

# ADR in Sport Disputes: Should Mediation be Used over Arbitration?

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**Abstract.** *In our days, sport is a big business, with huge sums of money involved. With various types of emotions and the huge budgets involved, conflict is a daily reality of sports organizations. The present article started from the idea that arbitration – the most commonly used procedure in dealing with sports disputes – does not represent a viable solution any more, and that mediation could succeed where arbitration has failed. The article will present the reasons behind this statement by describing the procedure and the high number of national and international institutions with arbitral responsibilities. Based on 40 interviews with athletes and staff, and from my own professional and academic experience as mediator, the article presents the main benefits of mediation that can be used in sports disputes.*

**Keywords:** *conflict, sports dispute, mediation, negotiation, arbitration, Court of Arbitration for Sport.*

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Since the autumn of 2014, I started to work in the administrative branch of a football club from my town. This opportunity, together with the one of being a professional mediator, gave me the idea to write this article in order to develop an old idea of mine that mediation should start to play a bigger part on the alternative dispute resolution scene of sports disputes. My first experience with mediation in a sports organization was in 2004 in Val d'Isère, a professional ski club where I acted for a year. At that point, the club had some financial difficulties and the managers invited all the athletes and adjacent personnel to a mediation meeting in order to negotiate the lowering of the contractual monthly fees. The club selected a mediator from Lyon, and each meeting took

no longer than one hour. From that point on, being a sports person myself, I saw and read that an increasing number of sports organizations include mediation and arbitration clauses as primary ways for dealing with conflicts that arise in the field of games, as well as from commercial and business matters.

In our days, sport is a big business, with huge sums of money involved. The sports industry is estimated to account for between 3 and 6 per cent of total world trade (McAuliffe & Rigozzi, 2013). Thus, it comes as no surprise that it is also a major source of legal disputes. "The unique investment of competitive egos, emotions, expectations, and money in international sports almost guarantees a dividend of highly charged disputes... and the structure for resolving them is complex" (Nafziger, 2009). With this type of emotions and the huge budgets involved, conflict is an inherent, and some would say natural, part of this phenomenon, like any other business or employment relation. Modern sports organizations are dynamic, made up of people with increasingly diverse backgrounds, opinions, values and expectations about work, but often the tension to manage these emotions and the responsibility to manage billions of dollars budgets can lead to disputes, which in turn can lead to conflicts.

In this context, disputes are inevitable. Neil Goodrum, a member of the Sports Resolutions Mediation Panel, has a very simple, linear approach in this regard. He says that when something is inevitable, the manager of the organization must have an idea, a model and an agenda to deal with it. When a dispute occurs, there is a risk that it will escalate. If such a risk can be reasonably anticipated, then a plan can be put in place to minimize it. Traditionally, the plan and the following action is that the dispute, if not quickly resolved between the parties, will be referred to a third, outside, party who must decide and impose a solution on the disputants. Generally, the process is costly, often time consuming and almost always stressful for those involved. The outcome does not necessarily guarantee to the parties the result they wanted and imagined. In the context of sports disputes, the reference to the third deciding party can be through the civil national courts. Alternatively, it can be done through an internal arbitration process, where the parties agree to submit the dispute to an internal decision maker such as the LPF Disciplinary Commission. Although the internal processes usually have the advantage of being confidential and less expensive than court proceedings, the disadvantages of a complex procedure, subject to the decision of a third party, still apply (Goodrum, 2013).

Unfortunately, this alternative plan is becoming more and more institutionalized at a national and international level due to the large amount of sports institutions developed in order to solve sports disputes through arbitration. For example, in Romania we have the case of Mihai Costea. Mihai Costea is a football player from Romania who didn't play for almost two years for his club due to a transfer clause between his old and new club. He hired a lawyer and hoped that the national commission from the Romanian Football Federation (FRF) would admit his right to work. Inside the commission, things moved

very slowly, and he went even further to CAS, at Lausanne, where several meetings occurred without any decision. Another example is yet another football player, Vasile Maftai. For almost 13 months now, he should have received a sum of money from his old club, but his case was passed on from one commission to another inside LPF and FRF. For almost two months he has advanced his case to the Court of Arbitration for Sport (CAS).

