

Sports and ADR

18 Sep 2016

This paper was prepared and settled jointly by the members of ADRAC.

One area of increased use of ADR is in Australian sport. Sportspersons usually have a limited sporting lifespan and sporting teams are built on the maintenance of team cohesion/morale. The reputation of sporting clubs can significantly impact their success both on and off the field. Accordingly, the use of ADR can provide for timely and cost-effective resolution of disputes which could otherwise damage individual and team performance, and even the very success of a sport in an ever competitive market.

There are a number of approaches to dispute resolution among sports governing bodies. While some have developed detailed rules to deal with disputes and complaints, others have committed to the 'Play By the Rules' approach. Some sports bodies use both their own regulations and the Australia wide *Play by the Rules*.

Over time, sports governing bodies have developed detailed rules to deal with every aspect of a game, from the rules of the game to disciplinary and grievance processes. For example, the Football Federation Australia (FFA) has [extensive regulations and by-laws](#) covering most aspects of its game.

Under most sports contracts, professional players will agree to have disputes resolved under the regime of regulation developed by the sport. In the case of professional soccer, players will normally agree to resolution of a termination of a player's contract to be dealt with under the grievance resolution regulations that are in place at the relevant time by the relevant sport's governing body. In the case of the FFA, an arbitrator, usually a barrister or solicitor, is normally appointed to hear a

dispute under its grievance resolution regulations, and to make a determination of the dispute in writing. These types of arbitral hearings will resolve a dispute within a short time period, usually behind closed doors, with no or very limited recourse to the courts. The parties are encouraged whenever possible to settle their differences without the need for a determination.

In Western Australia, sports associations are encouraged to follow the *Play by the Rules* guidelines, that is, to contact the Member Protection Information Officer for early intervention and to discuss suitable intervention beyond *Play by the Rules* with Officers of the WA Sports Federation. It is at this stage that ADR is considered.

Therefore, ADRAC acknowledges that sports governing bodies have quite successfully set up their own regulatory systems to manage their respective sports, and disputes are in a large part resolved quickly and efficiently.

Equally, ADRAC believes that sports governing bodies could benefit by adding additional ADR options into their regulations, building on (for example) the approach by *Play by the Rules*, to enable disputes to be resolved through more facilitative or advisory processes. ADRAC believes that there is still a lot of room for greater use of flexible ADR options in sports and would welcome comment as to how they might be usefully employed in resolving some sporting disputes. It should also be noted that sports stakeholders are not limited to just players and clubs - fans are equally important.

A good example was the soccer fan dispute in late 2015 which significantly affected the A-league, with a number of games boycotted by fans. This dispute arose from the objection by fans to the way the FFA banned some football fans for alleged misconduct, and the appeals process managed by the FFA, which according to fans was not fair. As the dispute with fans escalated, the FFA determined that the appeals process surrounding the banning of fans was to be reviewed. It is possible that this dispute, which affected the A-League significantly at the time, might have been resolved earlier through the use of a more facilitative ADR process.

Finally, ADRAC notes that governing bodies overseas have in some areas developed hybrid ADR processes to resolve disputes. ADRAC queries whether

Australian sport might benefit from such hybrid processes which are briefly outlined below, and seeks any comments on whether sporting bodies or the wider Australian community might benefit from their use in certain situations, or whether they are in fact utilised at present.

Hybrid process, also known as combined resolution or blended process, is a combination of a number of traditional ADR processes. The benefit of this approach is that it allows for a more tailored approach to be used depending on the situation. Some of the popular hybrid processes are described below:

Mediated-Arbitration (Med-Arb): The parties agree ahead of time that if there is an impasse, the mediator concludes the mediation and begins arbitration either immediately or at a pre-determined future date. The mediator will act as an arbitrator and gives a binding award or judgment.

Arbitration-Mediation (Arb-Med): Similar to Med-Arb, the process combines arbitration and mediation, but changes the order. In Arb-Med, the matter commences with a pre-arbitration hearing, where the arbitrator makes a determination and provides reasons. However, this decision is not disclosed to the parties at this stage. The matter will then go to mediation for resolution between parties. If mediation is unsuccessful, the initial decision from the hearing is revealed and parties are bound by it.

MEDALOA (Mediation and Last Offer Arbitration): This approach is commonly known as **baseball arbitration** as it is commonly used to resolve baseball salaries. In this approach, if mediation is unsuccessful, a mediator considers each party's 'last offer' and makes a decision for the most reasonable offer. The mediator's discretion only allows him/her to pick either one or the other position, but at no point in between. The mediator's decision takes the form of a binding award or judgment.

Night time baseball mediation is a variation of the baseball arbitration approach often referred to as **golf arbitration**. The mediator writes down what he/she believes to be the fairest, most reasonable and realistic final conclusion, either in monetary or non-monetary terms, on all claims and counterclaims. The mediator keeps this final

position confidential and then asks all sides to write down their final positions. The side whose final position is closest to that of the mediator becomes an award or judgment.

Pocket golf mediation: This approach commences with a mediator carefully reviewing the matter and writing down a recommendation that he/she deems to be the most appropriate solution. The mediator then runs a separate meeting with each party where the offer is pitched to that party in private. If both parties agree to the offer, it is binding. If only one side accepts, that side does not lose face because the party which does not accept does not know the position of the other side.

WADA-complaint anti-doping regimes

The World Anti-Doping Authority (WADA) has promulgated the World Anti-Doping Code (WADC) which obliges signatory sporting bodies to follow particular procedures and rules in cases of suspected doping rule violations. In Australia, the WADA and WADC are formally recognised under the National Anti-Doping Scheme enshrined in the *Australian Sports Anti-Doping Authority Regulations 2006*, made under the *ASADA Act 2006*. Both the ASADA Act and ASADA Regulations contain detailed mandatory provisions for handling suspected doping rule violations. These provisions do not recognise any formal role for ADR, noting that regulation of suspected doping rule violations is a complex combination of private and public law. WADA-based anti-doping regimes are ultimately predicated upon binding determinations by private sporting tribunals, subject to 'supervisory' arbitrations by the Court of Arbitration for Sport. These regimes do not allow for ADR-mediated resolution of disputes concerning suspected doping rule violations. To that extent, anti-doping regimes may be seen as quite distinct from those mechanisms which apply to resolution of other sports-related disputes.

What needs to happen?

The use of traditional ADR processes has been the preferred ADR methods in sport, namely, the use of an arbitral determination process. However, hybrid processes have had significant success overseas, and ADRAC queries whether they might prove useful in some areas such as Australian sport, and perhaps more broadly.

ADRAC welcomes any comments on whether there are significant benefits in the use of hybrid processes, and whether there might be greater use of facilitative and advisory processes in the sporting sector.