

# Mediation as an alternative method of resolving disputes before applying to international sports arbitration courts

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**ABSTRACT.** *Objective.* Today, one of the most important aspects in international sport contracts is how to resolve disputes with regards to understanding the inter-operation or acting agreement provision. Sport disputes influence speed, privacy information, investment and financial security of contract performance. One of the most effective alternative dispute resolution ways is "mediation", as a quick, less hassle, and cheaper dispute resolution mechanism, and the best alternative dispute resolutions before applying sport arbitration courts.

In this article, differences between the dispute and conflict will be discussed. The following methods will be explained: using silence technique; critical thinking skills; complex problem solving. Additionally, some practices of mediation as an effective dispute resolution method in sport will be provided.

*Conclusion.* Mediation shows a way to participate in the adversarial process without being an adversary. It requires a sport mediator to use many skills in order to help competing parties put the controversy behind them. The mechanism of mediation has different regulations, processing documentation, and conditions comparing mediation before commercial or investment arbitration courts. Also, for sport mediation, the mediator needs to have professional understanding and knowledge in the specific area of sport. An important condition for mastering the professional competencies of a sport mediator is the presence of a mediator's constant practice of dispute resolution.

In fact, mediation as a mechanism of sport dispute resolution is a gentle way which keeps the friendly relationship between parties and, this method of sport dispute resolution follows the fundamental principles of Olympism at the Olympic Charter.

**Keywords:** mediation, alternative dispute resolution, ADR, international arbitration, Olympic Charter, Olympism, sport arbitration, sport and cancellation.

## Медиация як альтернативний метод вирішення суперечок перед зверненням до міжнародних спортивних арбітражних судів Сем Ношадха, Жанна Кушнір

**АНОТАЦІЯ.** Одним з найважливіших аспектів міжнародних спортивних договорів є розуміння сторін порядку вирішення суперечок у разі їх виникнення. У сучасному світі спортивні суперечки негативно впливають на швидкість виконання зобов'язань, конфіденційність інформації, інвестиції та фінансову безпеку виконання контрактів. Одним із найбільш ефективних видів альтернативного врегулювання суперечок є медіація як більш швидкий, менш витратний, позасудовий метод вирішення спору із залученням посередника (медіатора), який допомагає сторонам конфлікту налагодити процес комунікації і проаналізувати конфліктну ситуацію таким чином, щоб вони самі змогли обрати той варіант рішення, який би задовольняв інтереси і потреби усіх учасників конфлікту.

У статті розкрито відмінності між поняттями «суперечка» і «конфлікт», проаналізовано поняття «медіація» як альтернативний метод вирішення спору до звернення в міжнародні спортивні арбітражні суди, а також вимоги до компетенції медіатора, такі, як нейтральність і неупередженість, висвітлено техніки, навички і здатності, якими повинен володіти професійний спортивний медіатор. Підкреслюється, що необхідним критерієм компетенції спортивного медіатора є володіння професійними знаннями у галузі спорту, наявність постійної практики вирішення спорів, що дозволяє віртуозно опанувати мистецтво ефективної медіації. Представлено деякі практики медіації як одного з ефективних методів вирішення спортивних суперечок.

*Висновок.* Медіація як ефективний метод вирішення спору із залученням посередника відповідає загальним принципам олімпізму в Олімпійській хартії та дозволяє забезпечити мирні відносини між сторонами конфлікту.

**Ключові слова:** медіація, альтернативне вирішення суперечок, міжнародний арбітраж, Олімпійська хартія, олімпізм, спортивний арбітраж, спорт, примирення.

**Introduction:**

Today, one of the most important aspects in international sport contracts is how to resolve disputes with regard to understanding the interoperation or acting agreement provision. Sport disputes influence on speed, privacy information, investment and financial security. When creating such regulations and agreements, we must consider the mechanism that effects such regulations on the flow of future relationship.

**The difference between dispute and conflict is [1, 2, 3]:**

- The dispute is a short-term disagreement that can result in the parties reaching some sort of resolution; it involves issues that are negotiable.
- In simple way, when there is an agreement between parties and any disagreement happened, it result a dispute.
- Conflict, in contrast, is long-term with deeply rooted issues that are seen as “non-negotiable”.

In this article mediation as a mechanism for sport dispute resolution is discussed.

In recent years, as a response to this need, we have seen the formation and use of new methods for peaceful settlement of disputes. These methods are known as Alternative Dispute Resolution (ADR) [3].

The ADR typically refers to processes and techniques of resolving disputes that fall outside of the judicial process. In such processes, the person(s) who resolves a dispute is formed based on determination of the parties involved and often heard by a “private person(s)/ private party (ies)” who are selected and agreed on by the parties.

