

## CHAPTER I

### GENERAL INTRODUCTION

#### The Business of Sport

Sport is now big business.

It has developed into a global industry and represents more than 3% of world trade. And it is worth more than 1% of the GNP of the European Union (EU). In the EU alone, two million new jobs have been created directly or indirectly by the Sports Industry.

This phenomenal growth in the value of the Sports Industry is largely due to the increase in the broadcast coverage of sports events and the exponential rise in the fees paid by broadcasters for the corresponding rights. A quarter of the world's population watched the television coverage of the 1998 World Cup Final in Paris and an audience of 3.7 billion watched the opening ceremony of the Millennium Olympic Games in Sydney on 15 September 2000. The broadcast rights to the Sydney Games were sold for a record US\$1.3 billion – five times more than those for the 1984 Los Angeles' Games. Whilst, earlier in the summer of 2000, the TV rights to The Premier League in England for the next three seasons were sold by auction for a staggering £1.65 billion.

Increased television coverage has also led to a spectacular rise in the value of sports sponsorship, by national and multinational companies wishing to associate themselves and their products and services with major national and international sports events, such as the Olympic Games. An exclusive global sponsorship package of the Games now costs some US\$50 million. It is not surprising, therefore, that the world-wide market for sports sponsorship grew in 1999 by 14% to US\$22 billion, whilst spending in Europe alone increased by 16% to US\$6.5 billion. And furthermore, the cost of an exclusive sponsorship for three seasons of the English Premier League has increased by more than 40% to £48 million.

The increase in leisure time in the developed world has also played a significant part in the meteoric rise of the Sports Industry with more people participating in and watching sport than ever before. This, in turn, has seen the rise of sports men and women as sports personalities with salaries, especially footballers – we are fast approaching, according to a recent Report on Football Finance by Deloitte & Touche, the age of £100,000 per week footballers – sponsorship and endorsement deals akin to the fabulous incomes of Hollywood 'stars'. In fact, sport is now part of the world-wide entertainment industry.

All of this, combined with the development of the Internet and other new forms

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of media, including mobile phones, to deliver sports programming, content and information (e.g., the latest cricket score), the value of the Sports Industry is set to grow even further in the future.

### **The Need for Alternative Dispute Resolution Mechanisms in Sport**

With all this money and wealth circulating in sport, winning is now everything – the privilege and satisfaction alone of taking part is passé. And, with the increasing use of performance enhancing drugs by sports persons, it seems to be a case of winning at all costs! For top sports persons, winning means money and riches. So, in line with the old adage, where there is money to be fought over there are likely to be disputes, it is not surprising that sports litigation is also on the increase.

This raises the question, given the special characteristics and structures of sport, well recognised around the world and not least by the EU Commission in Brussels in its evolving Policy on Sport, how best to resolve sports disputes.

In this work, we will examine the possibilities of using, instead of the traditional forms of litigation and arbitration, one of a growing number of alternative forms of dispute resolution, namely, mediation, as a means of settling sports disputes. To put the subject in context and by way of background, we will first take a brief look at the attitude of the courts generally to being involved in sports disputes.

## CHAPTER II

### THE COURTS AND SPORTS DISPUTES

#### Generally

Generally speaking, the use of alternative methods of resolving disputes, including arbitration, conciliation and mediation, is not opposed by the Courts.

Indeed, in many jurisdictions around the world, the Courts are very sympathetic and often actively encourage the amicable extra-judicial settlement of disputes of various kinds, not least in the sporting field.

#### The Position in England

For example, in England, there is a long tradition that the Courts do not generally intervene in sports disputes. They tend to leave matters to be settled by the sports bodies themselves regarding them as being, as Megarry, a former Vice Chancellor of the Chancery Division of the High Court of Justice, put it in the case of *McInnes v. Onslow-Fane* [1978] 3 All ER 211: 'far better fitted to judge than the courts'.

In similar vein, Lord Denning, the famous English Judge of the last century, expressed the point in the following succinct and typical way in the case of *Enderby Town Football Club Ltd v. Football Association Ltd* [1971] 1 All ER 215:

'... justice can often be done in domestic tribunals better by a good layman than by a bad lawyer'.

In England, there are also new rules requiring the parties to disputes to attempt to settle their disputes by mediation at an early stage in the litigation process (see next section).