Arbitration is a process in which a third-party issues a binding judgment based on the arguments presented by the parties involved in a dispute. Casual examples of such disputes are objecting to the selection of national team members, a disciplinary measure of a sports federation or when an athlete appeals an anti-doping rule violation. Even if this kind of dispute goes to court, there is a high possibility that it will be regarded as not being a legal dispute and be dismissed without prejudice. Even if an athlete can sue the federation, it will take a large amount of time; it is sometimes likely that the competition or the athlete's career will have ended before the decision (for example Adrian Mutu's dispute with FC Chelsea ended 10 years after it started).

My theory is that this kind of conflicts moves so slow because sports arbitration, although an ADR procedure, became so formal and institutionalized that it is now almost similar to traditional litigation. An alternative plan for dealing with disputes could be to appeal to a third party who would facilitate the communication between the parties to find a solution, rather than deciding it for the parties. This method is usually cheaper, quicker, and less stressful than the alternative, and also respects the confidentiality of any information shared. Sport is a fast-paced world, and it is in the interest of all stakeholders, clubs, and athletes, that disputes are resolved quickly and cost-efficiently (Hesse, 2014). In order to do that, I think that mediation should start to play a bigger part when dealing with sports disputes, due to its principles and techniques.

Today, in sports, the common ways to resolve sports disputes are very complex. One way is by submitting the dispute to a national court. The other way is to choose from a complex structure of national and international bodies that can provide arbitration services and decisions. Some relevant institutions include national sports organizations or governing bodies, like The Romanian Federation of Football (FRF), The Professional League of Football (LPF), international sports federations (IFs), like FIFA and UEFA, The International Olympic Committees (IOC), the International Council of Arbitration for Sport (ICAS), and, finally, the Court of Arbitration for Sport (CAS), which is the most frequently used procedure (Nafziger, 2002). Unfortunately, these institutions do not have procedures, and decide, according to the same rules, so both of these procedures, national courts and international football bodies, can be at least time-consuming and cost intensive. A short description of these bodies and their responsibilities would help us better understand his problem:

*National governing bodies* have the primary responsibility to avoid and resolve disputes and to apply sanctions. Disagreements are resolved by internal administrative review

within the commissions of those bodies or independent arbitration. Things don't look so bad, right? The answer would be NO, but these national bodies are a general subject to the rules of their respective IFs.

*International federations* may review the decisions of the national bodies concerning a large area of conflicts from the competition to the status of an athlete. The rules of the Olympic Charter rule supreme but sometimes are somehow unclear when IOC decisions pass the ones of IFs (Nafziger, 2002). Disagreements between IFs and national bodies that transcend national laws are resolved by, again, arbitration.

*The International Olympic Committee*, on its own initiative or on that of an athlete, can review a broad range of decisions made by the National Olympic Committees (NOC) or IFs. Under the Olympic Charter, IOCs recognize the "exclusive powers" of NOCs to represent their countries or select athletes to represent them in competitions, but at the same time it grants power to the IFs to establish criteria of eligibility and to establish and enforce rules to govern the practice of their respective sports (Nafziger, 2002). Nevertheless, the IOC retains authority as a final arbiter of disputes within the Olympic Movement.

*The International Court of Arbitration for Sport* is the umbrella under which many IFs require mandatory arbitration in contracts between athletes and national bodies. Athletes must sign these contracts in order to be eligible to participate in the competitions organized and governed by the IFs. Mandatory arbitration is conducted under the auspices of ICAS's principal sanction-review body, the CAS.

*The CAS* becomes a central mechanism for resolving sports disputes, especially those related to international competitions. At the beginning of the 1980s, the regular increase in the number of international sports-related disputes, and the absence of any independent authority specializing in sports-related problems, led the top sports organizations to reflect on the question of sports dispute resolution. In 1981, soon after his election as IOC President, Juan Antonio Samaranch had the idea of creating a sports-specific jurisdiction. The following year at the IOC Session held in Rome, Judge Kéba Mbaye, who was then a judge at the International Court of Justice in The Hague, chaired a working group tasked with preparing the statutes of what would quickly become the CAS (Court of Arbitration for Sport, 2015).

