

## MEDIATION AS AN EFFECTIVE TOOL FOR RESOLVING SPORTS DISPUTES

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### ABSTRACT

The relation to the infinite variety issues sprouting in sports or *lex sportiva*, like *lex mercatoria* in the early centuries, has now come of age and even begun a maturing process in the past thirty-five years or so. *Lex sportiva* now straddles sports management, sports medicine, tort, criminal law, employment contract, competition law and a host of multifarious activities related to sports. This has catapulted a host of legal issue and problems, demanding urgent legal solutions to actual or potential disputes. This paper briefly discusses the nature and development of *lex sportiva*, and how it is able to resolve sports disputes. Resolving sports dispute via the tiresome, dilatory and expensive process of litigation is most unsuitable. Arbitration may not be equally a satisfactory solution. The paper strongly advocates the far the most effective and resolution friendly mode of settling sports disputes is mediation. In support it highlights numerous advantages mediation has to offer.

Key words: Alternative Dispute Resolution; Mediation; Arbitration; Litigation.

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### Introduction

The rule of law in sport is as essential for civilisation as the rule of law in society generally. Without it, generally anarchy reigns. Without it in sports, chaos exists.<sup>1</sup> In Malaysia, Asean, Britain, Europe and elsewhere, there are many reasons for law's intervention in sport. The commercialisation of sport presents a palpable need for regulation. Many 'problems' in sports such as drug abuse, violence and match-fixing cry for legal regulations. This interaction between the sports world and the normative order redefine a distinct *lex sportiva*. The analogy with *lex mercatoria* (merchant law) allows sports law to develop distinctiveness and an incremental formation. It encourages sports bodies to reconsider their own rules and mode of governance in the light of the dominant legal norms. Thus this process of acculturation allows and promotes a convergence between *Lex Sportiva* and the dominant legal norms.

The analogy between *lex mercatoria* & *lex sportiva* or sports law is especially relevant: both respect a degree of autonomy, both acknowledge cultural specificities, both are part of a pluralistic and complex normative rule structure and both acknowledge the need for international emphasis in terms of legal regulation. *Lex mercatoria* or law of merchant was the legal doctrine developed in the middle ages by special local courts in Britain and elsewhere. The merchant courts had judges and jury who were merchants themselves and would apply the *lex mercatoria* as opposed to local law. An analogy can be made with the courts for arbitration for sport, and a view that it is developing a specific doctrine of international sports law. Before discussing the modes of resolving disputes sprouted by *lex sportive*, it is useful to explain what is *lex sportiva* or sports law.

Sports law deals with state interests and resolution of conflicts according to general legal norms. Sports maintain internal rules and structures to regulate, play and organise competition. In sports law, a wider legal system impinges on this traditionally private sphere and subjects the politics of the sport game to the politics of the law game. The result is a double drama and the deep human concern for play combines with the concern for social justice. Sports law addresses basic ethical issues of freedom, fairness, equality, safety and economic security. The subject matter of sports law include state control and the subsidy of sport, right of assess, disciplinary powers and procedure, commercial and property rights, employment relations and compensation for injuries. Sports law is grounded in the material dimensions of sport.<sup>2</sup>

An Australian writer says that: 'Sports law' is one of those fields of law which applied law as opposed to pure or theoretical law. Rather than being a discipline with a common law themes, such as criminal law, equity or contract law. Sports law is concerned with how law in general interacts with the activity known as sports. Hence, the label applied law.<sup>3</sup> The more progressive practitioner observers have acknowledged the importance of recognition of sports law. "The law is now beginning to treat sporting activity, sporting bodies and the resolution of disputes in sport, differently from other activities or bodies. Discrete

doctrines are gradually taking shape in the sporting field; English courts are beginning to treat decisions of sporting bodies as subject to particular principles.”<sup>4</sup>

Clearly, therefore, from its nascent beginnings about thirty-five years ago, *lex sportiva* or sports law like *lex mercatoria*, has come of age and is here to stay in the milieu of sports. The offshoot is that like all discrete areas of law, *lex sportiva* generates sports disputes, calling for resolution through the various modes of settling them.

