

Early mediation in sports disputes equals efficient outcomes

Published 08 June 2020, by Jeffrey Benz



The current pandemic has created tremendous disruption across all industries, including in sports. You may not think immediately about the effect of the pandemic on sports, but we have all been without the distraction of watching our favorite teams now for weeks and likely for many weeks more to come. Sports is an industry and is dependent on live events occurring, which is anathema to social distancing and lockdowns. Beyond just the effect on games or matches being played, there are a large number of moving parts in the sports industry that are affected by a change in event and game schedules. These include, just as examples:

- Athletes are paid to play and if they do not play, they may not get paid or they may face a reduction in payment if they do not have a guaranteed contract.
- Sponsors pay for the right to be associated with events, and if those events are postponed or are not occurring then the sponsors are not getting the benefit of their bargain.
- Construction has halted on building new venues.
- Anti-doping laboratories have ceased processing samples taken before people were forced to work at home.

The list of effects is a long one. When we emerge from the current situation, the world of sports will be changed. And disputes are undoubtedly going to increase, particularly disputes that may have been put on hold while the world has been paused. Obtaining the assistance of a trained and neutral third party (a mediator) is often the most efficient method to resolve these disputes quickly and effectively so that industry participants can get back to business.

We all know what mediation is; in a nutshell, the use of an experienced third party to assist parties in conflict with resolving their dispute. No one walks away from a mediation with the outcome imposed on them; mediation is a necessarily consensual activity with a mandatorily consensual result. The mediator has the power to try to persuade and convince the parties of finding common ground, but the mediator has no power to impose any result. Mediation may be required by a contract as a precursor to litigation or arbitration, or it may be strongly encouraged by a court to keep crowded dockets at bay or to entice parties to resolve their cases cost-effectively. Mediation may also be the result of the parties and/or their counsel attempting to find a cost-effective resolution to a dispute that might be on the verge of blossoming into a much bigger dispute or that might include reputational risks for a party or both parties. The timing of mediation is a question capable of as many answers as people have opinions on fundamentals like the weather or preferred style of barbecue, but mediation timing, and outcome, is fully controlled by the parties.

In this article, the author posits that in sports disputes, early-stage mediation is always worth the effort, even though its early-stage success, in certain kinds of cases, may be dependent on other factors in the dispute and their relative timing. Specifically, it looks at:

- The benefits of early mediation efforts;
- Why early mediation is useful in sports disputes; and
- How to pick the right early-stage mediator.

The author discloses at the outset that he is a mediator and arbitrator with JAMS, which is a leading provider of mediation (and arbitration) services in the United States (JAMS administers over 10,000 mediations and over 6000 arbitrations annually). The points made herein draw on the author's experience and perspective not only as a mediator in the field of sports for many years but also as a CAS arbitrator, a commercial mediator and arbitrator across several hundred cases, and as a general commercial dispute resolution practitioner and advocate.

Benefits of early mediation efforts

For purposes of this article, early mediation is mediation occurring before legal proceedings have been filed in court or in arbitration, or occurring just after that filing and before any meaningful procedural activity occurs in a filed case.

In the author's experience, the following are some of the key benefits and detriments of early mediation (this list discusses benefits of early mediation, not just mediation itself, the latter having a much longer list of key benefits):

