Dispute Resolution in Sport: The Role of Sport Resolutions (United Kingdom)

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[Intro]

Introduction

The lesson of Diane Modahl and the British Athletic Federation

If ever a case demonstrated the need for an independent national dispute-resolution service for sport, then the dispute between Diane Modahl and the British Athletic Federation (BAF) is it. Diane Modahl was sent home in disgrace from the 1994 Commonwealth Games in Canada after a drugs test showed she had 42 times the normal amount of testosterone in her body. Modahl said: “I have declared my innocence, I have never taken any banned substance.” A BAF disciplinary panel found her guilty of doping and suspended her for four years. Modahl won her appeal to the BAF a year later. In 1996 she was cleared of all charges by the International Amateur Athletics Federation (IAAF) and allowed to return to international competition after it ruled that her sample had been mishandled.

Four years later in December 2000, Modahl’s dispute with the BAF finally ended as it had begun: in tears. She had accused the BAF of bias in its approach to her case and lost a £1 million claim for damages in the High Court:

“When we sold our house to keep the case going”, Modahl says. “Then we had to sell the second home we had downsized to. We had to go back

and live with my parents. It was financially catastrophic.”

In the meantime, the BAF had endured its own “financial catastrophe”, with Chief Executive David Moorcroft admitting that unexpected legal expenses related to the action brought by Diane Modahl had played a part in the organisation becoming insolvent. It was against this backdrop that the Sports Dispute Resolution Panel (later renamed Sport Resolutions (United Kingdom)) was created, accepting its first referral in the year Diane Modahl’s case was heard in the High Court.

Sport Resolutions (United Kingdom)

Independent, affordable, speedy and confidential

The raison d’être of Sport Resolutions is to prevent a repeat of the sorry case of Diane Modahl and the BAF by providing a mechanism for British sport to resolve its disputes without the costs, delay, publicity and uncertainty of going to court. It exists to preserve the autonomy of sport and to ensure the public courts intervene only in the most exceptional of circumstances. The aim of Sport Resolutions is to provide an independent, affordable, speedy and confidential service.

Sport Resolutions (United Kingdom) was set up as the British national equivalent to the International Court of Arbitration for Sport, with its own panel of expert arbitrators and mediators, “sport friendly” arbitration rules and mediation procedure, and a sport focussed Board and Secretariat. In recent years national bodies with similar objectives have been established throughout the world. Examples include the Sports Dispute Resolution Centre of Canada, the Sports Tribunal of New Zealand, Just Sport Ireland and the Sports Panel of the American Arbitration Association.

Governance and funding

Belonging to sport but controlled by no single interest group

Sport Resolutions operates under a unique governance model which ensures that it belongs to sport but is controlled by no single interest group within sport. It was established by nine member associations representing the interests of athletes,

professional players, sponsors, governing bodies in England, Scotland, Wales and Northern Ireland and Olympic and Paralympic Associations. Each member association nominates a director to the Sport Resolutions Board. The member association directors then appoint an independent chairperson and four independent non-executive directors to form a Management Board, alongside an executive director and two of the member association directors.

The Board of Directors has no involvement in specific cases. Its role is to set the strategic focus of the organisation, to employ staff to operate the Secretariat, and to appoint individuals to the panel of mediators and arbitrators. The organisation is funded through a combination of sports council grant funding, service level agreements with sports organisations and income from ad hoc cases. Sport Resolutions is a not-for-profit organisation and any surplus income is reinvested in future services for sport.

**Jurisdiction**

**Securing consent**

Like any dispute-resolution body, Sport Resolutions’ involvement is dependent on it securing jurisdiction through the legal consent of the parties. This is given in one of three ways.