Methods of the Alternative Dispute Resolution (ADR) in international law are ways in which the parties of an agreement in case of a dispute replace state courts (Judicial court) with resolution via impartial “Third Person(s) or Third Party(s)”, whom the parties involved, have selected.

These methods are non-judicial and non-governmental in nature. The characteristics of these methods are flexibility, rapid, and low cost dispute resolutions. Additionally, the parties have the right to choose trusted and skilled person(s) for negotiation and conversation for dispute resolution in a friendly and confidential way.

One of the most effective Alternative Dispute Resolution procedures is “mediation”. The fact that many parties are looking for a soft kind of judgment as well as a quick, less hassle, and cheaper dispute resolution mechanism, caused for calling the mediation method one of the best alternative dispute resolutions before applying international sport arbitration courts.

In this article, mediation before applying international sport arbitration courts, and also challenge skills seeming to come more naturally as a part of normal competence, will be discussed.

Mediation in sport is an art, the “art of changing the parties positions, with the explicit aim of acceptance of a package put together by the parties, with the mediator

as listener and the suggestor, and the formulator of a final agreement to which both sides have contributed”.

More formally defined, mediation in sport is an interactive, dynamic, structured process where a neutral third party regulates disputing parties in resolving disputes through the use of specialized negotiation and communication techniques. All participants in the mediation are encouraged to actively join in the process. Mediation is a type of “party-centered” process in that it is pointed primarily upon the rights, interests, and needs of the parties. The sport mediator uses a wide variety of techniques to lead the process in a constructive direction and to assist the parties to find their optimal solution. A mediator acts as a facilitative in that they manage the interaction between parties and facilitate open communication. Mediation is also effective in that the mediator analyzes issue(s) and relevant norms (“reality-testing”), while refraining from providing prescriptive advice to the parties (As an example: “you should do ...”).

In a simple way, mediation is a private and voluntary method for dispute resolution, through which the third party impartially and directly encourages the parties towards dispute resolution.

Mediation is a non binding process, and parties may enforce the mediation decision voluntary. Parties for applying mediation must agree to terms and conditions, as well as mediation as an Alternative Dispute Resolution method before applying international sport arbitration courts, in sport mediation agreement or clause in their main contract.

A mediator by ending a mediation process issues, a mediation decision and it shall be provided to all parties of the mediation process. The mediation decision is a non binding decision but may be used as a proof in international sport arbitration courts. The United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the “Singapore Convention on Mediation”) [4] may be considered as one of the main and important conventions regarding mediation in the international arena.

The examination procedure is informal and unofficial, and the mediator assists in clarifying the dimension(s) of sport dispute. The mediator organizes a meeting for the parties’ negotiations about the dispute subject, and recommends possible and conceivable resolutions. Therefore, mediation is possible in a friendly and productive atmosphere. This is not a binding judgment for the parties involved. The mediator just recommends and tries to prepare a friendly atmosphere for compromise. Examination via mediation is quicker and less expensive than the international sport arbitration courts process. So, at the first most parties agree to mediation for sport dispute resolution and if the mediation will not work, they try the arbitration method.

When mediation first came on the scene, the legal profession treated this craft with skepticism. Now it is universally accepted as being eminently preferable to litigation in the vast majority of cases. Claimants like it because they

receive a faster result. A defendant likes it because mediation as a way of dispute resolution closes the file and avoids claim expense. One of the benefits of mediation is its effect on the parties. They can participate actively in creating a solution, an excellent tool to help the parties feel invested in carving out a resolution and they each exercise a balance of power. Unlike a trial, participants get to look each other in the eye, communicate directly or through lawyer and communication, demonstrate analytical skills which may lead to an outcome where all sides feel invested even if neither side walks away feeling like either a winner or a loser.

Good mediation techniques, however, are more difficult to master than many people believe. Practically, mediation sessions realized that mediators must possess a wide range of skills.

Some advantages of mediation are: 1 – cost; 2 – confidentiality; 3 – control; 4 – compliance; 5 – mutuality; 6 – sup-porting.

One of the most developed and important skills of a sport mediator is the ability to actively listen to what a party is saying and to note what the party is not saying. Active listening is important not just for the mediator but also for the parties. A skilled sport mediator should take steps to ensure the parties are hearing and responding to each other. Otherwise, the discussion will be like two boats passing each other in the night.

It must be considered that, the habit of preparing speech by a mediator in response to what the speaker was saying is a strong and difficult mistake to correct. Because, this makes a mediator miss some of what the speaker is saying, and the mind will be busy of thinking instead of listening and finally analyzing to make a correct decision.

In order to improve listening skills as a mediator, speeches must be listened to with a mediator's eyes as well as a mediator's ears. A mediator should not just rely on the words a speaker uses; but, a skilled sport mediator needs to note that the tone of voice, eye movements, facial expressions, hand gestures, and body language are all important parts of the message the speaker wishes to convey.

