Arbitrating or Mediating Sport Related Disputes?
Pros and Cons.

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I. Preamble

Maybe one of the most known examples trying to explain the advantages of Mediation against Arbitration or any other (alternative to litigation) form of dispute resolution is that of the orange. In this example two persons (to whom the story teller can attribute any kind of relationship, i.e. brothers, spouses, business rivals etc), both want desperately to obtain the one and only batch of oranges available to them. If they choose to resolve their dispute in court, by the end of the dispute no one will, most likely, need the oranges (even if they manage somehow to stay fresh and usable) anymore. It is evident that this dispute should be resolved fast; but at the same time it should be resolved efficiently. Among the out-of-court procedures two are the most known: Arbitration and Mediation. Both are fast, both are confidential, both are rather inexpensive. But are they both efficient for this particular case?

If arbitration is chosen the award will be, in line with the parties claim (i.e. to obtain the oranges) in favor of one of them. One will take the oranges and the other will take nothing. For the sake of the example, in that story, the parties decide to try Mediation; and during the process the unexpected happen: they discover that, actually, there is no dispute. They both want the oranges, but in reality, one of them needs the peel to produce orange marmalade, while the other needs its content to produce orange juice.

Mediation solved the case. And thus, because Mediation is targeting the needs and wills of the parties and in particular the "hidden" needs and wills of the parties trying to bring them in surface. It targets not to "*cut the pie in pieces*" and give the shares to the parties, but rather to "*expand the pie*" (to quote a phrase very common in the books[1] teaching negotiations) and leave everyone happy.

However, this is the ideal end of the Mediation; an end requiring the genuine will of the parties to work, together with the other party, for a mutually accepted solution. We should not ignore the fact, that in many cases, one of the parties accepts (or even propose to) mediate a dispute only to "gain time" and uses Mediation as a part of his tactic to, eventually, win the case.

Mediation is not necessarily the ideal method of resolving disputes. The same is, however, true for Arbitration. The same is also true for any of the known methods of resolving disputes. Every one of them have its pros and its cons. Pros and cons that

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[1] See, inter alia, R. Fisher and W. Ury, *Getting to Yes*, Random House Business Books 2nd ed. (1999).

when analyzed can help the parties to select the most efficient way to resolve their disputes.

Aim of the paper is, by examining the characteristics of both Arbitration and Mediation, and their similarities and differences, to identify the pros and cons of both those methods for the resolution of sport related disputes.

II. Basic Characteristics of Mediation

Mediation is the most known Alternative Dispute Resolution (ADR) process, lying, as it is said[2], "*at the heart of ADR*". It starts with the signing of a "*mediation agreement*" setting out the legal structure behind the mediation process and the framework within which the parties and the mediator will work.

According to the definition of CEDR[3] "*mediation is a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution*"[4]. This is, only, one of the many versions of the definition of mediation; it contains, however, the basic characteristics of the mediation process:

- ***Confidentiality***

Maybe the most important concept of mediation, which differentiates mediation from other form of dispute resolution, is the notion of confidentiality. The whole process of the mediation is strictly confidential in two, particularly, respects.

The first is that (unless there is an express agreement of the parties for the contrary[5]) if the case does not settle and it has to go to court (or to arbitration) anything said or occurred throughout the process "*stays there*". No-one, neither the parties, nor the mediator or anyone else involved in any way to the process is allowed to make any reference or to disclose to anyone else anything said or occurred throughout the process, unless of course he is explicitly authorised by both the parties[6]. Furthermore, anything said or occurred throughout the process cannot be used before a court of law or an arbitral tribunal. Only the settlement can be brought before one of those bodies, and only if the parties failure to honour their decision.

The second parameter of confidentiality is related to the mediator himself. At a certain point during the procedure, the mediator will have "private meetings" with the parties, i.e. meetings in which will be present only the mediator and one of the parties. The mediator is not allowed to disclose to the other party anything said or occurred during those "private meetings" unless of course explicitly authorised by the party.

As it is expected, there is a very good reason behind confidentiality and its strictness; it is that fact that one of the inherent aims of mediation is to give the parties a sense of a little more comfort about their ability to talk creatively, to discuss options, to be free to give birth and to disclose ideas that otherwise would hesitate to do.

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[2] See A. Redfern and M. Hunter *Law and practice of International Commercial Arbitration*, Sweet & Maxwell third edition (1999) 1-53

[3] Acronym for the "*Centre for Effective Dispute Resolution*", established in 1990 in London with the support of the Confederation of British Industry, specialised in dispute resolution.

[4] See *The CEDR Mediator Handbook*, 4th ed. (2004), p. 26.

[5] An agreement which nor common, neither advisable to make.

[6] But not the mediator, who is –under no circumstances– allowed to disclose anything, said or occurred during the mediation.

- ***Authority to settle***

The persons attending the mediation must have the authority not only to attend the mediation but also to negotiate and settle the case. That is a vital prerequisite for the mediation.

