went beyond Vincent’s finding that Brady was “at least generally aware” of the under-inflated footballs, concluding that Brady had definitively participated in a scheme to tamper with the footballs and had willfully obstructed the subsequent investigation.

Under the *Federal Arbitration Act* (“FAA”), the validity of an award is subject to attack only on those grounds listed in [9 U.S.C.] § 10, and the *FAA* requires that an award be enforced unless one of those grounds is affirmatively shown to exist. For example, the courts may vacate an arbitral award in instances where an arbitrator refuses to hear evidence “pertinent and material to the controversy” or where an arbitrator has demonstrated “evident partiality”. While courts owe a certain degree of deference to arbitral decisions, that deference does not extend so far as to require the courts to allow, and ultimately to confirm, awards obtained without fairness or due process. In reaching his decision to vacate Commissioner Goodell’s arbitral award, Judge Berman highlighted several legal deficiencies found to be completely inconsistent with established ADR principles.

Notice Requirement – When Ignorance Really is an Excuse

An arbitrator draws his or her authority from the statute at issue, which in “Deflategate”, was the NFL’s collective-bargaining agreement. Consequently, Commissioner Goodell was tasked with interpreting and applying the collective-bargaining agreement in accordance with the “law of the shop”. In the NFL, players must be provided with advance notice of both prohibited conduct and potential discipline. By way of the Player Policies (distributed to all NFL players), Brady had been given notice that equipment violations could only result in fines. In contrast, Brady was found to have violated the NFL’s Competitive Integrity Policy which was only distributed to NFL clubs and coaches. Judge Berman concluded that Brady could not be subject to disciplinary action or an arbitral award without notice of the Competitive Integrity Policy.

The Court also found that Commissioner Goodell had an obligation to ensure that the arbitral award was drawn from the essence of the collective-bargaining agreement. Commissioner Goodell, however, applied the same discipline that the NFL administers for a first-time violation of its Policy on Anabolic Steroids and Related Substances. Judge Berman determined that there was no comparability between Brady's alleged misconduct and steroid use. Therefore, the Steroid Policy could not serve as notice of potential discipline.

Denial of Testimony by Jeff Pash, Co-Lead Investigator of "Deflategate"

Prior to the arbitral hearing, Commissioner Goodell granted a motion by Brady's counsel to compel the testimony of Theodore V. Wells Jr., co-lead investigator of "Deflategate", but denied a motion to compel the testimony of Jeff Pash. In addition to being co-lead investigator of "Deflategate", Pash is NFL General Counsel and provided edits to the investigative report prior to its release to the public. In justifying his decision, Commissioner Goodell reasoned that Pash did not have first-hand knowledge of the events at issue and did not play a substantive role in the investigation.

As arbitrator, Commissioner Goodell was required to ensure that both parties had an opportunity to present evidence and argument. NFL precedent also demonstrates that players must be afforded the opportunity to confront their investigators. Judge Berman found that Brady was refused access to evidence that was pertinent and material to the controversy surrounding the "independence" of the "Deflategate" investigation. Without an opportunity to question Pash, Brady was denied a chance to inquire about the potential lack of impartiality created by the NFL General Counsel's edits to the report.

Equal Access to Investigative Files

A month prior to the arbitral hearing, Brady's counsel made a motion for access to the "Deflategate" investigative documents. The investigative files contained unedited accounts of witness interviews and were the basis for the final investigative report. As arbitrator, Commissioner Goodell had an obligation to ensure that this relevant documentary evidence was made available to Brady in a timely manner by the NFL. The day before the arbitral hearing, Commissioner Goodell denied Brady's document request citing the collective-bargaining agreement's requirement that the parties "exchange copies of any exhibits upon which they intend to rely no later than three (3) calendar days prior to the hearing". Commissioner Goodell stated that discovery under the collective-bargaining agreement is "tightly circumscribed" and "does not contemplate the production of any other documents" other than under the terms of the agreement. The United States District Court for the Southern District of New York has held that the absence of statutory provision for discovery techniques in arbitration proceedings does not negate an arbitrator's affirmative duty to ensure that relevant documentary evidence is shared between the parties. As such, without access to the investigative files, Judge Berman concluded that Brady was not placed in the same position as the documents would have afforded him.

The Court also noted that the prejudice that Brady suffered was compounded by the "dual and seemingly inconsistent roles" enjoyed by Paul, Weiss, Rifkin, Wharton & Garrison; the law firm that employs investigator Theodore V. Wells Jr. and that acted as counsel for the NFL during Brady's appeal. Without any need for discovery, the law firm retained sole access to the investigative files and used them in direct and cross-examinations of witnesses during the appeal.

Once Bitten, Twice Shy

Any organization looking to implement arbitration as a cornerstone of its disciplinary process should take note: to hold someone accountable, they have to know the score. Arbitrators are bound by the agreements negotiated by the parties. As such, it is in the best interest of the parties that these agreements be as clear and comprehensive as possible.

Fairness is a core value of all forms of dispute resolution. However, while employing their discretion, arbitrators are not free to dispense their own brand of justice, nor can they select which ADR principles to rely on. Nonetheless, they must ensure that all parties are on equal footing to present their arguments.

The NFL and Commissioner Goodell could have avoided judicial review simply by playing by the rules and ensuring Brady was on a level playing field. Instead of “Deflategate”, we now have “Investigate-gate”.

Note: On September 17, 2015, the NFL filed a pre-argument statement with the United States Court of Appeals for the Second Circuit outlining the arguments the league intends to raise on appeal. The requisite three-judge panel has not yet been named.

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