### Research Objective and Methodology

This paper seeks to briefly explore the possibilities of using, instead of the traditional forms of litigation and arbitration, alternative forms of dispute resolution, especially mediation as a popular and effective means of settling disputes generally, and it is also gaining favour, as a means of settling sports disputes or sports-related disputes.. This research adopts library based research, using printed and digital materials available in the library, including statutes, cases, books, and journal articles.

### Trend in Mediating Sports Disputes

Needless to say because of the global dimension of sport and sports disputes, the approach inherently is less insular and more comparative.<sup>5</sup> At the outset, to cast the subject into proper context, it is instructive to acquaint oneself with the approach taken by the courts generally relating their involvement in sports disputes. In England, traditionally, the courts do not generally intervene in sports disputes. They prefer to leave matters to be settled by the sports bodies themselves regarding them as being “far better fitted to judge than the courts”.<sup>6</sup> In a similar tone, Lord Denning MR stated succinctly that “justice can often be done in domestic tribunals better by a good layman than a bad lawyer.”<sup>7</sup> However, the courts will intervene when there has been a breach of the rules of natural justice<sup>8</sup> including cases of restraint of trade, where livelihoods are at stake.<sup>9</sup> North American shares the same position.

In the United States, sports disputes are regarded as private matters. The stance of the US courts are reflected in *Tony Harding v United States Figure Skating Association* [1994] 851 F Supp 1476 - “The courts should rightly hesitate before intervening in disciplinary hearings held by private associations...in the most extraordinary circumstances, where the association has clearly breached its own rules, that breach will imminently result in serious and irreparable harm to the plaintiff, and the plaintiff has exhausted all internal remedies. Even then injunctive relief is limited to correcting the breach of its rules. The court should intervene in the merits underlying the dispute”. The US courts are willing to hear sports disputes only between sports bodies in accordance with Federal law, and in breach of contract cases.

In Canada, the stand is graphically illustrated in 1996 in *Mc Caig v Canadian Yachting Association and Canadian Olympics Association*<sup>10</sup> to hold a second regatta to select the ‘mistral class’ sailing team to compete in the 1996, Sternly remarking: “the bodies which heard the appeals were experienced and knowledgeable in the sport of sailing and fully aware of the selection process. The appeals bodies determined that the selection criteria had been met...[and] as person knowledgeable in the sport,...I would be reluctant to substitute my opinion for those who know the sport and knew the nature of the problem”.

This short survey clearly shows that the court does not object to sports disputes being resolved by alternative dispute resolution modes. Malaysia and Singapore being actively involved in sports are likely to adopt the above stance. Before we examine the nature of the ADR in its sporting milieu, it will be useful to know what ADR is and why it is favoured and grown in importance. Essentially, ADR is any process that leads to the resolution of a dispute through the agreement of the parties without the use of a judge or arbitrator.<sup>11</sup>

Alternative Dispute Resolution has sprung out of the need to provide the parties to a dispute with an alternative to litigation as a means of settling disputes. Litigation has come to be regarded, especially by businessmen sports bodies, as expensive, inflexible and a dilatory method of dispute settlement. In fact, litigation because of these factors has created litigation fatigue. Arbitration originally seen as welcomed embracing by the commercial community as a quicker and less expensive ways of settling disputes is also now regarded as suffering defects, and litigation fatigue. The English and Malaysian courts have responded by promoting attempts to settle cases in the early stages of the litigation process as part of the recent reforms of the Rules of Civil Procedure introduced in 1999.<sup>12</sup>

Lord Woolf in the ‘Access to Justice: Final Report’ lucidly observed: Gladiatorial style litigation is losing its appeal. In its place, mediation – a conciliatory way to tackle disputes outside the courtroom is finally taking off. (Emphasis supplied).<sup>13</sup>

In fact, to encourage attempts at mediation, the courts may impose an adverse order for costs on party refusing to mediate who is considered to have acted unreasonably. The cultural shift’ was reflected in the words of the Lord Chancellor, Lord Irvine, that “there is no doubt that ADR can provide quicker, cheaper and more satisfactory outcomes than traditional litigation – I want ADR to achieve its full potential”. And mediation appears to be the most effective mode of settling disputes in sports law disputes.

