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ARTICLE

The promise of mediation in sport-related disputes

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Abstract The article examines the role that mediation can play and the added value it may bring to the resolution of sport-related disputes. Due to the pivotal role, arbitration has traditionally played in sport, the question posed in this article is not whether mediation should replace arbitration as a mainstream dispute resolution process. It only suggests that mediation should be institutionalized and used in appropriate sport-related disputes, primarily in contractual, commercial, and employment-related disputes as well as in disputes emanating from membership in sport organizations, as an alternative to going directly either to arbitration or to the courts. To substantiate the argument, the article explores and analyzes the limits of arbitration and the special advantage and potential contribution of mediation in sport disputes, in terms of efficiency and flexibility, privacy and parties' autonomy, and better and more sustainable outcome, enhancing access to justice, ability to deal with non-arbitrable disputes and preserving business and personal relationships. Notwithstanding the advantages, the article highlights two possible shortcomings of mediation in sport, namely, lack of finality and loss of rulemaking opportunities, and discusses the special barriers that stand in the way of developing mediation in sport-related disputes. Finally, the article maps the state of mediation in sport, especially the degree of institutionalization of mediation on the international level, such as the CAS, ECA, WBC, and IIHF and provides recommendations for promoting the idea of mediation in sport.

Keywords Mediation · Sport disputes · CAS · Arbitration · Mandatory mediation · Case settlement

1 Preface

"In the place where 'I am just' flowers do not grow"[1]

An African football club filed a request for ordinary arbitration with the Court of Arbitration for Sport (CAS) against a European football club, alleging breach of contract. The agreement subjected all disputes between the parties to arbitration in the CAS and according to the CAS Code of Sport-related Arbitration. After the respondent club had filed its answer, the CAS offered the parties to suspend the arbitration proceedings and try to find an amicable solution by mutual consent with the assistance of a CAS mediator. Both parties agreed and their counsels jointly selected a mediator from the CAS list of mediators and he was formally appointed by the CAS Secretary.

When it came to scheduling the mediation meeting, it became clear that one of the parties had retracted its consent to go to mediation and insisted on resuming the arbitration procedures. Since a mediator had already been assigned to the case, he attempted to engage the party's officials and outside counsel in intra-team mediation discourse to revisit their latest decision not to try mediation. After describing at length the nature and the advantages of the mediation process in the particular case, understanding the party's underlying needs and fears and explaining how

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[1] Amichai (1986).

they could be well addressed in mediation, the decision was reversed and mediation resumed. An important factor in the decision of the parties to resume the mediation process was the fact that the CAS was perceived as a one-stop dispute settlement forum and if no agreement was reached in mediation, the stayed arbitration procedures would resume immediately and without prejudice.

The parties and their counsels were convened for a 1 day marathon meeting at the CAS. The African club claimed that the European club had breached a contract regarding the transfer of a player. It had paid only the first installment of 400,000 Euros and failed to pay the remaining three installments (200,000 Euros each). Furthermore, it had continued to ignore its contractual obligations even after the African club had agreed on a substantial discount and extension establishing a new agreement between the parties in respect of the amount and the payments' schedule. The European club alleged that the whole deal was a sham and the player was not fit to play and, consequently, was quickly transferred for no money to an unknown club.

Instead of talking about the past events, trying to ascertain who was right and who was wrong, the mediation concentrated on parties' future needs. It was clear from the outset that the only way to enable the parties to enthusiastically accept a compromise over the money was by creating "new value" by "enlarging the pie" with a forward-looking deal that would meet their different and common interests or needs and somehow profit both clubs. During joint and separate meetings with the parties (commonly referred to as caucuses), it was quickly revealed that the African club was blessed with many young and promising talents in various stages of their career but lacked training facilities and expertise. In contrast, the European club had first class training facilities and programs for young players and a long tradition and expertise in scouting and developing young talents. This need-based or interest-based discourse was followed by brainstorming aimed at generating options for joint gains and eventually led to the following settlement.

(1) The European club would pay only 80 % of the debt in three installments backed by particular securities/notes that did not require enforcement through cumbersome court proceedings. In addition, the European club would supply the CAS and the mediator with evidence as to the first and the larger installment which was due several days after the mediation session.
(2) The remaining 20 % would be invested in a joint project. A promising young player who was eligible under the FIFA rules to be transferred and to play in Europe would be sent by the African club to the European club to train and play with its team for 1 year. The 20 % would cover his traveling, salary, and living expenses for the period. At the end of the year, the European club could decide among three options: (1) sending him back; (2) signing him; or (3) transferring him to another club. If the European club decided on options 2 or 3, it would pay the African club according to a certain formula.
(3) The European club would host a delegation of managers and trainers from the African club for a 1 week seminar in the European club's facilities and share management and training manuals with them.

The mediation took seven and a half hours and ended not only with a promising agreement, but also with the parties who had entered the room as adversaries leaving the room as partners.

This story is an abridged version of several mediation cases from the CAS files. For reasons of confidentiality and privacy, the identities of the parties and other details regarding the disputes were omitted. In this story, mediation proved to be quick, cost efficient, flexible, and value creating. By working cooperatively, the parties were able to come up with a solution which brought about mutual gain. In addition, the mediation process enabled the parties to rebuild trust, maintain their business reputations, and transform and restore the relationships between the two clubs. At the same time, it assured easy enforcement.

The story attests to the unique value of mediation for sports-related disputes—the subject of this article. The following sections will examine the underlying ideas of modern ADR and mediation, and the special value mediation can bring to the world of sport.

2 Introduction—ADR, mediation and dispute resolution in sport

2.1 ADR

During the last 35 years, we have witnessed a revolution or a paradigm shift that has been transforming the ways individuals, groups, organizations, and public institutions in modern societies manage and resolve conflicts and disputes. Since conflict resolution has traditionally been perceived as the monopoly of public adjudication, i.e., courts and private litigation, namely, arbitration, this revolution has completely transformed legal education and legal institutions—the courts, the judiciary, and the practicing bar. The literature and the practice name the paradigm shift ADR, which originally stood for Alternative Dispute Resolution. Over the years, there have been voices suggesting

that the letter A refers to amicable[2] or appropriate,[3] dispute resolution.

The underlying premise of ADR is embedded in four ideas. First, conflicts and disputes are not necessarily "legal problems" that need to be resolved primarily under the law through right-based adversarial litigation and by the state, i.e., courts and tribunals. They are human and organizational problems that need to be addressed multidisciplinary and not necessarily or primarily by the state, but by NGOs, private institutions and trained professionals. Accordingly, even the basic norm of access to justice has been reformulated. Recital 5 of the EU Mediation Directive provides that ' [t]he objective of securing better access to justice … should encompass access to judicial, as well as, extrajudicial dispute resolution methods'. Second, modern dispute resolution calls for a shift from decree-based and rights-based (justice by adjudication) to consent-based and interest-based dispute resolution (justice by agreement and settlement).[4] Third, a transition from adversarial confrontational lawyering to collaborative justice and cooperative problem solving. Fourth, a change from a single-track mind in process selection in case of impasse, i.e., litigation, in courts or arbitration, to a much richer and nuanced process pluralism. As a result of these changes, a considerable number of countries around the world are in the midst of transition from a court/litigation-oriented tradition to a more differentiated consent-based dispute resolution culture, and the civil procedure code of today will transform into the dispute resolution code of tomorrow.[5]

2.2 Mediation

The jewel in the ADR crown is mediation. No wonder that sometimes people view mediation as the cornerstone of ADR and refer to ADR as the "mediation revolution".[6] Although it has been practiced for many years, there is no agreement as to the definition of mediation. The literature speaks about the many ways of mediation[7] and a recent comparative study of mediation in 60 countries[8] colorfully pictured the absence of a coherent definition of mediation by saying that "the EU (as well as the rest of the world) is separated by this common word".[9]

For the sake of this article, suffice it to say that mediation is a process in which a third party assists negotiating parties to reach an agreement that they are unable to reach on their own through direct negotiation. In addition to assisting parties in their negotiation, in its purest form mediation aspires to promote party autonomy, to bring about creative and value-creating solutions, and to transform the disputing parties and their relationships.[10]

Over the years mediation, which originally was used primarily for contract renewal negotiations in labor relations, has branched out to all kinds of civil and commercial legal disputes,[11] domestic and transnational, as well as to employment, family, environment, community, public policy, consumer, tax, and even criminal law. The expansion of mediation has received worldwide practical recognition. In 2008, the EU issued its Mediation Directive 2008, which, according to an EU study, generated a genuine "ADR Movement" in the EU.[12] The Mediation Directive was followed by a public policy debate across Europe, rich scholarly works,[13] and various legislation initiatives in the member states. In 2003, the U.S. enacted its Uniform Mediation Act. The underlying premise of this pro-mediation public policy in many Western countries and in the EU Mediation Directive of 2008 has been that mediation and litigation need to be equal players in the field of dispute resolution. Article 1 of the EU Mediation Directive has stated the goal as 'ensuring a balanced relationship between mediation and judicial proceedings'.

The energy and enthusiasm fostered by the new idea and vision of mediation has brought about many institutional reforms and innovations. The leading organizations that provide institutionalized or administered international arbitration, such as the ICC, LCIA, WIPO, and ICSID, have added administered mediation to their portfolios; leading law firms have renamed their litigation department to dispute resolution department: the most prominent body in international arbitration—the ICC—showed its strong belief in and commitment to mediation by launching the ICC International Competition in Mediation Advocacy which in 2014 attracted 61 teams from 37 countries.

[2] Cheung (2006).

[3] Osi (2008) at 165; Lack and Bogacz (2012) at 50.

[4] In some Western countries, like the UK and the U.S., the new ideology attaches priority to settlement over adjudication. As a result, the old and idealized conceptualization of the courts as instruments of trial and judgment has been reformulated. Justice is supposed to be achieved through settlement rather than through adjudication. This new development has been termed: 'The Vanishing Trial'. *See* Galanter (2004); Roberts (2009).

[5] Hopt and Steffek (2013).

[6] Barak (2001).

[7] Menkel-Meadow (1995).

[8] Schonewille and Schonewille (2014).

[9] Schonewille and Lack (2014) at 19, 21.

[10] *See* Mironi (2014) (hereinafter Mironi, *Mediation v. Case Settlement*). As to the transformative aspect *see* Cobb (1993); Moen et al. (2001); Welsh (2001).

[11] Including: IP, bankruptcy and dissolution, foreclosure and malpractice.

[12] De Palo et al. (2014) at 6 (Hereinafter EU Study).

[13] The lion's share of these scholarly works have been comparative studies. *See* Alexander (2009); Steffek et al. (2014); Hopt & Steffek, *supra* note 5; Schonewill and Lack, *supra* note 9; Diedrich (2014).

2.3 Dispute resolution in sport

Disputing and dispute resolution has been a growth industry. This is especially true about sport, given the astonishing speed of growth and the potential sources of disputes.[14] As one commentator observed,[15] sport has become a global social phenomenon and business activity of huge scale[16] with multiple and different players and stakeholders: clubs, athletes, coaches, trainers, referees, agents, owners, managers, sponsors, investors, national, continental and international associations, sport-governing bodies, marketers, broadcasters, merchandizers, in house and outside lawyers, accountants and consultants, contractors, and service providers, the number of disputes has risen exponentially.

In contrast to the tradition in civil and commercial disputes, where courts and other specialized public tribunals have been the mainstream dispute resolution process, the world of sport relies almost exclusively on arbitration and internal tribunals (private adjudication) and less on public adjudication, i.e., the courts and public tribunals.[17] Sport laws as well as statutes and constitutions of international and national sport-governing bodies, federations, and associations funnel sport-related disputes to adjudication by various internal forums, such as arbitration machineries, tribunals, and other specialized adjudicatory bodies that are usually operated by national and international sport organizing bodies. International sport organizations, such as FIFA Dispute Resolution Chamber and FIFA Players' Status Committee,[18] WBC, FIBA, and IOC, to name only a few, use such internal adjudication in their dispute resolution capacity in almost all the cases. In addition, the highest tribunal for sport—the CAS[19]uses arbitration. Since all these fora are forms or brands of private adjudication and are often referred to as arbitration, the term arbitration will be used throughout this article, regardless of whether, legally speaking, these fora are recognized as such.