- Through mediation, a party is likely to achieve the largest savings in fees, costs and time.
- The parties are less likely to have become wed to their positions, but the issues between the parties may not be well defined, and the parties may not have reached a complete or accurate assessment of the strength of their own cases.
- The parties have greater incentive to settle to avoid the time, stress and – most quantifiably – the costs of litigation (particularly the legal costs).
- The relationships are more likely to be preserved, which can be important in cases where the parties need to deal with each other once the dispute is resolved.
- The parties may not have disclosed or exchanged all relevant documents and information, making it difficult to evaluate the strengths and weaknesses of each other's case with similar accuracy and making it more difficult to evaluate arguments made by the opposing party in the mediation and counter them effectively. This can be cured by the parties agreeing to undertake a short-form disclosure exercise similar to that used at court before the mediation or each party can make a pre-mediation written submission shared with the other side that includes the documents they think best supports their case.
- The earlier the mediation, the greater likelihood that confidentiality can be maintained, which can be particularly important if the dispute is high profile and risks hitting the press.
- Usually, early in a dispute's life cycle there is more informality and flexibility accepted by the parties as a mechanism of resolving a dispute, before the formality of a dispute proceeding is underway or before the parties have become entrenched in their positions.
- In the author's view, and as documented in other articles, there is evidence to suggest that some lawyers may have little incentive to resolve a case early, putting lawyers in a different interest position than their clients, so it takes a strong client, sometimes, to direct early mediation.
- With the Singapore Convention (in summary, the mediated settlement agreements equivalent of the New York Convention for enforcing arbitration awards internationally) entering into force in September 2020 (with 52 signatories already since its opening for

signature in August 2019), mediated settlement agreements (which essentially take the form of a contract between the parties) will be just as enforceable, and as easy to enforce, as arbitration awards are worldwide.

Even if it is unsuccessful, early-stage mediation may offer parties the opportunity to narrow or refine the issues between them with the guidance of an expert in their industry. These principles might apply generally to all cases, but they have significant effects in resolving disputes in the sports and entertainment industries.

On the question of how early is early in terms of mediation, the answer can be earlier than you might otherwise think it to be. There is no reason parties at impasse in negotiation cannot employ the use of a mediators to facilitate business negotiations, in other words you can use mediators to assist in negotiating the deal just as you might use them for later arising disputes. This is not some pie in the sky rambling of a peacemaker, but it actually has precedent. The village elder concept across most cultures has been with us for centuries and those elders were often instrumental in solving local disputes at nascent or developing dispute stages. This practice is even embodied in a new program at JAMS for early dispute facilitation¹. Recognizing this historical practice in Chinese business, the Shenzhen Court of International Arbitration [offers this service](#) as one of many among its offerings².

Why early mediation is useful in sports disputes

The sports industry encompasses many different participants, from players and clubs to sponsors and broadcasters. It is so broad that not everyone in the industry has the same interests. But some types of sports disputes can highlight the benefits of early mediation.

In sports-related commercial disputes, the parties have generally engaged in arm's-length transactions. For example, sponsors of large sporting events have armies of lawyers working with armies of other lawyers. These lawyers are drafting extensive agreements defining their relationship during the term of the sponsorship.

In labor and employment cases in sports, which arise mainly in team sports, the parties are in a commercial relationship (or in the case of U.S. professional leagues, a labor law-required

¹ See: <https://www.jamsadr.com/adr-strategies>; and also Gary Birnberg, 'The Business Case for Neutral Facilitation in the Days of the Coronavirus (COVID-19)', [jamsadr.com](https://www.jamsadr.com), 23 March 2020, last accessed 8 June 2020, <https://www.jamsadr.com/blog/2020/the-business-case-for-neutral-facilitation-in-the-days-of-the-coronavirus-covid-19>

² Shenzhen Court of International Arbitration, Negotiation Facilitation, <http://www.scia.com.cn/index.php/En/index/serviceinfo3/sid/32.html> (last accessed 8 June 2020)

relationship). In this instance, one party offers its services to a particular team to participate in a particular sport for a fixed period of time and compensation. Like many employment cases arising after the employment relationship has ended, maintaining the relationship is generally not as important as getting a viable result.

In both of these settings, the opposing parties often come to the table with hard feelings after a dispute affecting their commercial livelihoods has arisen. As with any dispute, the parties want to have their positions vindicated. Sometimes in the case of international football and basketball disputes, the teams are also motivated by other financial factors that they might benefit from, like the time value of money when they do not pay (the longer you sit on a large cash sum the more you can reap its benefits, so sometimes parties are just playing for time). Discussing settlement early has in the author's view the benefit of avoiding entrenched positions and allowing the parties to move on to their new working relationships with others.

