Using Mediation to Resolve Sports Related Disputes

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However, the adversarial nature of litigation and arbitration frequently drives these protagonists (i.e. parties) further apart as they compete to win the case. A case won or lost often does not change the mindset of parties who continue to be adversaries and go on fighting in appeal after appeal. Motivated by the high costs, delays, stresses and uncertainties associated with litigation and arbitration, business is increasingly turning to mediation as the first resort.

In sports-related disputes, national and international sporting institutions, such as the Court of Arbitration for Sport, are now actively encouraging parties to attempt mediation at the first opportunity. The World Intellectual Property Organisation, which offers sports-related intellectual property dispute resolution services (sponsorship, merchandising, broadcasting etc.), also promotes mediation.

Nonetheless common misperceptions about mediation persist e.g. that it is a soft option or that it gives the impression that an athlete, coach or business is weak or exposed. As a result, opportunities to find the most satisfactory deal, while maintaining valuable business relationships, may be missed.

What is Mediation?

Mediation is a process by which a neutral person (i.e. not connected to either party to the mediation) assists athletes, team representatives, officials or business people, whose negotiations have reached a deadlock, to resume negotiation and work constructively towards a resolution of their dispute or difference.

In stark contrast to litigation and arbitration, which typically try to put the parties into the position they were in before the dispute, mediation endeavours to put as wide a spectrum of solutions as the parties are prepared to consider onto the negotiating table, and, through the process of assisting parties to better understand the other's underlying legal, commercial and personal interests, and to contribute to future and stronger business ties.

Relationship building is particularly important in sport where the athlete-team/coach relationship is an important factor affecting performance. This also is true in business where considerable time and money is spent building relations that ensure the long term success of the business. The detrimental effect on relations are a disincentive to enter into, or an adverse by-product of, litigation or arbitration.

Litigation, arbitration and mediation encourage parties to confront each other, however a skilful mediator can minimise any deterioration in relations and assist each protagonist to better communicate the legal, commercial and often personal issues at stake in the negotiation. The dynamic of discussion is primarily focused on assisting each party to generate a variety of options, which best address the interests of the other party and thus, identifies a deal satisfactory to both parties.

It is this dynamic, which assists athletes, coaches, officials and businesses to a better understanding of the other's underlying commercial and personal interests, to tailor future discussions to better meet these interests, where possible, and thus, preserve and strengthen relations.

Further, parties are considerably more likely to adhere to mediated agreements, than court or arbitral tribunal imposed outcomes, which are often subject to appeal after appeal.

What types of sports-related issues are suited to mediation?

Mediation is not a universally appropriate process. Litigation or arbitration is sometimes a better option. The key to the successful use of mediation is knowing whether and when to use it.

Circumstances where mediation may not be appropriate are when:

- negotiations are continuing and a deadlock has not been reached;
- there is need for a court protection, particularly in intellectual property cases where a party may need to protect or seize assets, which may otherwise be removed to frustrate any order of a court or arbitral tribunal;
- there is need for a binding precedent, which is particularly true in doping cases where an organisation will want to set a precedent for deterrent purposes, although sometimes mediation before the hearing may reduce the issues and facilitate a speedy trial; or
- a party has no genuine interest in settlement. However, care should be taken to avoid assuming that a party is disinterested in settlement. Most people do not enjoy litigation or arbitration, as it is generally frustrating and stressful, they are only interested in the outcome that litigation or arbitration can produce. If terms can be identified that satisfy their interests, settlement can be achieved.

In my experience, mediation is beneficial to most disputes provided that the timing of the intervention is appropriate and parties are properly prepared. This is an area in which lawyers have a key role to play as the better prepared party will typically do better at mediation.

Common concerns about mediation

There can be a mistaken perception that mediation is a “soft option”, that a successful business does not require assistance negotiating, or that the inevitable outcome is to “split the difference”.

- *Will I give the impression my case is weak?* It is assumed that mediated outcomes involve splitting the difference. In fact, mediation should give each protagonist a better understanding of the strengths and weaknesses of its case and thus, the best alternative to a negotiated settlement. In practice, it is uncommon for the parties to settle for less than can be achieved at litigation or arbitration, and often negotiated settlements can be achieved that are better than the range of outcomes that are available through litigation or arbitration.
- *Is mediation merely a delaying tactic?* Few parties engage in litigation or arbitration for the sake of it and would prefer to avoid the associated distraction and cost, particularly if acceptable terms can be identified at the mediation. Often outcomes that do not seem possible prior to the mediation, can be achieved at mediation as parties will gain a better understanding of the legal, commercial and often personal issues at stake.
- *Are there real cost savings?* This objection is often raised once a case has gone through the various trial preparation steps e.g. exchanges of statements of case, party statements, etc. Frequently an opportunity has been missed earlier in the case, when sufficient information was available to permit a realistic assessment of the legal case and thus, some legal costs could have been avoided. While the timing of mediation is essential, even if mediation is not attempted until shortly before trial the costs of doing so, compare favourably to the costs of trial.
- *Will I have to disclose my hand?* First, mediation is a confidential process so any information obtained should not be deployed in litigation or arbitration. Second, parties can leave discussions about the legal issues to the lawyers and focus on the commercial interest so that only the strengths of the case are disclosed. Third, parties can discuss weaknesses in private with their lawyers and/or the mediator and thus control the flow of information. If there is consensus in private that an acknowledgment of liability may break the deadlock and generate movement towards settlement, a party may give the mediator permission to share it.

However, these considerations while important reflect a key misconception about mediation. The focus of mediated discussions is always on commercial options, with litigation or arbitration only used if a negotiated agreement cannot be reached.

In this writer's experience, commercial matters that have been settled through mediation include:

- design and construction of sports facilities;
- sport, team, player and event sponsorship;
- sports franchise and partnerships;
- licensing, intellectual property and broadcasting; and
- player contracts and relations between athletes and other stakeholders.

Do legal representatives have a role?

The lawyer, whether external or in-house, has a vital role in sports-related mediation.

First, it is essential that a party entering into mediation have a proper understanding of its prospects and options if a negotiated settlement cannot be achieved. A party must have a thorough understanding of all the facts and risk factors affecting the case to make a fully informed decision on whether there is a better alternative to settlement offers made at mediation.

Second, the lawyer may be required to attend the hearing to demonstrate to the other party that the legal position being presented has substance and needs to be taken seriously. Effective presentation skills are vital to demonstrating credibility and concealing weakness.

Conclusion

In the Middle East, there has been huge investment in bringing sports into the region. In a recent report by Repucom (a provider of sporting intelligence to business), they were quoted to say *"The Middle East and Asia are emerging as global giants in sports sponsorship and ownership and this trend shows little signs of slowing"*. Repucom also concluded that the UAE is the largest single-jurisdiction source of title sponsorship funding in professional sports globally, with 37% of global investments in sport coming from the UAE. According to a PwC report, the EMEA (Europe, Middle East and North Africa) market is currently ranked as the second largest sports market in the world, and is worth an estimated US$44.8 billion, which represents nearly a third of the global market. In such a valuable and commercial industry, the types of dispute that can arise are varied and often involve complex legal issues. Reputation and relationships are key to maintaining a place in this market. Mediation should always be an option for any dispute given its primary advantage is to encourage parties to focus on devising commercial solutions that best meet their interests and preserve relationships, with litigation or arbitration prospects informing only whether there is a better alternative to a negotiated offer.

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