In an effort to improve and enrich their dispute resolution services, several sport-governing bodies and institutions on the international level, such as World Boxing Council (WBC), International Ice Hockey Federation (IIHF), Amateur Swimmers Association (ASA), and on national levels, such as French Sailing Federation (FFV) and German Football Association[20] as well as sport legislation,[21] have introduced and promoted mediation as an add-on to their arbitration procedures. Mediation clauses are being incorporated more frequently into sport-related contracts, and sport mediation has become a growing field of practice for private dispute resolution providers, both general ones, such as CEDR and the ADR Group,[22] as well as specialized providers, such as the Australian National Sports Dispute Center (NSDR) and the UK Sport Resolution.[23]

CAS, which was established as an arbitration body added mediation service in 1999 to reflect the growing popularity, and acceptance and success of mediation as a dispute resolution process. Currently, there are 66 sport mediators in the CAS panel of mediators. In 2011, the ECA (European Clubs Association) introduced Mediation Service for disputes involving its 214 member football clubs. Initially, the use of mediation was on a voluntary basis. Starting from 2013, clubs which are parties to a financial dispute are obliged to participate in good faith in mediation.[24] Canada which has a centralized dispute resolution system covering all fields of sport uses mediation, including online mediation. When success of mediation is measured by the settlement rate, the experience with mediation in sport is quite encouraging. The commentaries speak about a settlement rate in excess of 70 %.[25]

This article will examine the role that mediation can play and the added value it may bring to the resolution of sport-related disputes. The unique phenomenon of an industry which has traditionally attempted to stay away from courts and has relied almost exclusively and quite successfully on arbitration[26] has two implications that

[14] Reeb (2002).

[15] Blackshaw (2002b).

[16] As far back as 2002, sport represented 3 % of the world trade, was worth more than 1 % of the total GNP of the EU member states and was responsible for two millions new jobs. *Id.*

[17] Generally speaking, this tradition has received the backing of legislators and courts. *Id.* at 17–18.

[18] Hesse (2014), *available at* http://www.lawinsport.com/articles/item/is-mediation-a-suitable-to-resolve-sports-related-disputes#references.

[19] Also known in its French name—TAS.

[20] Blackshaw (2002c) at 207 (Hereinafter Blackshaw, Mediating Sport).

[21] *Id.*

[22] For a partial list of cases that were resolved by mediation, *see id* at 183.

[23] Formerly Sports Resolution Dispute Resolution Panel (SDRP). *See id.* at 94–95.

[24] ECA Statutes & Organizational Regulations (2013).

[25] Goodrum (2011), http://www.lawinsport.com/articles/regulation-a-governance/item/mediation-in-sports-disputes-lessons-from-the-uk; Volker Hesse conducted a field study which included 16 interviews with sport lawyers, mediators and representatives from international and national federations. They participated in 117 different sport-related cases and reported a settlement rate of 65 %. *See* Hesse, *supra* note 18, at 4.

[26] A similar situation exists in the diamond industry.

dictate the framework of our investigation. First, in the context of sport-related disputes, if mediation is to be viewed as an alternative, it is by and large an alternative to arbitration, not to court proceedings.[27] Second, due to the pivotal role, arbitration has traditionally played in sport, and there is neither the intention to oust or limit the jurisdiction of arbitration, nor to reduce its enshrined status in the sport industry. Hence, the question posed in this article is not whether mediation should replace arbitration as a mainstream dispute resolution process. It is much more modest in terms of the role mediation is intended to play and its scope.

As to its role, the question is whether mediation should be institutionalized and used as an alternative to going directly either to arbitration or to the courts. As to scope, our underlying assumption is that, at least for the time being, a large segment of sport disputes, namely, doping and discipline cases,[28] will be excluded from mediation. Therefore, mediation will be used primarily in contractual, commercial, and employment-related disputes[29] as well as in disputes emanating from membership in sport organizations.

To summarize, our research question envisages that parties to appropriate sport-related disputes will try to resolve their dispute through mediation as a first step before they invoke arbitration or go to court.

Following this introduction, Part 2, which is the heart of the article, will explore and analyze the limits of arbitration and the special advantage and potential contribution of mediation in sport disputes; part 3 will discuss two possible shortcomings of mediation in sport; part 4 will highlight the special barriers that stand in the way of developing mediation in sport-related disputes; part 5 will map the state of mediation in sport, especially the degree of institutionalization of mediation on the international level; and part 6 will provide recommendations for promoting the idea of mediation in sport. These recommendations are intended for policy makers in sport-governing bodies and institutions at the international and national levels, players and club associations, other stakeholders as well as sport mediators and sport lawyers.

3 The limits of arbitration and the advantages of mediation in sport

The reader should be aware that, to some extent, the analysis regarding the limits of arbitration and the corresponding advantages of mediation for sport-related disputes is somewhat general and oversimplified. For instance, when speaking about arbitration being too slow and expensive, one must recognize that there are arbitration institutes, such as the CAS, that have gained a reputation for their overall speed and cost-efficient proceedings. Similarly, when speaking about compliance and enforcement, one needs recall that there are sport organizations, such as FIFA, that enforce arbitration awards very effectively, probably better than courts, through disciplinary measures and sport sanctions.[30]

The advantages of mediation over arbitration for the resolution of sport disputes can be clustered under the following seven aspects: (1) efficiency and flexibility; (2) privacy and parties' autonomy; (3) better discourse and more optimal substantive outcome; (4) preserving, restoring, and transforming business and personal relationships; (5) sustainability of outcome—voluntary compliance and enforcement; (6) legitimacy to act as an internal dispute resolution process for non-arbitrable sport disputes; and (7) enhancing access to justice.

3.1 Efficiency and flexibility

Sport has become a big and highly dynamic business.[31] In recent years, business people have come to understand that the traditional methods of dispute resolution, including the heavy duty "court-like" arbitration, have become too daunting, too expensive, too inflexible and rigid, and too dilatory and frustrating.[32] Quite often adjudication—arbitral or judicial—is not the only way and certainly not the best way to protect rights and get justice. There is never black and white in litigation and it applies to both the facts and the law.

Sport itself and the environment within which the industry operates produce a high level of uncertainty for all participants and stakeholders. Bringing a dispute to

[27] There is however one important exception—sport disputes in the context of employment relations that in many jurisdictions cannot be brought to arbitration. *See* further discussion on page 18 *infra*.

[28] As will be shown below, in Canada these types of cases do go to mediation.

[29] Note that in many jurisdictions only mediation can serve as an internal dispute resolution process since employment-related disputes or at least those involving *jus cogens* norms are not arbitrable. See Sect. 3.6 and 7.3 infra.

[30] Note however that FIFA applies these enforcement measures only to disputes that were adjudicated by FIFA fora and to arbitration awards issued by CAS in appeals launched against decisions of FIFA fora.

[31] According to one estimate the sport business is worth more than 3 % of world trade and 3.7 % of the combined GNP of the 28 states which are members of the European Union. *See* Blackshaw (2013) (Hereinafter Blackshaw, ADR and Sport). As to the dynamic nature of the sport industry, *see* Blackshaw, Mediating Sport, *supra* note 20; Blackshaw, ADR and Sport, at 26.

[32] Walde (2004) p. 100. Blackshaw, ADR and Sport, *supra* note 31, at 24.

arbitration adds another source of uncertainty and anxiety. Resolving the dispute through mediation is the best way to control risk and avoid uncertainty. In mediation, the final decision is made by the parties themselves rather than by an arbitration tribunal and there are no winners and losers.

Generally speaking, mediation is more efficient and effective than arbitration.[33] There is a well-known saying in the dispute resolution circles that all large disputes have started from a small misunderstanding. Thus, conflicts and disagreements should be treated as close as possible in time and space to the event which caused them to arise. Disputes between players and clubs are a good example. Since mediation is not right-based legal discourse, parties with or without their lawyers can easily and without delay sit and talk with the assistance of a mediator and without prejudice. Given the high rate of settlement through mediation, such a step is likely to resolve the conflict and prevent it from escalating into a full-blown dispute and legal proceedings.

Mediation is much quicker than arbitration; it usually lasts a day and rarely exceeds a few days.[34] In a study conducted in the EU comparing the length of mediation with litigation, the average number of days from filing to settlement in mediation was 43 and in litigation (first instance only) 580.[35] Arbitration assures finality and is usually faster than litigation.[36] However, when mediation is successful, it is by far the fastest procedure. According to an old study which compared the performance of arbitration and mediation of grievances in the U.S., 89 % of the grievances were resolved in mediation and the average time to resolve grievance through mediation was 15 days and in arbitration, 109 days.[37]

Mediation is also the least expensive and most cost effective. It requires a substantially smaller investment of resources—physical as well as emotional, than litigation—arbitral or judicial. There are huge savings on lawyering time, no lengthy hearings, no witnesses, and no records and documentation. In the U.S., where labor arbitration is relatively cheap, the costs of arbitration were four times higher than the costs of mediation.[38] Similar figures (15–25 %) are provided regarding the estimated costs of mediation in comparison with full-blown arbitral litigation of international commercial disputes.[39] There are many reasons for mediation being such an expeditious and cost effective process, among them its informal, non-adversarial and need-based discourse as well as the fact that the learning process in mediation is quite opposite from litigation-arbitral or judicial.[40]

Since mediation is much faster than arbitration, it is especially suitable for disputes in the fast-paced world of sport and in disputes involving athletes due to their relatively short professional life. The fact that by virtue of its simple learning process, mediation requires no pleadings, no testimonies, and no investigations, saves precious management resources and is less stressful.[41]

As a process, mediation is much more flexible and versatile than arbitration. It enables the parties to experiment with different forms and styles of mediation and to move during and as part of the process from mediation to various hybrid techniques, such as parallel procedures (mediation and arbitration), Med-Arb[42] and arbitration-connected mediation.[43]

In light of the above, it is no wonder that a recent study conducted by Cornell and Pepperdine[44] concluded that, in the U.S., mediation is replacing arbitration as the process of choice for business disputes. The study further reports that the beginning of what they referred to as the quiet revolution of going from the 'business arbitration era' to the business mediation era', i.e., preference for mediation over arbitration, had already been evident in a similar study conducted in 1997, but had become much stronger by 2011. Their data indicates that " [w]hile mediation appears to be even more widely used than in 1997, the

[33] Walde, *supra* note 32, at 100, 102; Goodrum, *supra* note 25.

[34] Blackshaw, Mediating Sport, *supra* note 20, at 24.

[35] EU Study, *supra* note 12, at 124. According to another estimate, on the average, the length of time for mediation is 25 % in comparison to litigation in court. *See* Hopt and Steffek, *supra* note 5.

[36] There is however one well known exception—The Macao Sardine Case. *See*: The RT Hon Lord Justice Kerr (1987).

[37] Brett and Goldberg (1983). In Italy, even a low settlement rate of 28 % is reported to save money for the state and the disputants. *See* Hopt and Steffek, *supra* note 5, at 101.

[38] *See*: Brett and Goldberg, *id*.

[39] Walde, *supra* note 32, at 106.

[40] First, there is a very detailed and costly period of learning about the case by the team of lawyers, and then a costly and difficult learning process by the arbitration tribunal as each party's advocates tend, in a ritualized manner, to present information in very biased, selective and often contradictory way. *See* Walde, *supra* note 32, at 100, 102. In Walde's words: "To learn about a dispute through litigation is like running a course with many hurdles—nobody wants you to learn what really happened" at 102; *See also* Cloke (2002) at 168.

[41] Goodrum, *supra* note 25.