However, the English Courts will intervene, where there has been a breach of the rules of natural justice (*Revie v. Football Association* [1979] *The Times*, 19 December 1979) and also in cases of restraint of trade, where livelihoods are at stake (*Greig v. Insole* [1978] 3 All ER 449).

The position is the same in North America. Let us first take a look at the US and then Canada.

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## The Position in the US

In the US, sports disputes are regarded as private matters. The attitude of the Courts is well summarised by the Federal District Court in Oregon in the Tonya Harding case in 1994<sup>1</sup> as follows:

'The courts should rightly hesitate before intervening in disciplinary hearings held by private associations ... Intervention is appropriate only in the most extraordinary circumstances, where the association has clearly breached its own rules, that breach will imminently result in serious and irreparable harm to the plaintiff, and the plaintiff has exhausted all internal remedies. Even then, injunctive relief is limited to correcting the breach of the rules. The court should not intervene in the merits of the underlying dispute'.

Again, on purely sporting issues, such as eligibility to compete in sports events, according to Judge Richard Prosser of the Seventh Circuit in the case of *Michels v. United States Olympic Committee*:<sup>2</sup>

'... there can be few less suitable bodies than federal courts for determining the eligibility, or the procedure for determining the eligibility, of athletes ...'

US Courts are willing to hear sports disputes only between Sports Bodies in accordance with Federal Law, and in due process and breach of contract cases.

## The Position in Canada

In Canada, the Legal System is, in general, based on the English Common Law and the attitude of the Courts to sports disputes is well illustrated by the 1996 case of *McCaig v. Canadian Yachting Ass'n & Canadian Olympic Ass'n*.<sup>3</sup>

There, the Judge refused to order the Canadian Yachting Association to hold a second regatta for selecting the 'mistral class' sailing team to compete in the 1996 Olympics remarking:

'the bodies which heard the appeals were experienced and knowledgeable in the sport of sailing, and fully aware of the selection process. The appeals bodies determined that the selection criteria had been met ... [and] as persons knowledgeable in the sport ... I would

<sup>1</sup> *Harding v. United States Figure Skating Association* [1994] 851 FSupp 1476 741 F.2d 155, at p 159 (7<sup>th</sup> Circ. 1994).

<sup>2</sup> *Michels v. United States Olympic Committee*, 16 August 1984 Seventh Circuit 741 F.2d 155; 1984 U.S. App. LEXIS 19507.

<sup>3</sup> Case 90-01-96624 [1996] (QB Winnipeg Centre).

*be reluctant to substitute my opinion for those who know the sport and knew the nature of the problem' (italics added).*

## The Position in the European Civil Law Countries

### GENERALLY

In the European Civil Law Countries too, the Courts are generally amenable to the parties trying to settle their disputes by arbitration and other extra-judicial methods, and will adjourn proceedings in cases where there is an express contractual requirement to refer disputes to, say, arbitration, to allow this process to be pursued. Only in the event of failure to reach an extra-judicial solution, and in some other very limited cases, will the Courts be prepared to entertain a suit and adjudicate on the dispute.

Also, generally speaking, the Courts will not intervene in sporting disputes, which concern the 'rules of the game' of the sport concerned.

The position in Switzerland provides a good example of these general principles.

### SWITZERLAND

Under article 190(2) of the Swiss Federal Code on Private International Law of 18 December 1987 a decision of the CAS, which is treated as an arbitral award under Swiss Law, can only be challenged in the following circumstances:

- 'a) if a sole arbitrator was designated irregularly or the arbitral tribunal was constituted irregularly;
- b) if the arbitral tribunal erroneously held that it had or did not have jurisdiction;
- c) if the arbitral tribunal ruled on matters beyond the claims submitted to it or if it failed to rule on one of the claims;
- d) if the equality of the parties or their right to be heard in an adversarial proceeding was not respected;
- e) if the award is incompatible with Swiss public policy'.

Also, the Swiss Federal Tribunal (the highest Court) has held, as part of a seminal ruling of 15 March 1993 on the juridical nature of awards made by the Court of Arbitration for Sport (CAS), that any judgement, that has as its sole object the application of games rules, is '... in principle, outside a juridical control'. We will return to this important case later in the section on the CAS.