In principle, two types of dispute may be submitted to the CAS: those of a commercial and those of disciplinary nature. The first category involves disputes regarding the execution of contracts, the sale of television rights, player transfers and relations between players or coaches and clubs and/or agents (employment contracts and agency contracts). Disputes relating to civil issues also come under this category (an accident of an athlete during a sports competition). These so-called commercial disputes are handled by the CAS acting as a court of sole instance (Court of Arbitration for Sport, 2015).

The second group of disputes submitted to the CAS is represented by the disciplinary cases, most of them doping-related. In addition to these, the CAS is called upon to rule on other various disciplinary cases like violence on the field of play or abuse of a referee. Such disciplinary cases are generally dealt with in the first instance by the competent sports authorities, and subsequently become the subject of an appeal to the CAS, which then acts as a court of last instance (Court of Arbitration for Sport, 2015). The CAS also has the power over IFs, being empowered to review IFs decisions in the following areas: IFs constitutions, its powers over an athlete or property and general contract law. The CAS arbitrates disputes brought by individual athletes, IFs and national bodies.

Thankfully, most recently, more and more sports organizations started to use mediation as a way to resolve their disputes with a low cost of time and money. In separate matters, the Western Athletic Conference and the Big 12 Conference utilized mediation to resolve issues pertaining to the departure of member schools, a mediated resolution being achieved within a month. Dealing with such disputes in court would have required a significant amount of time and resources. What's more, mediation provided the conferences and member schools the opportunity to resolve their problems with the respect of confidentiality and to continue and improve the working and competition relationship.

Another example regarding the use of mediation in sports disputes is represented by a group of top female soccer players who participated in a mediation process with the Canadian Soccer Association (CSA) in a bid to resolve a dispute over the proposed use of artificial turf at the Women's World Cup.

In addition to the contractual grievance arbitration, the CBA between the Major League Clubs and the Major League Baseball (MLB) Players Association provides for a hybrid form of arbitration for salary disputes. The past Agreement (effective 2007-2011) provided the parties with the ability to seek the assistance to select an arbitrator to resolve salary disputes in the event that both sides cannot agree to an arbitrator (by January 1st of any year during the agreement). While these arbitrations are a form of labor arbitration, the arbitrator is not permitted to fashion remedies or write opinions; they are closer to a mediator.

The agreement between the National Football League (NFL) Players Association and the National Football League provides for arbitration and mediation clauses for labor disputes between a team and a player. Issues can include salaries and whether an injury that precluded a player from performing was sustained as a result of the play or unprofessional conduct on the field.

Mediation is a relatively new concept in Europe and even newer in Romania, as an alternative to the traditional means of adjudication. Litigating procedures, arbitration included, result in winners and losers. In some cases, all parties leave the procedure

disappointed with the decision of the judge/arbitrator. When this happens, sports managers and their organizations are confronted with a lot of problems. Some of them are the stress and lack of concentration occurred during the court formal proceedings. Physical absence also represents a big cost as the individuals are more concerned to take care of the conflict than they are to do their jobs. Management is diverted to deal with the conflict instead of focusing on managing the business and also, and this is very important in the sport industry, the employer's external reputation could be compromised, being perceived at least as a low-moral individual, if not as a problem-individual for the team and the organization.

Certain unique characteristics of mediation provide remedies for many of the problems occurred between players and management in today's market (Bell, 2012). Mediation offers a speedy and cost effective way to resolve any type of sports dispute. Its confidential nature would promote open communication between the parties, which would preserve, if not enhance, their working relationships.

International superior bodies are also aware about the increase demand for speedy, less costly and more important, win-win benefits for the parties, so even CAS, the largest institution providing professional ADR services for sports disputes, recognizes the benefits of mediation in sports disputes. Mediation is defined in art. 1 of the CAS MEDIATION RULES starting from 1999 as: "a non-binding and informal procedure, based on a mediation agreement in which each party undertakes to attempt in good faith to negotiate with the other party, and with the assistance of a CAS mediator, with a view to settling a sports – related dispute". CAS mediation has all accepted characteristics of mediation. It may be provided for the resolution of all kinds of sports disputes, except for "disputes related to disciplinary matters as well as doping issues". The assistance of a mediator can help those involved to define the problem and discuss it in order to reach to reach a "win-win" solution, preferably.