[42] Med-Arb is a hybrid technique of dispute resolution. It combines the benefits of both the mediation and arbitration approach. Parties first attempt to negotiate and reach an agreement with the assistance of a mediator. If the mediation ends in impasse, or if issues remain unresolved, the parties move on to arbitration. The mediator assumes the role of arbitrator and renders a final and binding decision. On Med-Arb, *see* Bartel (1991); Landry (1996). On the different arb-med concepts *see also* McIlwrath and Savage (2010) at 185; Dendorfer and Lack (2007); Mironi (2007); Mironi (2012).

[43] This hybrid technique refers to situations where arbitration is commenced but during the arbitration a mediation process is initiated and conducted in connection with the arbitration. *See* Hopt and Steffek *supra* note 5, at 22.

[44] Stipanowich and Lamare (2014).

survey indicates a dramatic fall-off in the use of arbitration in most types of disputes: commercial,, employment, environment, IP, real estate and construction, among other categories…"[45] Similar preference of mediation over litigation was reported in Germany, where businessmen indicated that in the cases of dispute, 44 % would opt for mediation and only 20 % to litigation.[46]

Generally speaking, businessman and senior managers do not see their job as being immersed in prolonged disputes and preparing for or testifying and being cross examined in highly adversarial, formal and stressful hearings, be it in court or in arbitration. They want to manage, to deal with business and financial strategic planning, marketing, technology and business development. Nonetheless, when a dispute arises, they cannot ignore or walk out on it. Mediation can save them the time and hardship, so they may quickly get on with their business.[47] Furthermore, mediation which is embedded in forward-looking business dialogue is much more in tune with their needs and can bring a quicker and more amicable solution that will save the high costs of litigation and prevent the conflict from escalating and themselves from being entrenched in positions and legal arguments that will render a wise business solution impossible.

Businessmen wane in arbitration, as they lose control, are stifled by the structured and overly formal proceedings and feel left out,[48] as they neither speak the coded language nor play a meaningful role in the dialogue between the lawyers and the arbitration panel. In mediation, they flourish, especially when they are engaged in searching for forward-looking, innovative and value-creating solutions. This is the time when their leadership, entrepreneurship, creativity, and imagination come to play.

3.2 Privacy and parties' autonomy

The literature speaks about the need of the sporting community not to wash the dirty sport linens in public, but within the family of sport and thus, extrajudicially.[49] This is originally why arbitration was adopted. However, arbitration has become less and less extra-judicial in nature, and actually, it is not confidential. Recent case law and legal commentaries have demonstrated that the commonly held belief that arbitration is confidential is legally unwarranted.[50] In contrast, strict confidentiality is an enshrined premise of mediation[51] and is commonly secured not only by legislation, but also by the rules of the institutions providing the mediation services, by codes of professional ethics, and by standard mediation agreements.[52]

Sport disputes have become too complicated and complex. It is difficult to translate them into legal pleadings and to adjudicate them by arbitrators who might have expertise in sport and sport law, but otherwise are sporadic visitors to the specific context which has given rise to the dispute and to the particular relationships. Mediation puts the dispute back into the hands of the parties. Mediation comes from a place of modesty. Parties always know better than their lawyers and the mediators, let alone the arbitrators, the real causes, their respective interests and needs, and the array of feasible solutions.

A basic assumption in mediation is that with a little help, parties are better equipped to resolve the dispute on their own[53] and to come up with creative solutions. Once parties decide to go to arbitration, they lose control over the dispute. Their lawyers assume complete control over the case and the arbitration tribunal over the process and the outcomes. Mediation is just the opposite. Through their autonomy and voluntary participation, the parties maintain control over the process and outcomes. They are partners in the design of the process and the joint architects of the solution.

[45] *Ibid*, at 3. *See* also Blackshaw, Mediating Sport, *supra* note 20, at 92, reporting that in a survey of 530 of the largest corporations in the U.S. 88 % said that they use mediation to resolve their disputes and 79 % use arbitration. For an interesting account and interpretation of this development *see* Bush (2002). Bush explained that the underlying reason for the expansion of mediation was actually the rising demand for case settlement, not for mediation. Businessmen perceive case settlement (evaluative mediation) as "arbitration light", as a low risk settlement conference in the shadow of law and as a judicial settlement conference conducted by an adjunct judge. The person who conducts the case settlement provides the parties with expert case evaluation as well as substantive settlement recommendations and exerts pressure on the parties to accept her/his proposed solution. Nonetheless, since settlement is secured through mutual consent, they *see* the process as the best way to restore a sense of self-determination and control over costs and a means to eliminate or vastly reduce the risk of adverse results.

[46] Similar figures are reported in Spain. *See*: Villamarin Lopez (2013) at 839, 860.

[47] Note however that this may not always be the case; for instance, when a club is a defendant in a breach of contract claim. The club's management may think it can benefit at least financially by postponing payment from the lengthy FIFA proceedings that may take between 1 and 3 years. Therefore, it will prefer arbitration over time-efficient mediation.

[48] American Arbitration Association (2006), *available at* https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004326.

[49] Blackshaw, ADR and Sport, supra note 31, at 1, 57.

[50] Reuben (2006); Thoma (2008).

[51] Menkel-Meadow et al. (2006) at p. 317–342. There is a seam in the literature which raises doubt regarding the justification for conducting mediation under strict norms of confidentiality. *See*, e.g. Dore (2006).

[52] For a comparative analysis of regulations regarding mediation confidentiality, *see*: Hopt and Steffek, *supra* note 5, in general, pp. 49–53. Confidentiality in Austria: pp. 277 ff.; in Australia: pp. 888 ff.; in Bulgaria: p. 348; in Canada: pp. 938 f.; in Switzerland: pp. 1220 ff; in Germany: pp. 547 f; in United Kingdom: pp. 397 ff.; in Spain: pp. 849 f.; in France: pp. 477 ff.; in Greece: pp. 596 f.; in Italy: pp. 677 f.; in Japan: pp. 1066 f.; in the Netherlands: pp. 721 ff.

[53] Hesse, *supra* note 18, at 1.

3.3 Discourse and more optimal substantive outcome

Disputes, in general, and sport-related disputes, in particular, are not only about money;[54] not only commercial interests are at stake. Many disputes are highly emotional and parties really want something else besides or instead of money, regardless of what they officially claim. Quite often what is most important for people in dispute and what they really desire to get from the other side is an apology, recognition, appreciation, recommendation, and taking responsibility even without blame. They may want to get 'public goods' rather than an individualized remedy,[55] for instance, to prevent the negative event that gave rise to the dispute from reoccurring in the future by teaching a lesson, educating, and introducing reforms in policy, rules, procedures, and processes.[56]

Arbitration by its very nature is ill suited to unearth these desires and needs and to weave them into the outcome. It is backward looking and highly focused on the pleadings. The learning process is narrow in scope and shallow. Parties' stories and identities in their totality and full complexity are not presented before the arbitration tribunal, nor are their values, perceptions, intra-organizational dynamics, and cultural and personal constraints.[57] The arbitration tribunal is searching for an artificial solution for the case in hand;[58] to apportion blame or fault. There is always a winner and a loser; the latter is frustrated by the fact that the arbitration process, which was envisaged and conducted as a triad, ended as two against one, when the tribunal sided with her or his opponent.[59] Since the decision is based on pre-existing legal rules and parties' official legal positions and demands, the final outcome often resolves the case but does not give anyone the result that they really wanted.[60]

Mediation is a collaborative interest-based and not adversarial right-based process. There is no need to impress or convince the mediator or the other side about one's rightness, as there is neither a third party's ruling nor a winner and a loser. Hence, parties are not obliged to be defensive, to forcefully deny responsibility and to assert correctness.[61] The parties may more freely admit their weaknesses, mistakes, and wrongdoings.[62] This is why, as a result of the arbitration procedures, parties do not learn[63] and do not forget anything. Actually, they come out as they entered the process, only that one side is feeling beaten and alienated. In mediation, parties may learn a lot about themselves, about the events that gave rise to the conflict and about the way that they should approach conflicts and manage disputes. They may also grow personally and organizationally, as they gain insights and draw their own lessons.

The arbitration process is intended to resolve the case, to distinguish from the dispute, and to "divide the cake". In mediation, in contrast, parties are embarking on a journey during which they jointly search for solutions that meet their common and different interests; solutions that are not limited to traditional remedies available in arbitration and are intended to produce a richer and maximizing joint-wealth solution by creating new value—enlarging the game field.

For instance, in a case regarding an alleged breach of contract, both parties may unlock value out by renegotiating the terms of the original agreement and restructuring their relationships, instead of trying to enforce the terms and conditions of the original agreement, which by the time of the dispute has become partially unworkable.[64] In this way, mediation diffuses the tension between value creating and value claiming and dividing, associated with adversarial arbitration.

3.4 Restoring and transforming business and personal relationships

Since arbitration is a form of litigation, everyone loses, and quite early in the proceedings. It ensures that the dispute gets worse before it gets, if at all, better. This is because adversarial arbitration, by its very nature, entails a spiral process of escalation and demonization, as each party is engaged in combative tactics and competes to establish and reinforce the rightness of his position and the iniquity of the other party.[65] Given the legal nature of the arbitration

[54] We tend to assume that by awarding money, arbitrators and courts alike are giving people what they want. But as one commentator admonished, "… [W]hat people "want" is powerfully structured by legal institutions and the media". *See* Felstiner et al. (1980–1981) p. 648 fn. 14.

[55] *Id.*

[56] For instance, in a bitter defamation case, the plaintiff maintained in mediation that although he claimed millions, what he really wanted was to make sure that journalists behave more cautiously when the integrity and good name of people are in jeopardy. He agreed that all the money would go towards establishing a special academic program for ethics in journalism.

[57] Walde, *supra* note 32, at 102.

[58] Not to the conflict. Cloke, *supra* note 40, at 168–169. Cloke asserted that adjudication is designed to contain and control conflict, not to resolve and transform it.

[59] Shapiro (1981) at 2.

[60] Hesse, *supra* note 18; Goodrum, *supra* note 25.

[61] Cloke, *supra* note 40, at 165.

[62] This information may be provided to the mediator in confidence during private caucus.

[63] Cloke, *supra* note 40, at 171.

[64] Walde, *supra* note 32 at 101.

[65] Cloke, *supra* note 40, at 165.

discourse, the parties speak only through their lawyers to the arbitration tribunal and each side speaks about, not to, the other side. There is no dialogue. The flow of information and communication is highly controlled and structured.

Arbitration by its very nature is not geared to restore trust, even when parties would like it to be, and it does not rebuild the relationship that was broken by both the dispute and the escalation associated with the initial stages of adversarial litigation. Quite the opposite; it is bound to undermine and normally destroy valuable personal, professional and business relationships and reputation.[66]

Since mediation accepts that several realities may co-exist, the full story of the dispute that gave rise to the case is told, as perceived by each party, and in the operative language of the relationship, stripped of legal discourse restructuring. Parties are encouraged to engage in direct, open, and non-adversarial dialogue, to talk to each other in the presence of their lawyers, to come to a new understanding about themselves and the other side, and to respect the way the story is perceived subjectively and differently by the other side. Such discourse creates the level of trust and the information base needed for uninhibited brainstorming and a joint search for creative solutions that can address parties' shared and competing interests and needs.

Mediation prevents demonization and victimization associated with adversarial litigation, and thus preserves, maintains and restores personal and business relations.[67] It is interesting to note that the Major League Baseball selected an open final offer arbitration model to promote pre-hearing settlements. The underlying reason was to avoid the negative consequences inherent in adversarial arbitration in terms of loss of trust and broken-down relationships between the club, the coach, the player, and his teammates, as well as the individual player's self-confidence and future motivation.[68]

There is much talk in the sport community about the small world of sport,[69] where everyone seems to know everyone else and where relationships and reputation are strategic assets. The literature keeps referring to "the family of sport".[70] However, families do not resolve disagreements and conflicts in adversarial litigation, be it in court or arbitration. When they do, as in estate disputes, the case may come to an end, but the family does, as well. The result is always the destruction of the delicate fabric of family relationships.