Occasionally, a commercial sports dispute arises in which the parties want and need to continue working together after the dispute is concluded. For example, many sponsorship agreements for large sporting events contain stepped dispute provisions requiring mediation as one step on the road to final resolution, even if a dispute or commercial disagreement results in or arises from termination of the agreement. For example, this may arise if a party has been allocated a commercial sponsorship category for a large event and, due to advances in technology, an adjacent category is sold to another sponsor. The original sponsor understood the adjacent category was covered by its sponsorship agreement, so a dispute arose. In these cases, early mediation permits the parties to move on or through their relationship without too much additional rancor.

In sports-related disciplinary or governance disputes, the dynamic is different. The parties are not in business together through voluntary commercial transactions; they are thrust together through law or economic necessity. There is generally only one sports governing body for a particular dispute, which everyone must recognize. In this environment, where the parties will have to continue interacting with each other after the dispute is resolved, early mediation not only can save time and money, but it can also preserve relationships.

For example, in cases arising before Fédération Internationale de Football Association (FIFA), the governing body for international football (or soccer, for the American audience), prior to arbitration, the parties will have fought extensively about their dispute in various forums. The process includes participating in one or two proceedings before various FIFA administrative tribunals (one is appellate), filing an arbitration demand and hearing brief with the Court of Arbitration for Sport and waiting for a hearing to be set and an award to be issued. From the start

of the dispute to the final award, the process could take quite a while, costs tens of thousands of dollars over and above the underlying financial issue, and causes the parties to dig in on the perceived strengths of their own positions. Early mediation offers an opportunity for early resolution, significantly reduced costs and a timely result that allows the parties move on without the distraction of waging a protracted battle with the other side.

Many sports-related employment, sponsorship, discipline and governance disputes are public. This is distinguished from disputes in other industries, where there is often less public interest and a greater focus on confidentiality. The results of some sports-related disputes, by their terms, are necessarily made public. This factor should be considered more significantly. Early mediation can assist in resolving these kinds of cases before public disclosure occurs, or certainly before any sordid details become public.

Finally, there is the cost factor for arbitration. The default dispute resolution mechanism for sports is arbitration. While generally accepted to be less expensive than litigation, it can still have significant costs and fees. For instance, lawyers need to prepare and present a case, typically with at least two counsel on each side. Additional expense will result from using three arbitrators, with each party potentially responsible for half of their fees as well as half of the institution fees, or more if the fees are shifted by the arbitrators in the final award. This can be significant even with the cost efficiencies that are built into arbitration. On the other hand, early mediation is a more cost-effective alternative in terms of mediator time (usually only a single day or less), having only one counsel per side and minimizing lost time for parties and their principals. The advantages of early mediation, even with less-than-complete information or evaluation, are self-evident.

Even if early mediation is unsuccessful, it can assist parties in narrowing the issues between them in a litigated proceeding or set up a second round of mediation now that the battle lines have moved closer together.

Having said all of this, there still remains seeming reluctance to mediate most sports disputes, at least internationally. There are many reasons suggested for this, including that sports is inherently distributive, with one party achieving success by winning, and all others are losers (i.e. there is little room for a win-win). In addition, international sports is dominated by entities based in civil law jurisdictions (those of the continent of Europe), represented by civil law lawyers, where mediation is not widely taught or practiced (though around for centuries across many different cultures, mediation grew up in the common law systems in modern times, starting primarily in the United States 35+ years ago to deal with crowded dockets, and spreading to England/Wales, Australia, New Zealand, Ireland, and Nigeria, though the EU has recognized the

benefits of mediation in its Directive 2008 52/EC encouraging the use of mediation in cross-border civil disputes). Also, many believe that disciplinary disputes, like doping, matchfixing, or other forms of disputes involving punishment, cannot be mediated; this author thinks that is a shortsighted and formalistic view given that even criminal cases in many jurisdictions can conclude through a negotiated plea bargain. In the author's view, there is considerable room for greater use of mediation, particularly early stage mediation, in international sports practice, and the use of it could benefit the dispute resolution process for many of the reasons outlined above.