In principle, mediation is provided, according to this article, for the resolution of disputes submitted to the CAS ordinary arbitration procedure. Disputes related to disciplinary matters (doping, match-fixing, or corruption) are not eligible for mediation. However, in certain cases where the circumstances require this, and the parties agree, disputes related to other disciplinary matters can be submitted to the CAS (doping suspensions, suspensions after red cards, suspension of the stadiums due to violent fans). Unless the parties select a mediator, the CAS President will choose one for the parties from the list of the 59 CAS mediators. The mediator, the parties and their representatives (lawyers or agents) must all sign, according to Article 10, a confidentiality agreement. No information provided during the mediation procedure will be disclosed, unless required by law.

In order to get a better picture of the use and usefulness of mediation in sports, I participated in several meetings during which I conducted interviews with 40 athletes

and administrative staff from two football clubs from Cluj-Napoca. In order to understand both sides of the problem, I chose to discuss with 30 players from the first and second team (15 each) and 5 administrative staff from each club, namely 4 coaches and 1 Technical Director. These 40 interviews are just a small part of a bigger personal project, to conduct interviews with athletes and administrative staff within all professional sports clubs in this city – handball, athletics, basketball, rugby, and volleyball teams. I am going to extend this research in order to have a full picture of the way sports disputes are resolved in Romania and, most importantly, to see if mediation could play an important role in doing so. Being still an on-going project, a draw-back is that I am going to present just a few answers and conclusions drawn from the 40 interviews already done with the football clubs, so the final conclusions of the study could differ from the one presented here. Also, and this is the most important aspect, from both my academic and professional experience, straight from the beginning I've entered into a deadlock because none of the 40 persons knew anything about mediation in general, not to mention mediation in sports disputes. I've assumed this draw-back and postponed the interviews for a later date. During this time, I received permission from both clubs to present and even to teach the athletes and staff something about mediation. Things moved quickly because one of the football clubs is the one where I work, and my job is just that, to teach and use mediation techniques. Finally, I had the opportunity to conduct the interviews and below there are some conclusions I want to share, relevant for the present article.

Interestingly, 82.5% of the respondents (33 out of 40) were in favor of the use of mediation for contractual disputes between the club and themselves. For an outsider, the percentage is very high but for the athletes, staff and fans this could be a normal one, taking into account the present financial situation. Both clubs requested to enter into insolvency, the athletes must receive several unpaid monthly fees, and both the clubs and the athletes have pending arbitration decisions from the national football bodies to the CAS. When I asked why, all 33 pro-mediation respondents said the timing was the major argument because prolonged uncertainty and stress could affect their performances on the field. Another interesting fact, just three staff members out of ten were in favor of mediation, being in the same financial situation as the athletes. Moreover, the coaching staff has a major contractual problem in Romania, 27 coaches from 18 teams being changed in 21 competition stages since August 2014 until February 2015. All of them had at least one signed year of the contract.

Another important conclusion of the research is in terms of confidentiality in relationship with mass-media as playing a bigger role than neutrality or impartiality. A number of 29 respondents from 40 (72.5%) acknowledge the benefits of confidentiality regarding both the dispute and the outcome. Again, the percentage is not high because, according to the respondents, the increasing role of mass-media in sports activities and decisions could affect their reputation and performance. The rest of 11 respondents

are not against this principle but recognize the advantages of a transparent and open relationship with the media.

Probably the most important aspect of this research, and a strong argument for my thesis regarding the role of mediation in sports disputes, is the fact that all 40 respondents were involved in arbitration procedures at least once in their careers, so they experienced what this type of procedure implies. Most of the respondents were happy with the outcome of arbitration (30 of them), mostly because they gained something like less days of suspension after a red card, or their clubs paid them some pending fees. The majority of the administrative staff (eight out of ten) was not comfortable with the outcome because in most of the cases the organization lost something like money or suspension of the field. Even if most of the respondents were happy with the outcome, they were not happy with the solution imposed by the arbitrator. A number of 26 out of those 30 happy respondents (87%) said that they had another solution in mind during the procedure and that in most of the cases the gain was less than what they had thought of. The fact that mediation respects and grants the free will of the participants to attend and to discuss about their own needs and solutions can resolve the frustration coming from the fact that at the end of arbitration, even if you gain something, it could be less than what you desired. For the individuals who tend to see the glass half empty, this could lead to stress, frustration, and even anger.