If the sporting community clings to the family metaphor, as it should, it is not enough for disputes to be solved internally within the family. No less important is how and by which means they are resolved. A collaborative and consent-based process is more in tune with family than adversarial and right-based arbitration, and mediation is second to none in resolving the dispute while preserving and restoring relationships.[71]

3.5 Sustainability—voluntary compliance and enforcement

Durability and enforcement of arbitration awards have emerged as one of the problems of domestic and international arbitration. In some instances, arbitration in sport serves as an exception, namely, when enforcement is secured through sport sanction and disciplinary measures. However, generally speaking, justice may be imposed by an arbitration award, but the award itself cannot secure compliance. In certain areas, rather than replacing courts, arbitration is perceived as a first instance leading to adjudication by the courts.[72] While at least in the CAS, durability has not been a problem,[73] enforcement is. This is especially germane for ordinary CAS arbitrations in football and other sports where the sport-governing bodies' regulations do not provide for a special enforcement mechanism, such as sport sanctions, as, for example, in FIFA. Mediation mitigates the risk of non-compliance.

Research shows that settlement and mediated agreements assure higher voluntary compliance and durability than arbitration awards and require less enforcement proceedings.[74] Since parties are the joint architects and owners of the solution[75] and are convinced that it is practical and feasible, and the agreement reflects their own decision and addresses their own needs, they tend to feel committed to implementing it.[76] Therefore, disputing parties tend to comply with mediation agreements much quicker and in full than they do regarding court or arbitration

[66] Walde, *supra* note 32, at 100.

[67] Blackshaw, ADR and Sport, *supra* note 31, at 2.

[68] Wassner (2003–2004); Tulis (2010) p. 92.

[69] Blackshaw, Mediating Sport, *supra* note 20, at 181.

[70] *Ibid.*

[71] Frank Warren's lawyer who claimed that the most important advantage of mediation is its potential to preserve ongoing relationships, was quoted saying: "…[Relationships are important to any business, but particularly so in the sporting context]". *Id.* at 86 and 205.

[72] *Id.* at 24.

[73] Only a small number of arbitration awards were challenged in court (118 in 25 years) and only a fraction (nine) were successful. *See* Despina Mavromati, Counsel, Head of Research and Mediation at CAS, *Prospects for CAS Mediation*, Address at the 1st CAS Conference on Mediation (May 16, 2014).

[74] Hopt and Steffek, *supra* note 5, at 45; Caponi (2015) at 139.

[75] Blackshaw, Mediating Sport, *supra* note 20, at 18; Hopt and Steffek, *supra* note 5.

[76] Hesse, *supra* note 18, at 2; Stronach (2013), *available at* http://www.crdsc-sdrcc.ca/eng/documents/IntheNeutralZoneFeb2013EN.pdf.

decisions.[77] An empirical study conducted in the Netherlands revealed staggering figures regarding compliance with court decision and rather positive results regarding compliance with obligations contained in mediation agreements. Sixty-six percent of mediated agreements are performed in full after 3 months, while only 18 % of court decisions are performed after 1 year and 43 % after 3 years.[78]

3.6 Legitimacy to act as an internal dispute resolution process for non-arbitrable sport disputes

A substantial volume of disputes in sport involve labor and employment issues. This refers to almost all disputes in which one side is a club as an employer and the other side is a player, athlete, coach, or any other club employee. While the ethos of the sport industry has been that all sport-related disputes should be resolved internally[79] by arbitration, in many countries, individual labor and employment disputes fall within the exclusive jurisdiction of the labor courts and are expressly excluded from the scope of arbitration.[80] In some countries, such as Germany, the prohibition is sweeping and conclusive.[81] In others, the ban applies only to disputes involving *jus cogens* norms, i.e., protective labor legislation or labor standards, leaving only the rare cases of purely contractual disputes to arbitration.[82]

The same prohibition does not apply to mediation, since it is a consent-based process and does not deny access to a court if the dispute is not resolved in mediation.[83] Here, in the non-arbitable zone of sport disputes, where arbitration is not allowed, only mediation can undertake the role of an internal dispute resolution process. This means that parties to employment-related disputes in sport will try mediation before they litigate in labor courts. Employment-related disputes are usually considered the most suitable for mediation due to the fact that employment relationships are characterized by intimacy, continuity and mutual dependency, and, by their nature, they provide a broad array of forward-looking, and monetary and non-monetary value-creating solutions.

3.7 Enhancing access to justice

It is noteworthy that the title of Lord Woolf's Report in 1996, which was the catalyst for the development and spread of mediation in the UK, was "Access to Justice". Similarly, the underlying premise of EU Mediation Directive of 2008 was to facilitate better access to justice.[84] Lord Woolf envisaged that mediation might mitigate some of the defects that were identified as preventing access to justice. Although the report referred to the courts, in many instances, these defects might also be applicable to arbitration of sport disputes. Among them, bringing cases to a conclusion is too expensive and too slow; the process is too adversarial; often there is a lack of equality between the powerful and wealthy party and the under-resourced party; in addition to uncertainty regarding the outcomes of litigation, there is too much uncertainty regarding the process, i.e., parties experience difficulty of forecasting what litigation will cost and how long it will last. This, in turn, induces the fear of the unknown; the adjudication process is incomprehensible to many litigants.

In a series of empirical studies conducted in the U.S., the performance of employment arbitration was evaluated in terms of access to justice and compared to litigation in court and mediation.[85] The underlying premise was that since the basic assumption and *raison d'être* for regulating labor and employment is the existence of power imbalance, an enhanced access to justice which enables employees to vindicate their rights enhances equality. The relevance of these studies to the sports industry is obvious. Power imbalance exists in sports and is not limited to employment-related sport disputes.[86]

The results of these studies show that while arbitration came in ahead of courts in terms of speed,[87] reduced costs

[77] Hopt and Steffek, *supra* note 5, at 45.

[78] *Id.* at 106.

[79] An extreme example is FIFA which, as a matter of policy, expressly prohibits recourse to ordinary courts. Blackshaw, ADR and Sport, *supra* note 32, at 38.

[80] Lack (2011) at 364.

[81] In Germany under Section 101 of the Labor Courts Act, only collective labor disputes may be brought to arbitration. It is noteworthy that recently a German court decided that an arbitration clause in a contract between an athlete and her national sport organization declaring a decision of the CAS binding and final and disallowing access to the courts for review was invalid since it is not possible to waive the right of access to the judicial system by such a clause. *See*: LG München I (2014).

[82] This is the case in Israel. *See*: Mironi (2009). As to the UK *see*: Clyde and Anor v van Winkelhof (2011).

[83] *See Lennox Lewis v. The World Boxing Council and Frank Bruno* (1995). In this case Lewis filed an action in England challenging the sweeping mandatory mediation clause for all claims against WBC. The court rejected the claim and sent him to mediate in the U.S. The court also dismissed the argument that WBC, which was the defendant, was administering the mediation.

[84] Hopt and Steffek, *supra* note 5, at 6.

[85] The studies were discussed in: Colvin (2014) (hereinafter Colvin, Dublin).

[86] Such as individual disputes between clubs and their players or coach, and disputes between federation and referees. Power imbalance exists, among others, in disputes between national and international federations and athletes or clubs as well as many other sport-related disputes.

[87] According to the study, employment arbitration in the U.S. is twice as fast as litigation in courts. *See* Colvin (2011) (hereinafter Colvin, *Employment Arbitration*). This is due to its relatively informal and expeditious procedures, availability of arbitrators and finality of decision-making since there is no recourse to time-consuming appeals. *Id.* at 3–4.

and providing a certain degree of parties' control through the selection of the arbitrator,[88] courts delivered substantially better outcomes in terms of money awarded.[89] The shortcomings of arbitration in comparison to courts were intensified and the exacerbating effects of the inequality grew whenever the employer and the arbitrator were repeat players and when arbitration was part of an internal dispute resolution program designed and administered by the employer.[90] In short, adversarial litigation either in arbitration or the courts tended to replicate the power imbalance through employer's deployment of structural advantages, resources, and high quality and more sophisticated legal representation.[91]

The encouraging findings were that mediation was superior to both courts and arbitration in enhancing access to justice and as having an inequality reducing effect. In comparison with courts and arbitration, mediation is superior not only by its efficiency-related advantages, such as low cost and high speed[92] derived from informality and simplicity. Much more important for enhancing access to justice are the unique features of the process that make mediation so paradigmatically different from litigation and arbitration. Among them, the parties' autonomy, control, and participation, being a consent-based process led by an impartial non-evaluative mediator with no decision-making authority. This empowers the employee[93] and enables more equal presentation of the employee's perspective, and facilitates discourse which attempts to address the parties' joint and different interests and needs;[94] the ability to craft a rich menu of forward-looking remedies,[95] especially to maintain and restore employment relationships; the relegated role of legal representation which alleviates the substantive and psychological impact of employer's better quality and sophisticated legal representation; and the ability of everyone to understand and fully participate,[96] which may allow for self-representation.[97]

4 The shortcomings of mediation in sport

Generally speaking, there are two shortcomings in using mediation for the resolution of sport disputes in comparison to arbitration—lack of finality and loss of rulemaking opportunities. The first is more general, and the second is more specific to sport arbitration.

4.1 Lack of finality

Being a consent-based process, mediation by its very nature cannot assure finality. Some cases that go to mediation may end up without agreement and thus unresolved. In arbitration, at least in theory, there is always closure as the arbitration award is final and binding. True, closure and finality may be fragile. There is always a possibility that the losing party may attempt to quash the award before a higher arbitration tribunal or in court[98] or simply will not comply, thus forcing the winning party to go through long and often difficult enforcement proceedings.

On the aggregate level, the lack of finality and the fear that unsuccessful mediation creates extra costs and delay is not a real problem. Most cases do settle;[99] and since mediation is much faster and three to five times cheaper

[88] Colvin, Dublin, *supra* note 85, at 4.

[89] According to Colvin, arbitrators in mandatory arbitration programs typically award approximately 10–20 % of the amount awarded by courts. Colvin, *Employment Arbitration, supra* note 87, at 11; Colvin, Dublin, *supra* note 85, at 17.

[90] Colvin, Dublin, *supra* note 85, at 13–14. The relevance of these finding to arbitration in sport is clear.

[91] Estreicher (2001); Colvin, *Employment Arbitration*, *supra* note 87, at 11; Colvin, Dublin, *supra* note 85, at, 7, 12. Similar shortcomings were recently attributed by the FIFPro to the CAS. FIFPro asked CAS to refresh the arbitration roster in order to make it more independent and representative of all stakeholders and to make the selection process of arbitrators, chambers and chairpersons more transparent. *See*: FIFPro (2011a), http://www.fifpro.org/en/news/fifpro-demands-action-against-controversial-cas; FIFPro (2011b), http://www.fifpro.org/en/news/fifpro-resolution-on-cas-policy; FIFPro (2011c), http://www.fifpro.org/en/news/often-a-decision-by-the-cas-is-a-matter-of-chance; FIFPro (2011d), http://www.fifpro.org/en/news/cas-is-a-part-of-the-sion-case-problem; FIFPro (2011e), http://www.fifpro.org/en/news/swiss-players-union-cas-requires-faster-procedures. Recently it was reported that CAS had invited FIFPro and the clubs to nominate new arbitrators in order to address some of these concerns. *See* FIFPro (2015), http://www.fifpro.org/en/news/does-football-need-cas.

[92] Studies regarding grievance mediation in the U.S. show that mediation produces faster resolution with lower costs. *See* Feuille (1999). According to one study from 1983, which has become a classic, 89 % of the grievances were resolved in mediation. The average time to resolve grievance through mediation was 15 days and in arbitration, 109 days, and the costs of arbitration were four times higher. Brett and Goldberg, *supra* note 37.