How to pick the right early-stage mediator

Picking your early-stage mediator is of paramount importance. You can find mediators online through a simple search, and many organizations have lists of mediators that they promote. For example, you can go to the Court of Arbitrator for Sport ("CAS") website (www.tas-cas.org) where they maintain a list of CAS mediators, or you can go to the JAMS website (www.jamsadr.com) where there are hundreds to choose from, or try Sport Resolutions in the UK (www.sportresolutions.co.uk), and other institutions offer similar services. Mediators do not have to be legally trained so you are not limited to lawyers or barristers admitted to your local jurisdiction, though many mediators are legally trained (in addition to being trained as mediators). One important point to emphasize is that you should select a mediator with requisite *industry experience*, not just legal experience. Consider the following:

- If you have a sponsorship dispute, enlist a mediator who has experience managing or drafting sponsorship agreements. He or she should know how they work; the common terms and practices; how the rights, obligations and money flow; and how the parties relate.
- For a sports-related governance dispute, find a mediator with experience in that realm.
- A sports-related discipline dispute requires a mediator who knows the obligations and rights of athletes and/or coaches. Knowing how those are dealt with in the particular sport (or at least in sports in general) is helpful.
- In sports-related employment disputes, select a mediator who is knowledgeable about how those relationships are defined contractually, the rights and obligations of the parties and any greater regulatory issues that might govern those agreements (such as FIFA rules with respect to soccer cases), and better still find one who has experience hiring and firing employees.

A sports mediator should not just be an outside lawyer who has been involved in sports cases. If you want a truly effective business solution to your dispute, you should look for a mediator who has administered the business of sports and has a sense of how the industry works. If you want

to have a legal discussion about rights and obligations in sports, that same person, if legally trained and qualified, is a good candidate for those disputes as well. As with arbitrators in sports cases, if you want an effective and efficient result, look for someone steeped in the business and law of sports and sports disputes, with a well-rounded understanding of the business of your client and how parties organize and conduct themselves in the sports industry.

Your mediator should come with the requisite mediation credentials and experience. A professional mediator has a high degree of training in mediation and its techniques and has a large number of paid mediations under his or her belt. Simply stepping off the bench (having left wearing the robes that made you persuasive), or coming from a law firm or barristers chambers (with a focus on law and facts), does not qualify you as a mediator. You have to be able to match the ability to muster the facts, the law, and industry context and competence with the skills of persuasion, knowledge of psychology, and being steeped in the craft of mediation to be able to accomplish a final agreed result that the parties can and do live by. The work of a mediator is difficult, and this author thinks it is far more difficult than the work of an arbitrator, which is why parties should seek the requisite training, experience, and context in their mediator to ensure a successful go of the process.

Conclusion

Early mediation in the sports industry offers real benefits to parties. Reduced costs, limited hurt feelings and damage to personal relationships, minimized distraction and a contractually documented final result—all with relatively minimal time and money expended.

Even if a case does not settle at mediation, the cost of a one-day early mediation is nominal compared to that of a fully litigated case and the groundwork undertaken, if the early process does not succeed, can be reused in later efforts to resolve the dispute.

.....

Author: Jeffrey Benz



Jeff is an accomplished arbitrator, mediator and certified electronic discovery specialist with JAMS in Los Angeles and London and is a Door Tenant at 4 New Square Chambers, London.

Jeff started his law practice in San Francisco, first with a small maritime and admiralty firm and then with a major international law firm (Coudert Brothers) as an antitrust, commercial and IP litigator. As a former General Counsel of the United States Olympic Committee (where he was responsible for all of the legal work (commercial, regulatory, governance, and otherwise) of the world's largest and most successful National Olympic Committee), and other leading sports entities (including a stint as a California licensed professional boxing promoter, and separately as professional beach volleyball executive), and as a former athlete, Jeff's sports credentials are without compare, though sports disputes form only a part of Jeff's overall dispute resolution experience and practice.