(i) The rules of the sporting organisation involved in the dispute allow for recourse to Sport Resolutions

Sport Resolutions is named in over 100 rules and regulations of sporting bodies, such as the Football Association, Lawn Tennis Association, British Olympic Association and British Equestrian Federation, principally as a body of final appeal or arbitration. The most common areas of regulation where jurisdiction is afforded to Sport Resolutions in this way are disciplinary, child protection, athlete selection, anti-doping and club or player eligibility/licensing rules.

Jurisdiction is also gained through references in cross-sport national policies and rules. The best example of this is the UK National Anti-Doping Policy and Rules which have been adopted by almost all governing bodies and provide for arbitration by Sport Resolutions’ National Anti-Doping Panel.

(ii) The contract/agreement in dispute contains a clause referring disputes should they arise to Sport Resolutions

Sport Resolutions is named in numerous commercial agreements and contracts involving sporting parties such as: participation agreements between governing bodies and athletes; sponsorship agreements between governing bodies, clubs or players and sponsors; and agreements between training academies and players.

(iii) The parties to the dispute agree in writing to submit the dispute to Sport Resolutions for arbitration or mediation

Often a party will request assistance in resolving a dispute where Sport Resolutions does not have jurisdiction to become involved. In these circumstances consent needs to be secured in writing by all parties to the dispute, which is usually achieved through the signing of an arbitration or mediation agreement.

**Panels**

**Sport specialist panels of arbitrators and mediators**

Sport Resolutions manages a panel of 120 sport specialist arbitrators and mediators who are appointed for periods of three years against published selection criteria. Panel members are required to sign a Code of Conduct. The general aim is to appoint a well-balanced panel which is fit for purpose in terms of: experience that matches the range of services to be offered by Sport Resolutions in the short, medium and long-term; equality and diversity; and support for Sport Resolutions’ mission, objectives and strategy. Over the past few months, for example, Sport Resolutions has increased panel expertise in child, family and education law, in finance and accountancy, and has also improved its general coverage in Scotland. The number of panel members has been reduced in recent years in an effort to raise standards and to improve the match between members’ skills and experience and the requirements of referred cases.

**Panel of Arbitrators**

The Panel of Arbitrators is sub-divided into four classes: a chairpersons’ list, commercial list, professional list and lay list. The chairpersons’ list is maintained for the purpose of identifying and appointing individuals with the requisite experience to chair anti-doping, child protection, disciplinary and regulatory, eligibility, and selection hearings, and/or any tribunal which has the power to make decisions restricting participation in sport, commercial activities and funding. To be eligible for appointment, individuals must be a solicitor or barrister with a professional interest in sport and experience of chairing tribunals.
The commercial arbitrators' list includes individuals with the requisite experience to chair commercial arbitrations, sitting either alone or with wing members. To be eligible for appointment, individuals must hold a professional qualification with a national accreditation body such as the Chartered Institute of Arbitrators, have a professional interest in sport, and have completed at least ten recent arbitrations as sole arbitrator.

The professional list aims to provide a pool of individuals with specialist skills and experience to sit as wing members in cases which require specific technical knowledge. Members are required to hold a nationally recognised professional qualification in areas such as accountancy, anti-doping (including, but not restricted to, chemistry, medical and physiological qualifications), child protection (including social work, eligibility and funding issues), and to also have a professional interest in sport.

The lay members' list includes individuals with the requisite experience to sit as wing members in disciplinary, regulatory, eligibility, and selection hearings and/or any tribunal which has the power to make decisions restricting participation in sport, commercial activities, funding, etc. and/or commercial arbitrations. Members are required to demonstrate experience at a national level in a sport or sports organisation as a past or present administrator, competitor, coach, official, sponsor, adviser or other similar capacity.

Panel of Mediators

The Panel of Mediators is maintained for the purpose of identifying and appointing individuals with the requisite experience to act as mediator in any dispute referred to Sport Resolutions where mediation has been identified and agreed by the parties as the most appropriate form of alternative dispute resolution. To be eligible for appointment, individuals must hold a professional qualification with a national mediation accreditation body such as the Centre for Effective Dispute Resolution (CEDR), have a professional interest in sport and have recently led at least 10 mediations as a sole mediator.