In the employment sphere, speed is crucial for employees given the importance of maintaining or restoring ongoing employment relationships. A lapse of time has a negative effect since the relationship will probably deteriorate and changes will take place in the organization, thus reducing the chance of continued or restoring employment. It appears as if speed is even more important in the area of sports given the short career of athletes.

[93] Cobb, *supra* note 10; Kelly, *supra* note 10.

[94] Colvin, Dublin, *supra* note 85, at 7.

[95] Such as reforms in the company's policies and procedures, finding an alternative job. In contrast to arbitration and courts adjudication that concentrate on monetary remedies. *Id.* at 6.

[96] Cloke, *supra* note 40, at 170.

[97] In contrast to court litigation, arbitration and case settlement (evaluative mediation or conciliation), in mediation the main actors are the parties themselves and the lawyers play a secondary role. *See* Mironi, *Mediation v. Case settlement*, *supra* note 10, at 179.

[98] Blackshaw, Mediating Sport, *supra* note 20, at 24.

[99] *Id.* at 23.

than arbitration, even under a conservative settlement rate of 70 %, mediation comes in ahead. However, this aggregate calculation may not lend comfort to the parties to an individual dispute that was not settled and they have to bear the costs and time delay of mediation in addition to that of arbitration. They may find relief in the fact that quite often an agreement along the lines discussed in mediation does follow[100] and that the arbitration will be more cost and time efficient, since some of the issues have already been agreed or clarified and the gap between the parties' positions has been reduced.[101] In any event, a proposed way to ameliorate this problem will be taken up in the concluding part.

4.2 Loss of rulemaking opportunities

The second shortcoming originates from the ideological debate regarding all consent-based dispute resolution processes. In an article entitled "Against Settlement"[102] which by now has become classic, Professor Fiss argued that the main function of the court is not to resolve disputes but to use the cases that are brought to court as an opportunity to give concretization to constitutional and statutory provisions as well as to societal values[103] and to promulgate rules of behavior for the future. Therefore, court cases that end up in settlement and not in a published court decision deny the court the opportunity to perform its main function in society. Although his criticism was leveled against all forms of settlement, its rationale applies also to arbitration, since arbitration awards are seldom published. Consequently, this cannot be perceived as a shortcoming when one compares mediation and arbitration in general.

The picture is different when it comes to sport, certainly regarding the CAS which is the highest and last instances of all sport disputes; sometimes referred to as the Supreme Court of Sport.[104] The CAS selectively publishes arbitration awards, and in recent years, the number of published cases has been growing. The same applies to the FIFA Dispute Resolution Chamber (DRC) which tends to publish many arbitration decisions[105] and is probably true for other international and national sport organizations. These arbitration awards interpret and give meaning to the statutory provisions of the sport organizations through interpretation and filling lacunas, thus producing rules and norms of behavior.

There is no *stare decisis* principle (binding legal precedent) in arbitration, and arbitrators are not required to follow earlier decisions. Nevertheless, at least in the CAS, due to its institutional positioning and the desire to build jurisprudential stability and legal certainty, the norm is that arbitration tribunals maintain their own discretion but refer to previous decisions as guidance. In this way, a body of sport law "lex sportiva" has been constructed.[106]

In sum, to the extent that arbitration awards in sport are published and perceived by the sport community as dictating rules and norms of behavior, even as soft law, the position of arbitration in sport regarding the aforementioned ideological debate is akin to that of the courts. This is why it is referred to here as a shortcoming.

While it is difficult to see a way around this shortcoming, for the time being the problem is rather theoretical. As stated previously, the assumption is that doping and discipline cases will not go to mediation and only a fraction of cases go to, and more importantly, end in mediation. This leaves more than enough intake of cases for rule making and for developing "lex sportiva".

5 Barriers to mediation in sport

The literature and the public policy debate have failed to explain the failure to achieve the EU Mediation Directive's objective of ensuring a balanced relationship between mediation and adjudication[107] as well as the mediation under-use paradox. This paradox was documented in a recent study[108] and is comprised of two numbers: the average use of mediation in Europe is 0.5 % (based on the ratio of the number of mediations/the number of litigated cases) and the average settlement rate of 75 % for those cases in which mediation was used (80 % in voluntary mediation and 70 % in mandatory mediation).[109] Therefore, mediation has been perceived and has proven to be a high-quality product that has little been used.[110]

Although the reasons for the under-use paradox have not been empirically studied, the literature keeps pointing at a

[100] *Id.* at 184.

[101] Hesse, *supra* note 18, at 4.

[102] Fiss (1984).

[103] This point was further developed in Bush. *See* Bush, *supra* note 45.

[104] Blackshaw, ADR and Sport, *supra* note 31, at 31.

[105] *Id.* at 33.

[106] Foster (2003); Blackshaw, ADR and Sport, *supra* note 31, at 8, 15.

[107] EU Study, *supra* note 12, at 6.

[108] Schonewille and Lack, *supra* note 9, at 20.

[109] Note that in some areas the rates are higher. For instance, Center for Effective Dispute Resolution (CEDR) reports an average settlement rate of 85 % in business-related mediation. Blackshaw, Mediating Sport, *supra* note 20, at 91.

[110] Schonewille and Lack, *supra* note 9, at 20. A similar problem was reported in U.S. labor relations. Grievance mediation has been extremely successful with 89 % settlement rate and substantial saving in time and costs. Brett and Goldberg, *supra* note 37. Nonetheless, only 3 % of collective agreements contained a grievance mediation provision. *See* Feuille, *supra* note 92, at 197.

series of barriers that stand in the way of realizing the full potential of mediation:

1. Modern mediation has been around for more than 30 years. Nevertheless, parties and lawyers still lack awareness of mediation and its added value and how and when it can be used. Both are unfamiliar with the real distinctions between mediation, conciliation/case settlement, and arbitration and have misconception about the process.[111] Hopt and Steffek have concluded that disputing in Europe suffers from a considerable information and decision-making deficit when managing disputes and choosing a particular mechanism for dispute resolution.[112]
2. Business people and lawyers alike believe that they know how to negotiate and do not need anyone to help them do it. If negotiation fails, they can always rely on the old saying "we will see you in court".[113]
3. It is difficult to change habits that have been built over decades. In the general public's perception, dispute resolution is in the realm of courts and right-based legal discourse. Furthermore, all legal institutions, such as the courts, the judiciary, lawyers, the bar, arbitration institutions, and the legal education industry, are imbedded, vested, and invested in the adversarial adjudicative culture.
4. Mediation means taking responsibility. In a recent study conducted in Germany business people said that in principle, they were very supportive of mediation and ADR. However, they admitted that when they are faced with a real dispute, and they tend to hesitate about using these new processes. Consequently, when efforts to resolve the dispute through negotiation fail, they prefer legal proceedings.[114] The explanation for this is probably the leading obstacle for the development of mediation. When faced with a dispute, managers in the private sector and more so in large corporations and in the public sector prefer taking, i.e. hiring, a prominent lawyer over taking responsibility. To protect their own careers and shield themselves against future criticism, they opt for an external solution imposed by a third party with stature (a judge or an arbitrator), regardless of how bad it might be, over the possibility of achieving a much better creative or compromise solution of which they are the joint architects, but for which they have to be accountable and take personal responsibility.
5. Lawyers are the gatekeepers in dispute resolution. Even when they understand mediation well,[115] they are reluctant to use it. Many lawyers with mediation training are more interested in finding their own salvation as mediators rather than in finding solutions for their client's problems through mediation.[116] In addition to being generally conservative[117] and overly pessimistic and suspicious, lawyers encounter particular difficulties with the unique properties of mediation as a process.

First, lawyers do not feel comfortable with interest-based discourse and feel more at home traveling in the rights-based legal discourse of court or arbitration.[118] Second, a narrowly focused, backward looking, and highly formal and structured discourse led by an arbitrator or a judge is more in tune with the paradigm of adversarial litigation. Third, even when lawyers realize that settlement has become an integral part of litigation, they prefer a settlement conference led by a judge or arbitrator. This assures that they will feel at home, i.e., the negotiation will be conducted under the shadow of law and will be positional and competitive. Fourth, for lawyers, mediation is associated with loss of income.[119] It applies equally to those who work on an hourly basis and to those who work under various contingent fee arrangements. The former stand to lose due to the fact that mediation tends to be short and very informal; the latter, due to the fact that mediation settlements often tend to be creative, non-monetary,[120] future-looking, and non-quantifiable.[121] Fifth, for lawyers, mediation means a loss of hegemony and control. In arbitration and court proceedings, lawyers get to play a pivotal role and retain much more control over the process, the case, and their clients than in mediation.[122]

[111] For instance, many lawyers still fear that the mediation will become a fishing expedition, namely, that their opponent will use the mediation to receive important information which, if mediation fails and the case goes to trial, he or she would have to secure, if at all, through cumbersome legal proceedings. As a result, unsuccessful mediation may end up by losing important tactical advantages. The truth is that each party has full discretion as to the information disclosed and there is always an opportunity to reveal sensitive information only to the mediator in a private caucus. *See also* Blackshaw, Mediating Sport, *supra* note 20, at 23.

[112] Hopt and Steffek *supra* note 5, at 96.

[113] Goodrum, *supra* note 25.

[114] Aschenbrenner (2014) at 46.

[115] According to the author's observation, there is no substantive difference between lawyers with and without mediation training when it comes to advising clients to use mediation.

[116] *See* Loorbach (2002).

[117] One commentator argued that the problem is more severe in Europe. *See* Borris (2007).

[118] *See* Sternlight (1999) at 325.

[119] It has been said that for many lawyers, ADR stands for Alarming Decline in Revenue.

[120] Such as recognition of wrongdoing, apology or a joint press release. For apologies in mediation, *see* Robbennolt (2003); Levi (1997).

[121] Such as renewal or restructuring of business relationship.

[122] Riskin (1982) at 43, 47. In order to provide maximum space for their clients and their narratives, lawyers in mediation must act contrary to what they are used to in trial advocacy. They must give up the lead actor role and shrink their presence in the room.

All these barriers probably exist in sport. In addition, there are those specific to the sport community and its culture.

(1) Collaborative problem solving, cooperation, and joint search for value creating solutions are not part of the DNA of competitive sport. Instead, a highly competitive and confrontational win-lose environment has shaped the world of sport's disputing culture.

(2) A large proportion of disputes in sport, such as doping, selection, and eligibility, calls for zero-sum either-or solutions. As such, they do not lend themselves to easy compromise and to mediation-type discourse and outcomes.[123] Furthermore, it appears as if these disputes have shaped the paradigm for managing and resolving all sport-related disputes.

(3) Over the years institutional arbitration and the cadre of sport arbitrators have established credibility and professional prestige. Arbitration as a dispute resolution process has functioned well for sport-related disputes and is well entrenched. Why fix it when it isn't broken? Especially, when there is very limited experience with mediation in sport and it is difficult to ascertain mediators' credentials.

(4) The world of sport lacks a pro-settlement tradition. The legal systems in which mediation has been flourishing have had a long tradition of settlement-friendly courts. Only 5–10 % of cases ended with full hearing and judgment. Furthermore, mediation was introduced as a means to deal with overburdened courts, mounting backlog, delays, and rising costs that prevent access to justice.