A Court of Arbitration for Sport arbitrator and mediator for over 20 years (many of his cases would be characterized as leading or high profile cases, particularly in doping-related matters), Jeff has acted as arbitrator or mediator or counsel in a wide variety of sports, including, among others, archery, athletics/track and field, badminton, basketball, biathlon, bobsleigh, boxing, canoe and kayak, cycling, equestrian, figure skating, football/soccer, golf, gymnastics, ice hockey, rowing, rugby, sailing, shooting, skateboarding, skeleton, speedskating, surfing, swimming, table tennis, taekwondo, team handball, tennis, triathlon, volleyball and beach volleyball, water polo, and wrestling, and in cases involving complex disputes and transactions involving sponsorships, film financings and production, technology, licensing, and live events in the sports and entertainment industries. Jeff's wide and varied subject matter expertise in sports includes disputes involving commercial/licensing, governance, discipline, doping, matchfixing, selections, transfers, employment, rulemaking/regulatory, safeguarding, and technology issues.

In 1998-99, Jeff was one of five members of the independent Mitchell Special Bid Oversight Commission, headed by former US Senate Majority Leader George Mitchell, which was charged by the USOC with investigating allegations of vote buying, influence, and bribery in the bid for the 2002 Olympic Winter Games in Salt Lake City. The recommendations made by the Commission were adopted in whole by the USOC, and the International Olympic Committee adopted many of them when it reformed its Olympic Games bid process.

Jeff is Chair of the National Collegiate Athletic Association's Infractions Referral Committee and is a member of its Independent Resolution Panel. He is a member of the World Athletics Disciplinary Tribunal and is a Sport Resolutions arbitrator and mediator. He is also a member of the doping panels for the PGA Tour and Ladies Professional Golf Association.

He is a long-time member of the Sports Lawyers Association Board of Directors and former chair of its International Committee, and he is a member of the National Sports Law Institute, both of which are based in the US.

Jeff is a CEDR accredited mediator, an IMI certified mediator, a Fellow of the Chartered Institute of Arbitrators, and a Fellow of the College of Commercial Arbitrators.

He has extensive practical experience (as both counsel and neutral) in commercial arbitration, mediation, early neutral evaluation, and other forms of non-court dispute resolution. He is an active, appointed, member of several panels of arbitrators and mediators including the American Arbitration Association, JAMS, Hong Kong International Arbitration Commission, Beijing Arbitration Commission, China International Economic and Trade Arbitration Commission (CIETAC), Shenzhen Court of International Arbitration, London Court of International

Arbitration, International Chamber of Commerce, Court of Arbitration for Sport (CAS), and formerly the Rugby Football Union (RFU).

Jeff has taught dispute resolution, arbitration, mediation, and sports dispute resolution as an adjunct professor at the law school at Los Angeles-based Pepperdine University, and he contributes regularly to the literature and international speaking on dispute resolution and sports law.

Since 2013, Jeff has been named annually as one of a handful of worldwide professionals in the Who's Who of Entertainment and Sports Law, where he is one of the few neutrals so recognized in the field. In 2016, the BBC noted he is "widely regarded as amongst the most experienced judges" in world sport. According to Who's Who Legal UK Bar, where he has been listed since 2016, he is "widely recognised for his first-rate arbitration practice" and clients note he is 'in a class of his own' when it comes to complex sports disciplinary disputes."

He is qualified as a US lawyer as a member of the bar of the states of California, Colorado, Hawaii, and New York, and a number of United States federal district and appellate courts, and he is qualified as a barrister in England and Wales. Jeff has AB and MBA degrees from the University of Michigan and a JD degree from the University of Texas School of Law. Jeff also attended a semester of law school at Queen Mary University of London and the Institute of Advanced Legal Studies, and started his professional career as an intern in Lloyd's Claims Office, in London. Having lived in Pittsburgh, Detroit, Austin, San Francisco, Denver, and Los Angeles, Jeff now lives in London, splitting time in the US.