It is useful to note that the interesting case of *Lennox Levis v The World Boxing Council and Frank Bruno* [1995 – unreported], the UK High Court ordered Levis to try to settle the dispute with Bruno and the WBC over a fight with Mike Tyson, as required by the WBC Rules, by compulsory mediation, which the judge considered would be “a proper independent process of mediation”. Like many other innovative business practices, ADR originated in the United States and had quickly spread around the world including Malaysia.

As has been put by a leading ADR body, “all disputes, whether in difficult business negotiations or full-scale litigation, can become a strain on resources, sapping money, time and management focus and destroying important commercial relationship”. It has been strongly espoused that ADR offer these advantages: (a) speed, the process can be set up quickly and normally last only one or two days; (b) it is cost-saving; in fact costs a fraction of litigation; (c) unlike litigation, ADR is confidential thus avoiding an unwanted and many a time unwanted publicity; (d) very much different from court hearing, the parties themselves remain in full control of the ADR process and any settlement agreed. If no settlement is reached, the parties retain their rights to sue. In fact, the ADR process is conducted on a ‘without prejudice’ basis; (e) under ADR, commercial focus is maintained. The parties’ commercial and/or personal interest influence the outcome, thereby, allowing more room for making more creative settlements; (f) Businessmen relations, ADR modes being closer to business negotiations than adversarial courtroom procedures can be better preserved and restored; and (g) independence in the sense that parties can benefit robust and confidential analysis of their positions by a bona fide independent mediator.

In fact, ADR can be used in conjunction with litigation and arbitration and in national and international disputes. It can also be deployed in almost any area of law and business. But Lord Irving, a former British Lord Chancellor, had observed: “ADR is not a panacea, nor is it cost-free. It is widely believed by ADR group, CEDR and other service providers”. The most popular form of ADR is mediation, with high success rates. Mediation is also taking off in the rest of Europe, which is “more receptive to mediation because on the whole, the continent is less adversarial [with] fewer large law firms with strictly litigation departments (and) lawyers [who] do both corporate and litigation”.<sup>14</sup>

### **The Value of Mediation in Sports Disputes**

Most professional and those concerned with disputes arising out of sport generally agree that mediation as a dispute resolution mechanism enjoys the following advantages:

- (i) it is quick and it can be arranged within days or weeks rather than months or even years as in the case of litigation. It can be conducted in a very short time;
- (ii) it is less expensive, as the mechanism often results in quick settlement saving management time and legal costs;
- (iii) mediation is conducted privately in camera, and confidential, avoiding adverse publicity and unwanted parties such as journalists or competitors are not present;
- (iv) the mechanism spans wider issues, interests and needs; underlying issues and hidden agendas are exposed making creative solutions possible to satisfy the needs of all the parties;
- (v) because mediation is informal, it results in a common sense and straightforward negotiation;
- (vi) mediation allows the parties to retain control; the parties participate in the decisions, rather than control being handed over to an arbitrator or a judge; and
- (vii) the process is entirely ‘without prejudice’.

The parties have nothing to lose as their rights are not affected by mediation. Meaning, litigation can be commenced or continued if the mediation fails to make an agreed settlement. The value of mediation as an effective tool of alternative dispute resolution particularly in sports disputes has been graphically and neatly described as follows: “mediation differs from other alternative dispute resolution methods such as arbitration because the outcome or solution is not imposed. It has to be concluded voluntarily by the parties on either side. The mediator facilitates by evaluating the dispute and proposing solutions but does not make a judgment as happens in an arbitration or expert determination. This means the parties own the outcome, it is their problem and also their solution, therefore, they are more likely to get an outcome that they can live with”<sup>15</sup> (emphasis added). It appears these reasons result in a high rate of success in disputes relating sports.