National Anti-Doping Panel

The National Anti-Doping Panel (NADP) comprises of a pool of 16 individuals who are eligible for appointment by the President of the NADP, to UK national anti-doping tribunals. The NADP consists of nine “Legal Members” who are appointed to chair tribunals. They are solicitors or barristers with experience of chairing tribunals, writing reasoned decisions and handling anti-doping issues in sport. The NADP also consists of seven specialist members, with backgrounds in sports medicine, science, administration and elite competition, who are appointed as tribunal wing members.

Arbitrating sports disputes

Winner takes all

Arbitration has become an increasingly popular vehicle for the resolution of sports disputes in recent years (Sheffield United v West Ham United [2009] ISLR 25; Digicel v West Indies Cricket Board ?????????????????• and Kevin Keegan v Newcastle United [2010] ISLR SLR-???). Arbitration is a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute. In choosing arbitration, the parties opt for a private dispute resolution procedure instead of going to court. Sport Resolutions’ Arbitration Rules offer a flexible procedure which provides a framework for the resolution of all kinds of sports disputes. It can operate as both a stand-alone procedure or alongside the appeal rules or dispute resolution procedure of a governing body.

Arbitration has many advantages for sport, not least the speed, flexibility and confidentiality of the process. Arbitration hearings are held in private, away from the glare of the media spotlight, and decisions are not normally published unless both parties agree to do so. Arbitration can also be expedited to ensure a decision is made to fit around sporting deadlines. For example, an athlete selection matter or club eligibility issue before the start of a sporting season or major championship.

Arbitration in sport increases the confidence of governing bodies, clubs, athletes and sponsors in the process because decisions are made by expert, not generalist, judges who can be expected to understand the sporting context in which disputes occur. Arbitration also permits the parties to participate in the process of selecting their own arbitration panel. As far as Sport Resolutions’ Arbitration Rules are concerned, the parties can select a sole arbitrator together. If they choose to have a three-member arbitral tribunal, each party appoints one of the arbitrators; those two persons then agree on the presiding arbitrator. Alternatively, Sport Resolutions can provide a short-list of arbitrators with relevant expertise or directly appoint members of the arbitral tribunal on behalf of the parties concerned.

Perhaps the greatest benefit to sport is the certainty that arbitration brings. Arbitration awards are final and binding with limited rights of appeal compared to the multiple level of appeal in the courts. In the case of Digicel versus West Indies Cricket Board this allowed the much publicised “Twenty20” series between England and the
Contractual and relationship disputes between types of sports disputes. These are those involving an extremely effective means of resolving certain for one point when you can go for all three? Why settle at odds with the principles of mediation. Why settle passion and “playing to win” which appears to be furthermore, sport is characterised by its culture of participate in a league or not. There is no third way. A club is compliant with league rules and eligible to either selected to go to the Olympics or is not. An athlete is committed a doping offence or not. An athlete has themselves to easy compromise. An athlete has more focused nature of arbitration proceedings which reduce the overall legal spend and amount of wasted management time. Sport Resolutions’ approach is to provide arbitration services which are affordable to all sections of the sport community. It achieves this in two ways. First, through the goodwill of its panel members who agree to provide services under the Sport Resolutions umbrella at affordable fees. Secondly, through the active support provided by the experienced Sport Resolutions Secretariat, who contain costs by managing cases proactively and ensuring that efficient and effective use is made of the arbitrator(s) time.

Mediating sports disputes

Why settle for one point when you can go for all three?

Unfortunately, compared to arbitration, sport does not appear to be as fully sold on the value of mediation. Mediation is a consensual, non-binding, “without prejudice” process whereby a neutral third-party assists the parties in dispute to reach a mutually agreed settlement without recourse to court or arbitration. Mediation differs from litigation and arbitration because a judge or arbitrator does not impose a binding decision on the parties. It enables the parties to work with the Mediator to come to their own solution.