The picture in sport is completely different. The CAS arbitration rules authorize the president and the arbitration panel to resolve a dispute which is brought before them by consent award and through conciliation.[124] Nevertheless, in contrast to courts, in the world of sport arbitration, there has never been a settlement-friendly tradition or ethos. The vast majority of procedures that actually go to arbitration,[125] end with a well-reasoned arbitration award.[126]

(5) Dispute resolution in sport is devoid of the motive that gave rise to and has reinforced the spread and promotion of mediation in civil and commercial disputes. Sport arbitration is robust and successful.[127] With the exception of FIFA DRC, which suffers from a crowded docket and long delays, the problems that many courts encountered and which were part of the impetus to introduce mediation do not exist in sport, certainly not with the same magnitude and definitely not in the CAS. Cases that are brought to arbitration are resolved relatively fast and inexpensively; there is no backlog of cases and no delays.[128]

6 Institutional developments: mapping mediation in sport

As stated previously, in recent years, mediation has taken root in the landscape of sports disputes. It has made its way into sport laws in different countries, such as France,[129] and into international, continental and national sport federations and associations. Many sport-governing bodies and institutions have promoted mediation as an add-on to their arbitration procedures. Among them, the Association of European Football Clubs (ECA), the World Boxing Council (WBC), the International Ice Hockey Federation (IIHF), the Amateur Swimmers Association (ASA),[130] at the international level, and the French Sailing Federation (FFV) and German Football Association,[131] at the national levels. A good example is Canada which has a centralized dispute resolution system covering all fields of sport—SDRCC. It uses mediation, including on-line mediation, and reports an extremely high settlement rate, about 94 %

[123] Procter (2010).

[124] Article R42 of the CAS Code of Sport-related Arbitration, latest version effective as of 1 March, 2013 (2013) and *available at* http://www.tas-cas.org/en/arbitration/code-procedural-rules.html.

See also Blackshaw, ADR and Sport, *supra* note 31, at 30. In this context, conciliation is different from mediation. It is akin to case settlement. *See* Mironi, *Mediation v. Case Settlement*, *supra* note 10.

[125] Not all registered arbitration procedures end up in arbitration hearings and decisions. In many instances, the case is deemed withdrawn either because of failure to pay the advance of costs or to comply with the pre-hearing procedures. In others, the parties no longer wish to proceed with the arbitration.

[126] So far, relatively few CAS arbitration procedures (approximately 50) have ended up with a consent award. Email from Despina Mavromati, to Mordehai Mironi (July 5, 2014, 10:23 UTC).

[127] Peter Feuille attributed the low use of grievance mediation in the U.S. to the ongoing success of labor arbitration. Feuille, *supra* note 92, at 197.

[128] Blackshaw, ADR and Sport, *supra* note 31, at 39.

[129] *See* Blackshaw, Mediating Sport, *supra* note 20, at 207.

[130] The Amateur Swimmers Association (ASA) urged parties to use mediation for disputes regarding alleged breach of the association's 'Code of Ethic'. *See* Blackshaw, Mediating Sport, *supra* note 20, at 183.

[131] *Id.* at 207.

of the cases in which parties agreed to go to mediation. In the cases that parties chose Med-Arb, 50 % reach agreement and do not reach the arbitration stage.[132] Similar enthusiasm is shown in the private sphere.

A growing number of commercial contracts, such as broadcasting and sponsorship contracts, contain mediation clauses either in the CAS or by mediation providers, such as CEDR and ICC,[133] and sport mediation has become a growing field of practice for private mediation and ADR providers both general, such as CEDR and ADR Group,[134] as well as specialized providers, such as UK Sport Resolution,[135] which in 2012 reported that mediation amounted to a quarter of its cases.[136] More indicative is the development of mediation in the CAS and the pioneering experimentation with mandatory mediation in the ECA, WBC, and SDRCC. Until very recently, the CAS proposed that parties consider mediation in all ordinary procedures. If they express mutual interest, the arbitration procedure is suspended and a mediator is selected by the parties from a list of CAS mediators. The service was not applicable to doping, discipline and all other appeals procedures as well as cases brought before the ad hoc division, which together comprised approximately 75 % of the CAS procedures. However, as provided in Article 1 of the CAS mediation rules, in special circumstances, disciplinary procedures that do not relate to doping, match-fixing, and corruption can be subject to mediation. Starting from July 2014, the CAS also offers mediation in appeal procedures involving contractual matters. This is a major change, since appeals constitute the vast majority of CAS procedures and a large segment of appeals involve contractual cases, such as training compensation, transfer, alleged breaches of employment, and commercial contracts, among others.

The data regarding the patterns of using mediation in the CAS and the success of mediation, measured by settlement rate are interesting and encouraging. The number of times parties express interest in going to mediations per year has shown steady growth. It has almost tripled—from an average of 1.5 cases per year during the first 9 years to 4.2 during the last 7 years.[137] There is similar improvement in retention rates, i.e., in the proportion of cases in which mediation actually took place. It went up from 27 % in the first 9 years to 58 %. In absolute terms, the actual use of mediation has increased from an average of 0.55 cases per year to two cases per year. While the absolute numbers appear small, the important measure is the average rate of using mediation. If one takes into account only cases that are eligible for mediation under the CAS's policy, i.e., ordinary procedures, the ratio of number of mediation divided by the number of ordinary procedures is approximately 0.5 %. This ratio is similar to the data from Europe where the average use of mediation is 0.5 %.

The most encouraging data, however, have to do with settlement rates. In 14 out of the 19 cases in which mediation actually took place, the parties reached agreement. This settlement rate of 74 % is on par with data from Europe (75 %) and with the estimates that are usually provided in the literature.[138] Mediation has proved to be very expeditious and cost effective. The average duration of mediation is 3.5 months and the total costs[139] never exceed 4000–5000 CHF.

In 2011, ECA—an association of European football clubs—introduced mediation service for disputes between their 214 member clubs. The mediator for a specific case is drawn from the ECA Legal Advisory Panel, and the mediation service is provided free of charge. In February 2013 ECA expressed its further commitment to the idea of mediation by introducing mandatory mediation in all financial disputes. According to the new rule, member clubs are obliged to use mediation in good faith, prior to adjudication.[140] Given the limited number of disputes involving purely ECA member clubs, the ECA mediation service has established itself as an effective dispute resolution process in a relatively short period of time. Between May 2011 and March 2014, seventeen (17) requests for mediation were filed; in four (4) cases one party refused to mediate[141] and settlement was reached through mediation in nine cases (70 %).

This is not the only mandatory mediation program in sport. The World Boxing Council (WBC) introduced a sweeping mandatory mediation clause for all claims against WBC. The obligation to use mediation covers all

[132] Hon Graeme Mew, Judge (Superior Court of Justice, Ontario), CAS arbitrator and mediator, Address at the 1st CAS Conference on Mediation (May 16, 2014).

[133] Howard Stupp, Director legal affairs IOC, Address at the 1st CAS Conference on Mediation (May 16, 2014).

[134] For a partial list of cases that were resolved by mediation, *see* Blackshaw, Mediating Sport, *supra* note 20, at 183.

[135] Formerly Sports Resolution Dispute Resolution Panel (SDRP). *Id.* at 94–95.

[136] https://www.sportresolutions.co.uk/resources/statistics.

[137] Most of the cases are football-related. Others involve tennis, judo, basketball and gymnastics.

[138] Hesse cites a study conducted by the Swiss Association of Mediation which reported a 70 % settlement rate. He also indicates that, according to the literature, the rate is 75–90 % depending on the type of dispute. *See* Hesse, *supra* note 18, at 4. Ian argues that in appropriate cases the rate is even higher—an 85 % settlement rate in the literature. Blackshaw, ADR and Sport, *supra* note 31, at 26.

[139] Including the mediator's fees and travel expenses.

[140] As explained by ECA Legal Service Manager, Wouter Lambrecht, the ECA's mandatory mediation is de-facto a light model (soft law). There is a moral obligation and clubs are not sanctioned for refusal to use mediation.

[141] Three of the four belong to the period prior to February 2013.

types of disputes and every person or entity that has such a claim.[142] Since 2006 the Canadian SDRCC requires disputing parties to participate in mediation (referred to as Resolution Facilitation)[143] process for at least 3 hours as a mandatory step before arbitration.[144]

7 Summary and recommendations

Sport, as a social phenomenon and a big industry, has special characteristics, a unique structure and a distinctive ethos.[145] This is probably why the sport industry has demonstrated a clear preference for keeping its disputes away from the state general courts and tribunals and having its own internal dispute resolution machinery. In constructing its system, the sport industry has relied almost exclusively on institutional or administered arbitration. As a process, arbitration has gained credibility, high status, and popularity.[146] Over the years, arbitration in sport has become more legalistic and gradually shown signs that it may fall into the same trap as commercial arbitration. The process has become overly formal, cumbersome, and too technical and specialized,[147] much like the court adjudication that it was supposed to replace. Until now, at least the CAS has managed to keep the lid on costs and to assure speedy arbitration proceedings. Nevertheless, if this trend continues, the CAS and other arbitration institutions in sport run the risk of arbitration becoming too expensive and slow.

The sports institutions have made some changes to address new needs. However, these changes are not enough. It has been clear that the world of sport needs an alternative, better, richer, sophisticated, and more nuanced and suitable system of dispute resolution.

The paradigm shift and the basic ideas of ADR, in general, and mediation, in particular, have great potential to provide the missing feature in the new design of a dispute resolution system for sport-related disputes. In recent years, mediation has made its first steps into the world of sport. As a dispute resolution process, mediation is still in its stage of infancy and is virgin territory in the world of sport. However, in view of the long and well entrenched arbitration tradition in sport, the data regarding the experience with mediation in the CAS, ECA, at the international and continental levels, and in the Canadian SDRCC and UK Dispute Resolution,[148] at the national level, is encouraging. It appears as if the newcomer has been well received and has gradually been making its way into the sports dispute resolution landscape. There is also a growing interest among officials in sport-governing bodies and institutions as well as sport lawyers to learn about the potential of mediation. The First CAS Mediation Conference which took place in Lausanne in May 2014 attracted 130 participants from 40 countries.[149]

The article highlights and analyzes the advantages and benefits of mediation for sport-related disputes in terms of efficiency and flexibility, privacy and parties' autonomy, optimal substantive outcome, restoring, preserving and transforming relationships, voluntary compliance and enforceability and better access to justice. Most important, mediation can fulfill the role of an internal dispute resolution process for employment-related sport disputes in those jurisdictions, where arbitration, which traditionally was supposed to undertake this role, is banned by law.

Sport mediation also has two shortcomings, namely, lack of finality and the loss of opportunities to develop "lex sportiva". In addition to the barriers to the development of mediation in other fields, there are two which are particular to sport. First, the confrontational, competitive and win-lose DNA is out of tune with the non-adversarial collaborative music of mediation. Second, in contrast with courts and commercial arbitration that have been suffering from problems, such as a heavy burden, backlog, delays, and high costs, sport arbitration has been relatively free of these flaws, and as a result, there is less pressure to look for complimentary processes.

There are many measures, one can undertake to enhance the status and change the patterns of using mediation in sport. A large portion of these measures is not specific to the sport industry, only that in sport, due to its particular culture and the high esteem and status of arbitration, they are more urgent and difficult. The list includes, among others, developing awareness among[150] and educating all

[142] Blackshaw, Mediation Sport, *supra* note 20, at 84–85.

[143] Gunn (2013), *available at* http://www.crdsc-sdrcc.ca/eng/documents/ReflectionsontheRF-RGUNNENG.pdf.

[144] Note that the SDRCC Resolution Facilitation process is also used as a preventive mediation measure and in an adapted version, also in doping. *Id.* at 2.

[145] These special characteristics of sport have been referred to as "The Specificity of Sport". *See* Blackshaw, ADR and Sport, *supra* note 31, at 1 quoting from the European Union Commission White Paper on Sport. *See also* Blackshaw (2002a); Arnaut (2006); Weatherill (2010).

[146] One indication is that during the first 25 years only 118 applications were made to the Swiss Supreme Court against the CAS awards and only nine were upheld while four more were still pending. Mavromati, Address at the CAS Conference, *supra* note 73.

[147] Blackshaw, Mediating Sport, *supra* note 20, at 181.

[148] In 2010, UK Dispute Resolution reported that the number of disputes going to mediation doubled when compared to the previous 18 months and mediation had been used in 25 % of the cases. *See* Procter (2012).

[149] Interview with Despina Mavromati, Counsel, Head of Research and Mediation at the CAS (2014).