### **The Notion of Mediation**

Mediation as a dispute resolution mode is not new; it has been on for centuries. People have been mediating i.e. trying to reconcile differences between individuals and groups for thousands of years. The Quran, the Bible and other ancient texts are replete with examples. However, in the last thirty-five years or so, mediation as a method of settling commercial disputes has become popular in business community and has attempt on it certain feature and characteristics. Mediation in the shipping industry too is frequently employed and highly developed. It is also widely effective and successful. The mode will be effectively useful in settling disputes in the area where sports is commercialised.

So useful has mediation been found as an alternative dispute resolution model that many learned books have been written and numerous seminars conducted on the theory of mediation and underlying principles of negotiations including manuals written on its practical application to a variety of disputes and issues. Therefore, it is clear that mediation if not a science, is certainly an art, advocating a need for mediators to be properly trained in it.

Mediation is a voluntary, non-binding, ‘without prejudice’ process that uses a neutral third party (mediator) to assist the parties in disputes to reach a mutually agreed settlement without having to resort to litigations, i.e., a court. It differs from litigation and arbitration, in that a binding decision is not imposed on the parties by a judge or an arbitrator. The essential advantage of the mediation process is to allow the parties to work out their own solution to their dispute with the assistance of the mediator.

As can be seen, mediation is a logical or natural extension of the most common method of settling disputes, negotiation. But many a time, negotiations either break down or cannot be begun for many reasons. Here, mediation gives the parties in dispute the option to start or continue negotiations in a controlled setting should the mediation be not successful, the parties are still free to go to court or arbitration. So nothing has been lost.

### **Common Misconceptions about Mediation**

There appears to be a notion that agreeing to mediation is in fact an admission of failure. This is far from the truth. Because negotiations break down for many reasons, and so too in mediation, the parties they are given the opportunity of keeping the negotiations going. The negotiations have not concluded until mediation has been attempted putting the dispute into the hands of a mediator does not involve any loss of control by the parties. In fact, the control remains with the parties because the mediator has no authority to render any decision or force any settlement. The settlement is only reached if and when the parties consider that the settlement suggested is fair and reasonable.

Mediation does not create extra work for the parties in dispute. On the contrary in the long run mediation saves times. Of course, the parties do have to invest some time and effort in the mediation, but vast majority of cases submitted to mediation are settled, save further time. Even in the minority of cases in which mediation does lead to settlement, the time spent on the mediation reduces the time needed for preparing for trial. Neither does mediation create extra costs. Mediation in fact, reduces costs related to litigation through early settlement of the dispute. It also reduces the trial preparation time required in those cases, which do not settle.

Many people are reluctant to use mediation because they labour under the misconceived notion that an opponent during the mediation stand to gain more information about their case (fishing for information). However, in the mediation process, each party is completely in control of the information disclosed. If a party does not wish the "opponent" to know something they can keep it to themselves or disclose it to the mediator in confidence. Of course, if the information is something which might persuade the other party to accept a settlement, or something they will find out about later on through discovery, there is little, in those specific situations, to be lost by disclosing that information.

The parties are entirely free to choose the mediator, and most mediation session is quick, lasting a few hours or a few days, though the mediator will continue to work with the parties as long as they wish to continue with the mediation. It has been said that arbitration rather than replacing litigation tends to lead to litigation. Mediation, on the other hand, is not just an extra step in the dispute resolution process, it is usually the final step as most cases get settled. In fact, nothing is lost if mediation is not successful. As the mediation process is conducted on a 'without prejudice' basis, the parties are free to go to court or arbitration. It is as if the mediation did not take place. Nothing revealed in the mediation can be used by either party, and neither can the mediator be required to give evidence on behalf of either party in any subsequent litigation or arbitration proceedings.