The ambivalence to mediation within sport is to some extent explained by the nature of many sports disputes. Doping, athlete selection, club eligibility and serious disciplinary matters often do not lend themselves to easy compromise. An athlete has committed a doping offence or not. An athlete is either selected to go to the Olympics or is not. A club is compliant with league rules and eligible to participate in a league or not. There is no third way. Furthermore, sport is characterised by its culture of passion and “playing to win” which appears to be at odds with the principles of mediation. Why settle for one point when you can go for all three?

In Sport Resolutions’ experience, mediation is an extremely effective means of resolving certain types of sports disputes. These are those involving contractual and relationship disputes between player and club over image rights, between parents and club over opportunities afforded to their children, between governing bodies and athletes over training programmes and support services, or between organisations over their rights to govern aspects of a sport. It is quick, proven, confidential, straightforward and—most relevant of all—it helps to maintain sporting relationships more effectively than litigation and arbitration because it is a non-adversarial process which facilitates communication between the parties. It seeks to find creative solutions which provide satisfactory results for all sides and where this cannot be achieved it does not prevent commencement or continuation of litigation or arbitration.

Sport Resolutions’ role is to work with the parties to secure their trust and confidence in the mediation process, to match the needs of the dispute to the skills and experience of individual mediators, to negotiate a realistic and affordable fee and to secure formal consent to mediate through the drafting of a mediation agreement. At the end of mediation, where the parties have reached agreement, a legally binding settlement contract is signed. This may provide opportunities for creative solutions which strengthen future relationships such as joint press statements and contingency plans to prevent a reoccurrence of the dispute.

Panel appointments

Calling in the experts

Sport Resolutions also nominates and appoints arbitrators to chair internal disciplinary panels, appeals and reviews on behalf of governing bodies under governing body rules (as opposed to Sport Resolutions’ Arbitration Rules). There are undoubted advantages for governing bodies in utilising the services of Sport Resolutions’ independent sport specialist arbitrators, particularly in complex and hard fought disciplinary cases involving illegal betting, match-fixing, child protection and other allegations which, if proved, are likely to attract severe penalties for the individuals concerned.

National Anti-Doping Panel

Consistency and quality of decision making

In 2008 UK Sport, the National Anti-Doping Organisation, appointed Sport Resolutions to establish and operate a National Anti-Doping Panel (NADP), following a competitive tendering process. The main aim of the Panel is to improve the quality and consistency of tribunal decision making in anti-doping
cases and to remove the cost burden and conflicts of interest inherent in governing bodies organising their own tribunals. Sport Resolutions appoints a president to act as judicial head of the NADP. The President and the Board of Directors of Sport Resolutions then together appoint legal and specialist members (see above section on ‘Panels’) to the NADP.

The NADP operates under its own rules of procedure and is afforded jurisdiction through centrally drafted national anti-doping rules which governing bodies are encouraged to adopt as their own World Anti-Doping Code compliant rules.

The NADP—under the management of Sport Resolutions—therefore acts as the first instance hearing body for all UK anti-doping cases and as the appeal body for all cases involving national level athletes. Appeals relating to international level athletes continue to be made to the Court of Arbitration for Sport for final determination.

Tribunals of one or three arbitrators are appointed to specific anti-doping cases by the President of the NADP. The President is also responsible for determining applications relating to interim suspensions, for improving consistency of tribunal decision making and for ensuring that the NADP Procedural Rules remain World Anti-Doping Code compliant and fit for purpose.