In addition, mediators need to quiet their mind in order to listen without judging. When the mediator tries to listen attentively, often they make judgments or form opinions about the person or what he/she is saying rather than listening with a completely open mind.

Asking open-ended questions can provide a speaker with an important opportunity to speak more comprehensively in expressing their views about the facts and evidence in the case. Also, cross examination employs leading questions to get the point across. But open-ended questions during mediation gives the parties a better opportunity to say things and make important points in their own words. This is important because it gives the parties the feeling that they have said what needs to be said. The best questions are short and simple!

#### **Using silence technique:**

Silence may convey a willingness to listen, a desire to understand and a willingness to respect the opponent's position, even though the quiet listener is the opponent. The use of silence as a tool in mediation is part of how mediators usually communicate with people, in general. So, a skill mediator needs to develop this technique, along with good listening, as a way to demonstrate respect for the speaker and their comments.

Paraphrasing or restating what the speaker has said is another powerful tool. Good listening enables a person to better paraphrase. A paraphrase should always be shorter than the speaker's own statement and should mirror, but not parrot the speaker. Paraphrasing should not show disrespect to the speaker, it must be observed and carefully rephrased by adjusting use of language so that it may sound confident and natural.

#### **Critical thinking skills:**

A skilled sport mediator must develop critical thinking skills, the use of logic and analytical reasoning to identify the strengths and weaknesses of alternative solutions or approaches to the problems. To strengthen critical thinking skills mediator must think creatively and keep in mind that often the parties have emotions connected to the controversy, and emotions sometimes prevents parties from being logical and analytical. This puts more pressure on the mediator to lead the parties pass their emotional roadblocks to common ground where settlement becomes possible. This is a challenge for the sport mediator – not to let the parties emotions distance the mediator from critical and creative thinking.

#### **Complex problem solving:**

To enhance the settlement oriented mediation, the sport mediator should assess the conflict between two parties and then reframe their positions. This requires the mediator to have a calm state of mind so that he/she may do the critical thinking needed to untangle the complicated parts of the controversy and reframe the positions of the parties.

Simplifying the controversy is sometimes key to getting the parties to common ground. The mediator may read nonverbal communication easy and with interest. The mediator should gain the knowledge of how a mediator connects and builds better relationships with parties. The mediator must observe how parties and lawyers are interacting, and conclude that when a party's nonverbal signals match up with the words they are saying, they increase trust, rapport and clarity. When they don't, they generate mistrust, tension and confusion.

Standing in other's shoes is easy to grasp and apply. This is the technique as a mediator in the role play. The mediator shall take each party to "step into the other's shoes" and view the issue from that perspective. Parties tended to see the facts they thought they knew - events and dispute, in a different light. Consequently, this take parties to understand why the other was interpreting the same situ-

ation differently. This allowed them to examine the dispute from a different perspective, therefore helping them to understand that the other party's position may be not be as unreasonable as first assumed.

Mastering the emotions raised by the facts and the nature of the controversy is the most challenging element of successful mediation. How people deal with their emotions varies from culture to culture. Nevertheless, a sport mediator must acknowledge that strong feelings play a prominent role in conflicts universally. Knowing how to recognize the presence of strong feelings and getting the parties to acknowledge how these feelings can damage the chances of successful mediation is truly a skill needed to acquire.

Getting the parties to understand and accept how emotions affect perception and how it can influence negotiations is a challenging task. However, there are guidelines to improve how to address the issue. Maintaining eye contact with the speaker is the key to understanding emotion. It demonstrates that the sport mediator heard the message. The mediator must listen to the story, and once detecting strong emotions, needs to acknowledge every person's feelings as being equally important. Maintaining neutrality is vital. Mediator must be empathetic and express appropriate sympathy, but give no appearance of taking sides, both in separate session and in the joint session. Skilled sport mediators discuss emotions rather than ignore them. Any discussion must be appropriate and respectful.

Another way to work with emotions is to solicit an apology. Often, apology reduces tension and eases relationships. Apologies are undeniably necessary in a situation where the goal is to repair an ongoing relationship. But according to some cultures, efforts to use apologies properly, the mediator better understand when an apology can create more tension rather than reduce it.

Using breaks as a way to calm parties down and allow emotions to dissipate is also important. The mediator should model appropriate behavior as to use well-modulated tone, remain seated, and should not raise their voice.