Another step back of arbitration for the respondents was the timing and the procedural delays like one body not having the final decision on a dispute, and the solution being likely to be appealed to another body. From their responses, I found out the shortest arbitration procedure lasted just 30 minutes (two athletes were recorded having a violent and provocative attitude toward the referee; both of them received a red card and two days suspensions. The arbitrator kept this decisions imposed by the national bodies due to the video recordings) and the longest procedure lasted for 15 months (a contractual clause contested at the national and international bodies). In most of the cases the procedure lasted between two and four months. From their responses I found out that 38 of 40 consider their arbitration experiences time-consuming and would use mediation due to this problem. 23 of them continued their responses with examples occurred during the procedure, like stress or lack of concentration on the field that led to the lack of performance.

With the help of these responses, and based on my academic and professional experience in the mediation field, but also as a former athlete and employee in a sports organization, I can now present some of the most important benefits of mediation in order to sustain my idea that mediation should start to play an increased role in sport disputes.

According to Simon Gardiner, one main advantage of using mediation to settle sports disputes is that the process preserves personal and business relationships. *"The sports world is a small one – everyone seems to know somebody – and relationships, and indeed,*



*reputations, are therefore more important and worth preserving". Mediation allows "legal disputes to be resolved within the family of sport".*

Sports disputes undoubtedly have a negative effect on fans and team morale. Mediation is praised for its potential to promote the spirit of understanding and fair play. Taking a confrontational posturing of positions, which is a staple of litigation, can terminate existing relationships and impair interaction on future projects. Since the entertainment industry thrives on a unique collaborative effort, mediation provides a template for continuity in partnerships (Slotnick, 2014). From my experience, most of the parties desire to continue their business relationship. Although working relationships are important to all businesses, the performance of a player can lead to unique problems. For example, there are cases when the managers want to sell or buy a specific player. In most of the cases, the negotiations are like a cat and mouse play, with both parties wanting to gain as much as possible. Sometimes, the performance of the player involved is questioned in order to lower his agent individual demands. When this happens, the manager does not want the player to know this in order to maintain his confidence on the pitch. In conclusion, mediation can prevent the player hearing such negative commentary directly in order to continue his job on the field.

Another major benefit is the fact that the parties have direct participation and control over the outcome, in contrast to the risks and uncertainties of litigation or arbitration. According to Chereji and Pop, mediation is a voluntary process, based on self-determination. Mediators do not impose a solution and do not pass judgment - mediators will offer skilled assistance and support for the people involved voluntarily taking responsibility for finding a practical way forward (Chereji & Pop, 2014). All conflicts involve downsides, the main one being the risk of losing (the case, money, reputation, or opportunities). Mediation permits the parties to engage in a careful discourse with the ultimate aim to find a solution that satisfies both parties. The most important factor is that the parties themselves find this solution, rather than the mediator, who only facilitates the parties' communication and helps them explore their issues, needs, and options. The mediator does not have the competence to make a decision (Hesse, 2014). Instead, his role is to guide the parties through the mediation process, facilitating communication in a way that is optimal for the parties' needs and that tries to bring the discussion towards a rational solution. The mediator may offer suggestions and point out issues that the disputants may have overlooked, but the resolution of the dispute rests with the disputants themselves (Hesse, 2014).

At the heart of mediation is the principle that negotiations can only be effectively facilitated in an atmosphere of privacy and confidentiality. This expectation of privacy not only distinguishes mediation from most adjudicative processes, but also lays the foundation for more candid interactions between the parties and the mediator. As French advocate Pierre Raoul Duval explains, "Confidentiality allows the parties frankly to

discuss the facts, their position, the issues and settlement options. It also facilitates the exchange of information ... It encourages the parties to participate actively in the mediation process." Most of the agreements to mediate sports disputes protect what is said and done during the mediation sessions. Such agreements, permit the parties to discuss and negotiate with the understanding that what is said or done will not show up in the next day's papers (Nelson & Stipanowich, 2004).