[150] Mediation suffers from a lack of public exposure, among others, due to the norm of strict confidentiality and the media's lack of interest in drama-less peaceful resolution of conflicts.

stakeholders,[151] including sport lawyers,[152] about mediation and its value and advantages; special education for the latter in mediation advocacy, i.e., how to represent clients in mediation;[153] developing and improving the cadre of sport mediators;[154] and developing manuals for hybrid dispute resolution processes.

There are, however, three measures that need further elaboration. They are more specific and are highly needed due to the current state of mediation in sport. These are: institutionalization, mandatory mediation, and positioning mediation as a central pillar of dispute resolution for all employment-related sport disputes.

7.1 Institutionalization

To facilitate the use of mediation in sport, to change habits, and to overcome initial reluctance, sport federations, associations, and governing bodies at the international, continental, and national levels should examine the possibility of introducing into their statutes, constitutions, rules, and regulations, a preliminary mediation stage to precede any adjudication stage—arbitral or judicial. The international and continental federations and associations should secure that their members, i.e., the national associations, introduce mediation into their own rules and the rules governing the relationships between national clubs and national players, as well as others. It is difficult to overstate the importance of this measure. An illuminating lesson can be drawn from the CAS early history. At least initially, it achieved its status through the recognition of sport federations, associations, and governing bodies, which included an express provision regarding CAS arbitration in their statutes, constitutions, and rules.[155] The CAS should also take the leadership and publish "Guidelines for Mediation" including model mediation clauses and mediation agreements, as it did in 1991 for arbitration.[156]

In addition, the existing rules regarding dispute resolution need to be adjusted to weave mediation into the rules and make the use of mediation more attractive through incentives and innovations. The following are several ideas for consideration.

(a) Upon the request of the parties, mediation should be conducted in every venue mutually selected by the parties. Mediation singles itself out as being informal, inexpensive, flexible, and attentive. There is no reason for two parties from South America to be compelled to mediate in Europe. Furthermore, mediation does not need special facilities and an administrative infrastructure. The idea of freedom to select venue is by no mean novel. It has been increasingly resorted to in the modern world of institutional transnational commercial arbitration.[157]

(b) The arbitration and mediation rules should be changed to enable the arbitration institutes to lend support to the mediation process through their arbitration procedures. An example is the use, before and during the mediation, of interim provisional or conservatory measures[158] and access to advisory opinion procedures that formerly existed under the CAS rules and were abolished in 2011.[159] More

[151] Especially at the early stage of conflict. *See* Procter, *supra* note 123, at 5.

[152] A prominent UK sport lawyer argued that sport lawyers may gain great benefits from taking their clients to mediation. First, they may look good in the eyes of their client as the ones who save them money and time. Second, in the majority of cases there will be an agreement that the client really likes and wants. Third, this is the only process which assures strict confidentiality. Fourth, they have quality and intimate time with their client. All mediation in transnational disputes and often in domestic disputes is conducted in marathon sessions. It is a different experience emotionally to go on the mediation journey guided by a mediator together with one's client, his/her opponent and her/his lawyer. Fifth, a good mediator will know how to involve and give place to lawyers in the process. Sixth, if the mediation fails, nothing is lost. It may well be that the parties have reached agreement on some of the issues or on procedural aspects and as happens many times, agreement will follow. In any case, the parties and their lawyers come out with much better knowledge about the other side and deep understanding about the case. Duthie (2014), *available at* http://www.tas-cas.org/fileadmin/user_upload/Bulletin_1_2014.pdf.

[153] Abramson (2011).

[154] Through co-mediation, supervision and continuing education in mediation, ADR, sport law and sport management. Omar Ongaro attributed the failure of mediation in FIFA to two main factors: the low quality of mediators and parties' fears of problems associated with the execution of mediation agreements. Omar Ongaro, Head of Players' Status and Governance, FIFA's Legal Affairs Division, Address at the 1st CAS Conference on Mediation (May 16, 2014).

[155] The best example and the most important volume-wise was FIFA in 2002.

[156] Blackshaw, ADR and Sport, *supra* note 31, at 3.

[157] Even the leading international commercial arbitration institutions like ICC and LCIA have changed their long held approach and conduct arbitration proceedings all over the world. The CAS itself which has a seat in Lausanne keeps two permanent branches or "satellite offices" (in Sydney Australia and New York) that can host arbitration hearings as well as hearing centers in Shanghai and Singapore and allows panels to conduct arbitration hearings anywhere.

[158] As for conservative measures *see* Blackshaw, ADR and Sport, *supra* note 31 at 12–13. Providing a platform for ascertaining particular interim measures without filing a request for full blown arbitration is an important step to enhance mediation. It can easily be done in a one stop place like the CAS. *See*: Banfi (2015), *available at* http://www.clydeco.com/insight/updates/view/mediation-undermined-in-spain.

[159] Former the CAS rules enabled disputing parties to avail themselves of an advisory opinion. The CAS Advisory Opinion was a unique process and procedure. It was a non-binding opinion written in an arbitration format, answering specific questions, primarily legal. The answers were supposed to set out certain general principles and act as guidelines as to possible ways of viewing and characterizing particular situations. Although in practice this procedure was seldom

important, the rules should include an escalation clause which allows parties to request that the mediation agreement becomes a consent arbitration award.[160] Often parties need an arbitration award for internal use or feel more confident and secure, holding a formal arbitration award rather than a mediation agreement, believing it is more enforceable and durable.[161]

(c) Similarly, arbitration institutes should offer a positive monetary incentive in the form of discounted arbitration fees to parties who have tried but have failed to resolve their dispute through mediation. Since mediation is much cheaper than arbitration and there is a substantial chance to reach an agreement that will end the dispute in mediation, knowing that they will be entitled to a discount in the case of no settlement may make them less troubled by mediation's lack of finality.

(d) Liberalize the mediation and arbitration rules to enable the use of mediation as a platform for freely agreeing on different dispute processing procedures. For instance, on a particular types of arbitration, (e.g., expedited procedures), on hybrid techniques, such as Med-Arb[162] and on parallel techniques, such as an "arbitration window" or non-binding expert opinion regarding a particular issue during the mediation process.[163] As stated above, one of the advantages of mediation is flexibility and creativity. In some instances, parties in mediation might not be able to reach agreement on the substantive issues but can agree on procedures that will yield the substantive outcome. They need to be assured that the institutional rules are flexible enough to support their agreement and make it feasible.

7.2 Mandatory mediation

The best way to promote mediation in sport is by educating the participants—individuals, clubs, unions, dispute resolution institutions, federations and associations as well as sport lawyers, that mediation is important and may bring an added value. The problem, however, is that it may take too long and even if they are convinced, there are psychological barriers and institutional, organizational, and tactical inhibitions that prevent them from using mediation. The fact that mediation is a good product has been already established. The way to cope with the other part of the mediation under-use paradox, i.e., the fact that it is still hardly used, is by changing the consumption habits. This is the place where the idea of mandatory mediation comes to play.

In the mediation literature, there has been an ongoing debate regarding the pros and cons of mandatory mediation.[164] Those who oppose mandatory mediation argue that since the basic tenets of mediation are voluntarism, consent and parties' autonomy, mandatory mediation is a contradiction in terms. On the practical level, they argue that imposing a duty to use mediation may have the undesirable effect of lawyers going through the motions or, worse, misuse of the mediation process to advance strategic[165] and tactical[166] aims.

The proponents argue that mediation is a still new and unfamiliar process which has to pave its way into an arena characterized by a long tradition and culture of adversarial adjudication and against the resistance of lawyers. Hence, for the formative years and until mediation is established,

Footnote 159 continued
used (an average of once per year), in appropriate case, it can be very helpful in mediation. It is a fast and inexpensive means of clarifying legal issues that may otherwise block the progress of mediation. The fact that these opinions are only advisory, i.e., not legally binding, make them very valuable and suitable for mediation.

[160] There is an ongoing debate in international arbitration circles as to how to give a mediated settlement the power of an arbitration award. *See*: Sussman (2009); Weiss and Hodgkinson (2014). At present, a party to a CAS mediation agreement may use expedited procedure in order to get a declaratory award.

[161] In order to encourage parties to use mediation in pending cases and even in cases that are on their way to court, mediation legislation in many countries help to execute the mediation agreement by giving it the power of enforceable court judgment. *See*: Hopt and Steffek, *supra* note 5, at 45–47. It is noteworthy that Israel adopted an extreme model of direct enforcement. If a settlement is reached in a pending case the mediated agreement is filed and automatically possesses the power of a court judgement. In addition, in order to encourage potential litigants to use mediation even before initiating court proceedings, Israeli law authorizes judges to issue consent decrees bestowing the power of the court's judgment on agreements reached through pre-action mediation, i.e., in situations where a lawsuit was not even filed. *See* Courts Law (1984).

[162] This hybrid procedure is probably possible under the CAS rules but is prohibited under ECA rules. The last paragraph of Article 17 to the CAS Mediation Rules provides that "in the event of failure to resolve a dispute by mediation, unless the parties agree in writing otherwise, the mediator shall not accept an appointment as an arbitrator in any arbitral proceedings concerning the parties involved in the same dispute". The demand for a written consent is not a barrier since it is stipulated in the mediation agreement that the parties agreed to appoint the mediator as arbitrator. More important, when parties move from mediation to Med-Arb they ought to sign a separate agreement.

[163] It can also work in the reverse order, i.e., parties may attempt to settle one or more issues through mediation during the arbitration proceedings.

[164] Hedeen (2005); Sander (2000); Mayer (2004); Wissler (2002).

[165] Such as dragging out the dispute in order to gain time and enhance stress or depleting the other side's resources and combative spirit. *See* Lack, *supra* note 80, at 344.

[166] Such as fishing for facts and legal arguments and getting to know the other side and her counsel. *Id*.

mandatory mediation is essential and the only way to overcome the initial inertia and to give mediation a chance to get off the ground. In addition, mandatory mediation is simply one way of ensuring that disputes that are appropriate for mediation go to mediation. The EU Study regarding the underuse of mediation[167] concluded that, in light of the many benefits a greater use of mediation can bring and the failure of pro-mediation regulatory features, only a certain degree of compulsion to mediate can significantly change the actual use of mediation.[168] Furthermore, the EU Study cited data that proved that mandatory mediation has a positive effect on voluntary mediation.[169]

A scheme of mandatory mediation eliminates the perception that it is the weaker party that is interested in mediation; and it overcomes the reluctance of lawyers to recommend mediation to their clients. This is particularly true in sport. Lawyers who specialize in sport law tend to be litigation-prone/friendly, completely immersed in the arbitration tradition and due to the competitive culture of the industry, are more afraid to be perceived as weak and non-combative.

Different legal systems that have opted for mandatory mediation have experimented with a broad array of models of mandatory mediation for family, labor, employment and commercial disputes.[170] They range from full mandatory mediation, i.e., an obligation to participate in mediation in good faith before being able to pursue adjudication, to a mitigated less intrusive model which involves mandatory exposure to mediation. This latter model, which has become popular in recent years, requires the parties to participate in a preliminary case management or mediation information and consultation session conducted by a mediator prior to pursuing litigation. This session is usually provided free of charge and serves the goal of making sure that parties have seriously considered the pros and cons of adjudication and mediation for their particular case. There are two types of mitigated mandatory mediation schemes—opt-in and opt-out. Under the first, at the end of the information session, parties may decide to go into mediation either with the mediator who conducted the information session or with another mediator. Under the second, parties who were not convinced may opt-out of the mediation.[171]

In between these two, there are many variations, among them the UK's semi-mandatory model. In the United Kingdom, the basic presumption is that many, if not most, cases are appropriate for mediation and that disputing parties should seriously consider the possibility of using mediation. Two means are used to promote this idea. First, a pre-action protocol in which the parties are required to report, among others, whether they have considered or used mediation; second, an unreasonable refusal to mediate entails penalty in the form of an exception to the general rule that "costs follow the event". A successful party in litigation may not recover litigation costs due to an unreasonable refusal to accept an offer to use mediation, whether the offer is made by the court or by the other party.[172]

In sport, the WBC has substantial experience with mandatory mediation and the ECA moved in 2013 from voluntary to mandatory mediation. At the national level, the Sports Dispute Resolution Center of Canada has had positive experience with its light model of mandatory mediation.