### SPAIN

In some jurisdictions, for example, Spain, there is a legal requirement for the parties in dispute to attempt a resolution through conciliation proceedings conducted

before a Judge ('acto de conciliacion') before being permitted to proceed with an ordinary legal action before the Courts. In such proceedings, the Judge explores with the parties in dispute the possibilities of their settling their dispute amicably.

#### ITALY

There is a similar situation in Italy in relation to sports disputes.

## CHAPTER III

### ALTERNATIVE DISPUTE RESOLUTION (ADR)

Before looking at the pros and cons of using Mediation to settle sports disputes, it would be useful to put the subject of ADR into context and look at what it is and the reasons for its growth and popularity in general.

#### What is ADR?

##### GENERALLY

Like many other innovative business practices, ADR originated in the States and has quickly spread around the world. For example, a number of US organisations, including one appropriately called 'JAMS/ENDISPUTE'<sup>4</sup> has been providing an ADR service to individuals and companies for more than 20 years, claiming a settlement rate of 90%.

ADR has been defined by the ADR Group<sup>5</sup>, which is based in Bristol and claims to be the UK's first and largest private commercial dispute resolution service, as follows:

'Any process that leads to the resolution of a dispute through the agreement of the parties without the use of a judge or arbitrator'.

The ADR Group was established in 1989 by a group of lawyers, businessmen and professional mediators to provide a 'quick and inexpensive means of resolving disputes without the need to resort to the courts'.

The ADR Group has affiliated offices in the USA, Canada and throughout the EU, and mediates in more than 12,000 cases annually, claiming a 94% settlement rate. The Group offers services in dispute prevention and management and training courses in negotiation and mediation.

The other body providing ADR services in the UK is the 'Centre for Effective Dispute Resolution' (CEDR), which is based in the City of London. CEDR<sup>6</sup> was established one year after the ADR Group in 1990. CEDR also offers training programmes and its members include leading lawyers and law firms and many 'blue chip' companies. CEDR claims an 85% settlement rate.

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<sup>4</sup> Further information on 'www.jamsadr.com'.

<sup>5</sup> Further information on 'www.adrgroup.co.uk'.

<sup>6</sup> Further information on 'www.cedr.co.uk'.

ADR has grown out of the need to provide parties to a dispute with an alternative to litigation as a means of settling their disputes. Over the years, litigation has come to be regarded, especially by businessmen, as an expensive, inflexible and dilatory method of dispute resolution. Arbitration, originally seen and embraced by the commercial community, as a quicker and less expensive way of settling disputes, is also now regarded as suffering from similar defects.

### THE 'WOOLF REFORMS' IN ENGLAND

The English Courts have responded to these complaints by promoting attempts to settle cases in the early stages of the litigation process as part of new reforms of the Rules of Civil Procedure introduced on 26 April 1999 by Lord Woolf. Writing in 'The Times' on 4 April 2000, Frances Gibb, the newspaper's legal editor, noted:

'Gladiatorial-style litigation is losing its appeal. In its place, mediation – a conciliatory way to tackle disputes outside the courtroom – is finally taking off. These are the findings of a survey [by "MORI"] into Lord Woolf's shake-up of civil justice. The message one year on is that the reforms have promoted a "cultural shift" towards mediation.'

In fact, to encourage attempts at mediation, the Courts may impose an adverse order for costs on a party refusing to mediate who is considered to have acted unreasonably.

As the Lord Chancellor, Lord Irvine of Lairg, told the CEDR Civil Justice Audit Conference, held in London on 7 April 2000:

'There is no doubt that ADR can provide quicker, cheaper and more satisfactory outcomes than traditional litigation. I want to see ADR achieve its full potential'.

It is interesting to note, *en passant*, that, in the 1995 unreported case of *Lennox Lewis v. The World Boxing Council and Frank Bruno*, the High Court ordered Lewis to try to settle the dispute with Bruno and the WBC over a fight with Mike Tyson, as required by the WBC Rules, by compulsory mediation, which the Judge considered would be 'a perfectly proper independent process of mediation'.

### Advantages of ADR

As CEDR, the Centre for Effective Dispute Resolution, another UK provider of ADR services, puts it:

'All disputes, whether in difficult business negotiations or full-scale litigation, can become a drain on resources, sapping money, time and management focus, and destroying important commercial relationships'.