Mediation can provide special benefits in the case of disputes between persons of different cultures. In the last ten years, most of the teams started to bring athletes from different countries and continents in order to help them reach their goals. Cultural, social, and political differences often represent factors that influence our communication and perception. Mediators who understand these differences may help the parties avoid jams in their interaction and re-frame and re-phrase any misunderstanding.

Reduced costs in terms of resources and time are among the most important benefits of mediation. Mediation usually produces positive results in a relatively short time. Depending on the complexity of the dispute and the number of parties, the process may conclude in a matter of days, weeks or, at most, a few months. Given the consensual nature of mediation, the parties always have the choice of continuing with the process, pending a resolution, or calling a halt (Nelson & Stipanowich, 2004).

Most importantly, there can be a mistaken perception that mediation is a soft option and that real business people do not need to mediate. The perception of some parties to a dispute is: "we know how to negotiate and we don't need someone to help us do that", frequently coupled with "if we can't do a deal on these terms we will see you in court!" (Goodrum, 2013). Both of these approaches miss an opportunity. Using a professional facilitator, the discussion is not an admission of being a poor negotiator, but rather recognition that changing the dynamic of the discussion in this way enhances the prospects of getting a satisfactory deal where bilateral negotiation is not getting over an impasse.

A conflict has many faces, various dimensions and many different ways to be resolved. People involved in a dispute will initially look at what they believe is their right to have or to obtain. After they establish this, the parties will think of the method they are going to use to get it. As we in the conflict studies field all know, all the methods to resolve a conflict are presented in the Continuum Model of Conflict Resolution. If we take a look at the methods ranging from avoidance to violent coercion, and letting aside the avoidance, it will seem right to choose a third party, such as a judge, who can impose a solution, but it is rarely as simple as that (Goodrum, 2013). Even if a conflict was brought in front of the judge, there is an opportunity to negotiate the settlement. That can be through direct talks (negotiation), or through a meeting in front of a third party (arbitration or mediation) and this is a method that frequently produces a resolution. The choice of one or another is conditioned not by the superiority of one method over

another, but by the particular structure of the dispute which makes a method suitable and adequate for an efficient resolution (Chereji, 2013).

The history of sports disputes resolved by litigation or arbitration, their negative effect on the entire staff, athletes, and fans demonstrates the need for the sports organizations to adopt a speedy and cost-effective alternative resolution technique, such as mediation. In my opinion, mediation is not the perfect remedy for sports disputes, but it could be a good alternative to the many national and international commissions with arbitration responsibilities, because it provides a safe, informal, and proper scene for open communication, which is currently missing in many sports relations. Mediation gives both parties the opportunity to express freely, in a confidential way, which can be used to strengthen both their working and private relationship. The neutral environment provided by mediation has proven to be very helpful and efficient in resolving disputes because of the trust it inspires. In short, the unique qualities of mediation prove that this method could be the right answer for resolving various disputes in sports. In the same time, being a professional mediator, I am aware of the limitations. As a mediator and a sports fan, I want some cases to be arbitrated at CAS or even in national courts. It is in the best interest of the competition for some athletes or teams to be punished and sanctioned for corruption or doping, and these cases must be public in order to stop this bad evolution of the sports industry. On the other hand, the use of this technique would be financially and emotionally rewarding for the business part of the industry, like the athletes' contracts or partnership between sports organizations and different sponsors. Parties involved in sports disputes often look for a quick, confidential, and cost effective resolution. Unfortunately, arbitration, even as a major pillar of ADR, became more and more institutionalized at various national and international levels. It became so formalized that now, at least in sports disputes, it is of more and more resemblance with the traditional litigation. Mediation is capable of meeting these needs and interests, having the potential to reduce the cost of time and resources to the benefit of all stakeholders involved, including athletes, clubs and federations.

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