Relying on the positive experience with mandatory mediation in many jurisdictions, sport federations and sport dispute resolution institutions should consider introducing a model of mandatory mediation. It can be either full mandatory mediation with or without an opt-out option or just a mandatory exposure to mediation before parties may invoke arbitration.[173] Initially, it can be introduced as a pilot program and for certain categories of disputes, for instance, in disputes relating to training compensation in

[167] EU Study, *supra* note 12.

[168] *Id.* at 7.

[169] *Id.*

[170] New York recently introduced an innovative mandatory mediation program under which every fifth case that comes to the New York County Commercial Division has to go to mediation. Parties may opt-out by showing just cause. The program was introduced in July 2014 as a pilot for eighteen months. *See* Brennan (2014) *available at* http://www.jamsadr.com/files/Uploads/Documents/Articles/Brennan-Lorraine-Mandatory-Mediation-NY-LAW-2014-07-23.pdf.

[171] Romania adopted an opt-in version, according to which if at the end of the information session both parties are interested in pursuing mediation they start a new process. *See* EU Study, *supra* note 12, at 8.

[172] Dunnett v. Railtrack (2002); Halsey v. Milton Keynes General NHS Trust (2004). As an exception to the general rule, the unsuccessful party has the burden to prove that, with regard to all circumstances of the particular case, the successful party acted unreasonably. The court provided a non-exhaustive list of factors to be taken into account, including the nature of the dispute, the merits of the case, the extent to which other methods of settlement had been attempted, whether the cost of ADR would be disproportionately high, whether a delay associated with ADR processes would have been prejudicial, and whether mediation had a reasonable prospect of success. For a recent holding, *see*: Garritt-Critchley v. Ronnan (2014); Laporte v. Commissioner of Police of the Metropolis (2015).

[173] As a matter of principle, there is nothing exceptional in compelling disputants to use mediation. In our culture we have traditionally compelled defendants to submit to court adjudication whenever a claim against them was filed and the same is true for most sport disputes, only that they are subject to arbitration. In light of the important aim, on the one hand, and the tyranny of the status quo as well as the forces, vested interests and obstacles, on the other hand, I do not see a problem with the slight concession regarding the concept of voluntarism.

football. In the case of CAS mediation, such an obligation may solve the problem of the low retention rate. Alternatively, the CAS should consider requiring every mediator who has been appointed to conduct a mediation information and consultation session with parties' lawyers and representatives to improve the prospect that the case will actually go to mediation.[174]

The CAS may also adopt the UK quasi-mandatory model, introducing a principle under which the prevailing party in arbitration may not recover its costs due to an unreasonable refusal to accept an offer to use mediation, whether the offer is made by the CAS or by the other party.[175] Finally, since the practice of sport law tends to be more international, it is not feasible to expect that all lawyers will be subject to the duty to consult their clients about the possibility of resolving their dispute through mediation and other ADR techniques.[176] Instead, the CAS and other sports arbitration institutions should require that the statement of claim, which commences the arbitration proceedings, shall declare whether the filing of the claim has been preceded by an attempt at mediation or another consent-based technique and whether there are any impediments to using such procedure.

Strategically speaking, FIFA is a large international federation which can reap immediate benefits from introducing mandatory mediation and is in a position to take the leadership and have an impact on the sport industry as a whole.[177] FIFA has a large volume of cases, many of them emotionally charged and having the potential for value-creating mediation-type solutions. Furthermore, as a rule, parties may have an interest in preserving good professional and business relationships. At the institutional level, FIFA's DRC has consistently suffered from backlogs and long delays. Mediation with its proven 70–80 % settlement rate can substantially relieve the burden and reduce workload and backlog. In any case, the time that cases are waiting for an arbitration hearing may be utilized to try and resolve the dispute through mediation provided either by its DRC or by CAS. It took FIFA 18 years to introduce the CAS into its constitution as a mandatory forum for all football-related appeals. It can do the same with CAS mediation and have a lasting impact on the sport industry and the prominence of mediation, as it has had on the status of CAS arbitration.

7.3 Mediation in employment-related disputes

As stated above, the sport industry has insisted on resolving its disputes internally within the family of sport and has relied exclusively on institutional arbitration. However, in many countries, a large segment of sport disputes, i.e., employment-related disputes, may not be brought to arbitration by law. They must be adjudicated only in public fora, either in the labor courts or at public tribunals. Since mediation is a consent-based process, and parties are not bound by a third party's determination, it appears as if this ban does not apply to mediation, including mandatory mediation.[178]

For those cases that are outside the reach of arbitration, mediation should take the place of arbitration as an internal dispute resolution process. In this way, this large segment of sport disputes will be resolved at least partially within the sport industry's family and by processes administered by the institutions that are governed by the international, continental, and national sport federations or associations.

Certainly mediation should be used for collective labor disputes in sport, i.e., wherever an association or a union of players, coaches, or referees is a party. Much more important, however, are the individual employment-related disputes. Most relationships in sport are employment relationships as the clubs and the sport-governing bodies themselves are big employers. Employment-related disputes are specifically amenable to mediation. They take place within a relational contract[179] and a continuous relationship and often they are polycentric.[180] It is noteworthy that the relationships between the clubs and the associations or federations as well as the relationships between the different levels of sport-governing bodies have similar properties. It may well be that strategically, the field of employment-related sport disputes is the place to start experimenting with mandatory mediation.

[174] Such a session can be conducted through a video or telephone conference and should be free of charge.

[175] It appears that there is no need to change the CAS rules in order to adopt such measure. Under Article R64.5 the arbitration panel has a wide discretion in awarding costs to the successful party including legal fees and costs of witnesses and interpreters. The rule stipulates that in its decision, the panel may take into account the complexity of the proceedings and the conduct of the parties. Nonetheless, in order for the parties to be aware of this consequence beforehand, it may be wise to amend Article R64.5 of the CAS Code by inserting a new provision which explicitly mentions this possibility.

[176] *See* Hopt and Steffek, *supra* note 5, at 23–24.

[177] It is noteworthy that in 2001 FIFA offered a mediation service. The experiment was short-lived and abolished after one year due to what FIFA considered to be low demand (1 % of cases) and a low settlement rate that would justify investing resources in building an institutional mediation service. Ongaro's Address at the CAS Conference, *supra* note 154.

[178] The German Constitutional Court has decided that an obligation to try mediation before going to trial does not violate the constitutional principle of access to justice. *See*: BVerfG (2007). The European Court of Justice came to similar conclusion. *See*: CJEU (2014).

[179] Employment contract is a prototype of relational contract. *See* Macneil (2001).

[180] Fuller (1978).

8 Epilogue—the future of mediation in sport disputes

The world of sport badly needs the mediation discourse. The more sport develops as a global social phenomenon and business activity, the more the industry will feel the need, as the number of disputes will rise exponentially, as will their complexity. The need to promote mediation does not rest merely on the advantages of mediation in terms of being time and cost efficient, but on its added value in terms of better outcomes and facilitating the continuity of business relationships with minimum interruption. The adversarial competitive culture or ethos belongs in the sport field. It does not belong at the negotiating table and to the relationships within the family of sport.

It is much healthier for the sport industry to base its relationships on consent, recognition, understanding,[181] interest-based discourse, and shared responsibility in the pursuit of individualized "justice", rather than on relationships governed by legal rules and authoritative decisions as to who is wrong and who is just. In mediation, parties who are assisted by a third party do "justice" to each other instead of waiting for a third party to do justice for them.

There is a bright future for mediation in sport. This is true not only for employment-related disputes in jurisdictions, where it is the only legally permissible internal process, but also for all types of commercial disputes domestic and international as well as to governance disputes. The potential gains and usefulness of mediation outweigh the shortcoming and hopefully will overcome the barriers. The data coming from the CAS and ECA regarding the performance of mediation are encouraging. The mediation stories regarding complex sport disputes that were resolved through mediation[182] and the way they were resolved from process and outcome perspectives attest to the great potential of mediation in sport-related disputes.

Theoretically, all sport-related disputes can be brought to mediation.[183] The experience with mediation in commercial and civil disputes demonstrates that even appeals, including in the highest instance, can be resolved expeditiously and amicably by consent through mediation.[184] The successful experience with mediation in the public sphere, including public policy disputes, suggests that mediation has great potential for resolving governance disputes. Some regulatory disputes, such as eligibility and selection, may be more difficult due to the urgency and the limited range of possible solutions (zero-sum).[185] Disputes regarding discipline and doping seem *prima fascia* to be out of reach. Nevertheless, the Canadian experience with mediation in these types of cases,[186] and doubts raised in the literature,[187] as well as the increasing popularity and growth of restorative justice and victim-offender mediation in criminal law[188] may prove that in the future and in the right cases, mediation can also be used in discipline.[189] Certainly, mediation can be used to resolve commercial and contractual fallout resulting from decisions in disciplinary cases, especially doping.[190]

The CAS is in a unique position to become a leading one-stop dispute resolution provider for all the types of sport-related matters by offering a winning model of arbitration-mediation-arbitration. Parties and their counsels who are entering arbitration proceedings at the CAS and are assured that they are already inside the CAS's arbitration chambers, may feel less inhibited to accept a proposal made by the CAS to try mediation before they proceed to arbitration. They know that if mediation fails, arbitration will be resumed immediately. In the worst case, it entails a short delay of up to 3 months, a worthwhile price for the possibility of reaching an agreement through mediation.

If the recommendations contained in this article are implemented, mediation will increasingly become a standard pre-arbitration dispute resolution process for most

[181] When mediation was first introduced into the CAS, the former Senior Counsel emphasized that mediation was to encourage the "spirit of understanding" which is made to measure for sport. Blackshaw, ADR and Sport, *supra* note 31, at 25.

[182] See for example the case of Richie Woodhall and Frank Warren. This entrenched contractual dispute which received extensive media coverage, a war of words and hostility, was resolved by mediation in 2 days, by re-negotiating the contract which promised to preserve their successful relationships. *See* Blackshaw, Mediating Sport, *supra* note 20, at 85–86.

[183] Goodrum, *supra* note 25.

[184] In Israel, for example, all types of non-criminal appeals, including civil and administrative law, are referred to mediation, including appeals before the Supreme Court.

[185] Blackshaw, Mediating Sport, *supra* note 20, at 93.

[186] Hon Graeme Mew, *supra* note 132.

[187] Brown (2014); Duthie, *supra* note 152, at 36–37.

[188] van Wormer and Walker (2013); Barnes (2013).

[189] Currently all disciplinary procedures are based on "negative discipline", i.e., punishment, and uniform treatment. Mediation can be much more creative, leading to tailor-made solutions which fit the individual case. For instance, if a player or a coach is blamed for inappropriate conduct, such as making a racist statement, he can be assigned to write a new anti-racism code and present it or devote time to educate different groups about the negative societal consequences of racism. This is why mediation has been referred to as the New Equity. *See* Main (2005).

[190] Such as loss of lucrative sponsorship and endorsement contracts Blackshaw, ADR and Sport, *supra* note 31, at 25. Ian Blackshaw, Professor at the Anglia Ruskin University, international sports lawyer, honorary fellow at Asser Sports law center, *Overview of the Different Mediation Clauses and Examples Tailored to Sport Federations*, Address at the 1st CAS Conference on Mediation (May 16, 2014).

sport-related disputes. If it is true that it has taken 75 years for arbitration to achieve maturity and gain its international status and acceptance,[191] mediation is likely to reach this place faster.

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[191] The International Chamber of Commerce's International Court of Arbitration's volume of cases has grown from 32 new arbitrations in 1956 to 759 in 2012. This is a roughly 24-fold increase over the past 48 years. *See* Born (2014) at 93. *See also* Blackshaw, Mediating Sport, *supra* note 20, at 93.

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