### **Relevance and Application of Mediation to Sport Disputes**

The most important advantage of using mediation to settle sports dispute is the process preserves and even restores personal and business relationship. The sports world is a small one, everyone seems to know somebody.<sup>16</sup> Relationships and even reputations are, therefore, more important and worth preserving. As a well-known mediator lucidly said 'mediation allows legal disputes to be resolved within the family of sports'.<sup>17</sup>

As the mediation process is not adversarial, there is no winner and therefore no loser. In fact, at the most the parties share the pain. Mediation reopens lines of communications which have often broken down, requiring the parties to co-operate with one another in finding a solution to their problems, thus providing the opportunity for co-operative problem solving. Through careful probing by the trained mediator, the actual underlying reasons for the particular dispute can be identified and addressed. This goes a long way towards finding an appropriate solution to the parties' problems.

Needless to say, dispute settlement through litigation and arbitration is backward looking, the decision or award being reached on the basis of past historical facts and background. Mediation, on the other hand is more flexible than traditional form of litigation or even arbitration, which are often technical and specialised. There are no set rules of procedure or evidence to get in the way. The approach is informal and flexible. Mediation is swift, which is a particular advantage to sports persons, who have pressing events and other commitments and commercial deadlines.

In fact, this was one of the factors why a dispute in 1999 between Frank Warren, the well-known boxing promoter, and Richie Woodhall, the former WBO super middleweight world champion was successfully resolved by mediation. Woodhall started his proceedings in the [English] High Court in 1999. The dispute had all the markings of a full blown legal fight in the courts with lots of blood on the wall and the full glare of the media. As such, it would not only be time consuming and expensive to both parties, but also potentially damaging to their reputations. Woodhall was anxious to get back to the ring, and if he were to continue to be of any value to Warren, he needed to fight his mandatory defence to his world title within a short period of time. All these circumstances promoted the question whether the court was the best forum in which to resolve their bitter dispute. It was decided to refer the dispute to mediation, which hastily arranged and conducted by CEDR. And within 72 hours later, the dispute was resolved, and happily Woodhall signed a new deal with Warren and continued to box for him. Mediation in fact is now the process adopted in many other sports cases. Clearly, mediation was an immense success in the Woodhall/Warren case and many other areas of sports law. But it is also useful to remember that mediation does have some limitations.

### **Conclusion**

It is the research finding that of the various form of ADR available, conciliation, mini-trial, neutral evaluation, mediation is proving to be a popular and effective means of settling disputes generally and it is also gaining favour, as a means of settling sports disputes or sports-related disputes. The reasons are cogent. As mediation is confidential, there is no official record or transcript of the process. It is not possible to have a 'blow by blow' account of what was said, the arguments adduced, why a

settlement was reached and what were its terms. There are sporting and commercial deadlines to concentrate the minds of the parties and act as an impetus to reaching a compromise. Finally, there is also a pressing need for the parties not to 'wash their dirty linen in public'. The upshot is that mediation is really suited to situations where disputes arise quickly and needs to be resolved quickly and the business of sports certainly fits into this category. Mediation can have real benefits, not only in terms of saving of management time and money, but also, in the preservation of on-going relationships between the parties. These relationships are fundamental to any business but particularly so in the sporting context.<sup>18</sup>

Mediation as a mode of settling sports disputes is not a panacea. It works in most cases, but it does not work in some cases. Being not a legally based process, mediation is not suitable in those cases in which a legal precedent or injunction is required. It is not appropriate where a sports body needs to make a public example of another party to the dispute to act as a deterrent to others. Being a voluntary and non-binding process until a settlement is agreed, written down and signed by the parties; it is not suitable either in those cases where the parties are not interested to settle by mediation or extra-judicial means. In fact, mediation is unsuitable for resolving doping and other disciplinary cases. However, mediation may be useful for dealing with commercial fallout from such cases, for example, claims for financial compensation for losses suffered as a result of wrongful 'conviction'.

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