Future developments

Rising to the challenges of the “Golden Decade”

In 2010, it will be a decade and 500 referrals since Sport Resolutions resolved its first dispute: Diane Modahl is long retired as an elite athlete and UK Athletics has risen from the ashes of the BAF, but neither Modahl or the BAF will be forgotten. The lighting of the Olympic flame in London, in 2012, will mark the start of a golden decade of sport in Britain. Glasgow is set to host the Commonwealth Games in 2014 with Rugby League and Union World Cups in 2013 and 2015 respectively and the possibility of a football World Cup in 2018. So what challenges will Sport Resolutions face over the next 10 years?

Many governing bodies continue to put themselves at risk of litigation by not having adequate dispute-resolution procedures in place, by not following their own rules and by playing lip-service to the principles of natural justice. Sport Resolutions’ challenge is to use its privileged position to provide practical information and education about the consequences of being ill prepared and of getting it wrong. There is also scope for Sport Resolutions to further increase its jurisdiction by encouraging the legal advisors of more organisations to include arbitration and mediation clauses in their rules and regulations and commercial contracts.

There is still much work to do to convince sport and its legal advisors of the considerable value of mediation, especially during the early stages of a dispute, before litigation commences or before unnecessary disciplinary action is commenced. Compromise may be seen by some to be against the competitive spirit of sport, but if there is one lesson that Diane Modahl has taught the sporting community, it must surely be that a different approach is required.

Sport Resolutions also has to be prepared for closer scrutiny as its profile rises. The Court of Arbitration for Sport had to deal with awkward questions about its funding relationship with the International Olympic Committee (IOC) and Sport Resolutions is facing up to similar questions with regard to its relationship with UK Anti-Doping and UK Sport. Whatever management protections are in place, to be true to its values of complete independence and neutrality, Sport Resolutions cannot afford to be perceived to be funded, controlled or influenced by any body that may have a direct interest in any of the disputes that it is asked to resolve. At the turn of the year the new UK Anti-Doping (UKAD) organisation comes into being. It will be responsible for drugs testing, investigation and also for charging athletes and others, and for presenting cases before the National Anti-Doping Panel. The Department of Culture Media and Sport have agreed to directly fund the NADP to ensure that a financial relationship does not exist between the anti-doping prosecution body and the anti-doping tribunal.

Sport Resolutions’ next challenge is to convince government that it should take a further step by creating a national independent dispute resolution service for sport based on Sport Resolutions and on the organisations recently established in Canada and New Zealand. It is envisaged that such a body would build on the work of Sport Resolutions by providing five services:

- an affordable and independent mediation, arbitration and appeals service for all sports related disputes, using panels of independent specialists in the sport and sports law field;
- operation of the National Anti-Doping Panel;
- operation of a National Safeguarding Children Panel with cross sport powers to sanction individuals who pose a risk to children;
- an independent advisory service on the procedural aspects of dispute resolution in sport;
- information, education and training aimed at reducing the number and impact of disputes in sport.
Government has a unique opportunity to empower sport to safeguard its own autonomy by creating and supporting, but not running such a body. This could be achieved without significant new investment, through a streamlining of existing funding provision.

Conflict in sport shows no sign of abating as London 2012 draws ever closer. So what lasting legacy would Sport Resolutions wish to see arising from the Olympic Games in London? There could be no better legacy than the application of the core Olympic values of respect and friendship to the growing problem of “off field” conflict and dispute. The Olympic Charter defines respect as, amongst other things, “respect for rules and regulations... ethical behaviour and fair play”. Friendship is defined as, “overcoming differences... and improving mutual understanding”. These values are closely aligned to those of Sport Resolutions and to the objectives of alternative dispute resolution approaches more generally. The challenge for sport over the next 10 years is to strengthen these connections to ensure that the shine of the golden decade is not tarnished by a repeat of the catastrophic case of Dianne Modahl.
Author: Please take time to read the below queries marked as AQ and mark your corrections and answers to these queries directly onto the proofs at the relevant place. DO NOT mark your corrections on this query sheet:

AQ1: Author to please provide citation for *Digicel v West Indies Cricket Board* (we will provide final citation for Keegan).