One more excellent way and important skill to deal with emotions is to reframe it; especially, since it may be so important to a good outcome. Reframing requires positive language. When reframing, the mediator must learn how to identify the reason for the disagreement and what is important in reaching a solution. When reframing, identify the reason for the disagreement and what is important in the solution. Even with understanding of how emotion affects perception and negotiation, dealing with emotion in mediation is challenging. However, there are some steps to improve to address the emotion. Maintaining eye contact with the speaker is the key to emotion understanding. It demonstrates, that a mediator heard the message. The mediator (she/ he) has to listen to the story and once they recognize strong emotion, must acknowledge every person's feelings as being equally important. Appearing neutral is vital. Sport mediators must be empathetic, and express appropriate sympathy, but not give the appearance

of taking sides, both in caucuses and in the joint session. Try not to cross-examine the parties. Professional mediators discuss emotions rather than ignore them. However, any discussion must be appropriate and respectful. Another way to work with emotion is to solicit apology. Often, apology reduces tension and eases relationships. Apologies are undeniably necessary in situations where the goal is to repair an ongoing relationship. Notwithstanding, an apology at the wrong time or by the wrong person may be demeaning and inappropriate. Another way to achieve balance is to take breaks to allow people to calm down and allow emotion to dissipate is one more skill recommended and found quite challenging to manage.

Finally, to understand important role of the mediation in sport as an effective dispute resolution mechanism, the following practices as sample may be considered:

On 2011 Judge Susan Richard Nelson of United States District Court, who heard arguments in the players' request for an injunction to stop the lockout, returned Players and National Football League of the United States [5] to mediation and appointed Arthur J. Boylan, the chief federal magistrate judge in Minneapolis, as the mediator [6, 7].

One of the greatest mediation consequence in sport disputes was doubtlessly dispute regarding to labor during the National Hockey League (north America) 2012 which meditation ended deadlock and whole the season was averted only after the parties met in mediation room as the season could cancel because of this season. 16 continuous hours of negotiating, with the assistance of Mr. Beckenbaugh, Deputy Director for Mediation Services for the Federal Mediation and Conciliation Service (Washington D. C.), a tentative deal was reached on a new collective bargaining agreement (CBA) to end the National Hockey League (NHL) lockout. This was especially appreciated by the sports journalists and everyone involved in the negotiation [8].

On 2011 the Football Arena League of Australia players were headed toward mediation to resolve a dispute over division of revenues after an historic meeting of players in five venues around the country [9].

On 2011, Maryland was required by state law to provide mediation possibility to assist obtain a new modeling agreement between Rosecraft Raceway and experienced racing's representatives, if the Parties were not able to negotiate an agreement privately [10].

### **Conclusion**

The concept and exercise of sport mediation is well interesting enough. Mediation shows a way to participate in the adversarial process without being an adversary. It requires the sport mediator to use many skills in order to help competing parties put the controversy behind them and move on with their lives. To be a skilled sport mediator, the practices of daily life must be considered and must be put together to get people thinking about settlement.

Active listening, reading people's words, tone of voice, eye contact, facial expressions and body language are

skills that help us be successful people in mediation and as well as every part of life. Holding off on judging a situation until you have heard all, where there are things to know about a case makes sense in all walks of professional and personal life, but a mediator should consider how this and other qualities can make for excellent mediation results.

Just as asking questions in a correct way may open up a cache of information in any social interaction; doing so in mediation also provides answers in which they help the speaking party feel better about being able to tell their side of the story completely. Paraphrasing and the skillful use of silence as a path to critical thinking in getting the parties and the sport mediator to use critical thinking to better understand and explore the essentials of the issues can become powerful tools to the mediator. Empathy produced by the “standing in the other’s shoes” can make the exchanges between the parties more respectful and, consequently, more productive. Getting the parties to examine emotions generated by the dispute and having them understand the effect those emotions may have on the rational analysis often needed for settlement is a critical skill. The agility needed to rephrase in a fashion that helps the parties see the facts and issues differently is one that a mediator strives to earn.

Mediation is nonbinding process and parties shall enforce the mediation agreed decision voluntary.

The mechanism of sport mediation before applying international sport arbitration courts has different regulations, processing documentation, and conditions comparing commercial or investment arbitration courts. Also, for sport mediation, the sport mediator needs to have professional understanding and knowledge in procedural and material issues of the mediating case.

In commenting efforts to acquire these skills mediators which have come more easily (practicing seldom), and those that have not, are recommended to practice more as well as have admiration for the art of effective mediation.

Additionally, possession of professional knowledge in field of sport is a necessary criterion for the competence of a skilled sport mediator. An important condition for mastering the professional competencies of a sport mediator is the presence of a mediator’s constant practice of dispute resolution, which it gives professional art of effective mediation.

In fact mediation as a mechanism of sport dispute resolution is a gentle way which keeps friendly relationship between Parties and, this method of sport dispute resolution follows the Fundamental Principals of Olympism at the Olympic Charter [11].

Global practices show that the mediation as an alternative dispute resolution is a need to resolve sport disputes because, this method tries to keep relationship and friendly atmosphere between parties of a sport dispute instead of destructive methods.

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