## ALTERNATIVE DISPUTE RESOLUTION (ADR)

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ADR addresses these particular issues and, again, according to CEDR, offers the following advantages:

- Speed – ADR processes can be set up quickly and usually last only one or two days.
- Cost Savings – ADR costs a fraction of litigation.
- Confidentiality – ADR is confidential, thus avoiding any unwanted publicity.
- Control and Flexibility – Unlike a court hearing, the parties themselves remain in full control of the ADR process and any settlement agreed. If no settlement is reached, the parties retain their rights to sue. In other words, the ADR process is conducted on a ‘without prejudice’ basis.
- Commercial focus – The parties’ commercial and/or personal interests influence the outcome, thereby making more creative settlements possible.
- Business relations – ADR processes, being closer to business negotiations than adversarial courtroom procedures, can be better preserved or restored.
- Independence – Parties can benefit from rigorous and confidential analysis of their position by a genuinely independent mediator.

ADR can be used in conjunction with litigation and arbitration and in national and international disputes. It can also be used in almost any area of law or business (see later).

But, as the Lord Chancellor, Lord Irvine of Lairg, has also pointed out in the Inaugural Lecture to the Faculty of Mediation and ADR in London on 27 January 1999:

‘ADR is not a panacea, nor is it cost-free’.

Indeed, it is worth setting out the text of the complete Lecture, which the reader will, I think, find interesting and informative:

**Lord Irvine of Lairg**  
**The UK Lord Chancellor**

Inaugural Lecture to the Faculty of Mediation and ADR  
 Wednesday, 27 January 1999 London

Let me begin with a quotation for everyone who still thinks that the concept of alternatives to combative, court-based, Olympian dispute resolution is today’s modishness. It is from *The Charitable Arbitrator*, written in 1688, by the so-called ‘Prior of St Pierre’, who was evidently no fan of litigation. If you are minded to satirise lawyers in print, a pseudonym may have been then, as now, a shrewd move! He wrote:

‘... to be a good mediator you need more than anything patience, common sense, an appropriate manner, and goodwill. You must make yourself liked by both parties, and

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gain credibility in their minds. To do that, begin by explaining that you are unhappy about the bother, the trouble and the expense that their litigation is causing them. After that, listen patiently to all their complaints. They will not be short, *particularly the first time around.*'

The Academy of Experts has worked hard in recent years to improve the standards of dispute resolution in this country. I am delighted to be here today, to deliver the inaugural lecture of this Faculty of Mediation and ADR. I hope that this lecture – like the Faculty itself – will continue to take forward the essential public debate about ADR.

The modern development of ADR has its origins in the United States of America in the 1970s as a reaction against the high cost and long delays of litigating business disputes. ADR has now come to be recognised internationally as an effective alternative to highly expensive and rigid adversarial systems.

ADR has spread primarily through the influence of the institutions. These include the international arbitration organisations, national and regional arbitration and conciliation centres, national arbitration institutions, professional institutions and national courts. Whilst not dependent on government endorsement, this can provide additional impetus. The International Chamber of Commerce, recognising that the conduct of formal arbitration or litigation may be costly, time consuming, and entail considerable disruption for the parties involved, has always had a procedure for conciliation and two thirds of all ICC arbitration cases are resolved through negotiation before the imposition of an award. Other major international arbitration organisations to offer conciliation services include the American Arbitration Association, the London Court of International Arbitration, the World Intellectual Property Organisation and the International Centre for the Settlement of Investment Disputes. Building on this international framework, most national arbitration centres and organisations now actively promote the use of ADR.

In the UK the Centre for Dispute Resolution (CEDR) was launched with the support of the Confederation of British Industry in 1990 to promote ADR in dispute handling. CEDR promotes ADR, trains and accredits mediators and arranges mediations and they claim a 95 per cent success rate in resolving disputes. The Academy of Experts, although its main purpose is to promote the better use of experts, is also at the forefront in the development of ADR processes and was the first UK body to establish a register of qualified mediators. The British Association of Lawyer Mediators was set up in 1995 with the aim of promoting mediation in the UK and of the role of lawyers in mediation and the maintenance of high professional standards. The City Disputes Panel, was founded in 1994 to settle financial disputes in the financial services industry. Its panellists are dedicated to the resolution of financial disputes through mediation, evaluation, determination and arbitration. Also the use of ADR has been established in the UK in resolving family and divorce disputes,