- ***Neutrality and impartiality of the mediator***

Neutrality is one of the notions that constitute the "role" of the mediator. The question "*What the mediator does?*" is the most common (and totally logical) question asked by parties who encounter this procedure for the first time.

In order to answer that question, it is helpful to say what the mediator does not; what the mediator is not: The mediator is neither a judge, nor an arbitrator and therefore does not rule in favour one or the other, does not issue a decision or an award. The mediator is not a party to the mediation procedure. He is only there to help the parties to find their own solution, freely accepted by all of them. His role is, therefore, to become the "*medium*" through which the parties will find such a solution.

Pursuant to his role, the mediator does not (and should not) come to the procedure with the view to favoring one or the other party or disliking one or the other side. The mediator is, and should be throughout the whole process, neutral. Otherwise, i.e. not acting as a neutral, such a behavior constitutes a reason to be challenged.

- ***Non – judgmental attitude by the mediator***

Going with neutrality is the notion of being non – judgmental in two respects. The first is, as already mentioned, the fact that the mediator is not a judge and therefore he does not reach decisions. The second is related to his conduct throughout the procedure; the mediator should always keep in mind that it is the parties who will (hopefully) find the solution. Such a solution, provided that it is not against the law, can be shaped in any form which, at the eyes of the mediator might not look as the ideal solution for the said case. However, the mediator cannot criticize such an agreement, exactly because his role was effectuated at the time the parties reached a mutually accepted agreement. Similarly, the mediator is not supposed (and should not) "judge" in the meaning of criticising the parties during the process irrespective of his personal opinion of the issues at stake.

- ***Voluntary nation of the procedure***

Another important characteristic of mediation is the fact that it is based on the will of the parties to use it as a means to solve their dispute. The parties are at any time free to stop the process. Although, it is generally advised by experience mediators or people who have attended mediation to exercise persistence, patience and try not to give in, but rather try to keep at it, the fact is that the parties are not locked in the rooms of the mediation. They can simply leave and "go home" at any time they feel they cannot go on. And of course, exactly because the whole process is based on the will of the parties, they can later on, decide to try mediation again!

- ***Non – binding procedure until its end***

Going with the voluntary nation of mediation is the notion of a non – binding procedure until the signing of the final agreement. Nothing is binding legally until that agreement is written up and signed by the, so authorized, parties. This fact (strengthened by confidentiality) gives people the opportunity to talk generally

about the way things might resolve without been committed until the agreement is signed.

To sum up, because of those characteristics, unlike arbitration for which it is sometimes said[7] that "*the test of a good arbitral award is that it leaves both parties feeling disappointed*", mediation, if successful, ends up in, what is known, as a "*win – win situation*".

III. Basic Characteristics of Arbitration

However, that does not mean that arbitration is not an efficient method of resolving disputes. On the contrary, arbitration is a generally accepted, private, method of resolving international business (and not only) disputes[8]. It should not, however, be classified as a method of Alternative Dispute Resolution (like mediation), because although arbitration presents an alternative to litigation, it is nonetheless fundamentally the same in that the role of both the Judge and the Arbitrator is judgmental. They both not propose or even help parties to find the best solution to their dispute, but rather make a binding decision[9]. This characteristic of arbitration is, actually, the most important difference between it and mediation.
For the sake of comparison, it is useful to examine whether the above mentioned characteristics of mediation exist in the case of arbitration:

- ***Confidentiality***

Arbitration is also a confidential procedure. In fact, the notion of confidentiality is considered as one of the advantages of arbitration in relation to litigation[10]. It should not be forgotten that arbitration (as also mediation) is a private, not public, procedure. However, confidentiality cannot always be maintained, not only because, for instance, a public company might need to inform the public about some parts of the result (even without all its details), but because, in case of non – compliance of the party against whom the award was rendered, the winner will have to ask for court assistance in order to enforce the award and therefore reveal its whole content.

- ***Authority to settle or Authority of the parties?***

Since the parties in arbitration are not there to settle the dispute, an authority to settle (vital in mediation) is not necessary. The only authority needed is to represent the parties throughout the proceedings, but this is just about everything.

- ***Neutrality or Impartiality and Independence?***

Just like the mediator the arbitrator must fulfill his role in accordance with the generally accepted fundamental principles of arbitration. One of those principles is the duty of the arbitrator to be and remain throughout the whole process "*impartial and independent*". Although the term "*neutrality*" is distinguished from the term "*impartial*" in the sense that an arbitrator, especially in the case of a party – appointed arbitrator[11] might be predisposed towards one of the parties, or has an already

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[7] See A. Redfern and M. Hunter op.cit 10-02.
[8] See A. Redfern and M. Hunter op.cit 1-01.
[9] See A. Redfern and M. Hunter op.cit 1-51 with further reference to Carrol and Dixon, Alternative Dispute Resolution Developments in London, *The International Construction Law Review,* [1990 Pt 4] 436 at 437.
[10] See A. Redfern and M. Hunter op.cit 1-43.
[11] See J. Paulsson, Ethics, Elitism, Eligibility, *Journal of International Arbitration* (1997) Vol. 14 n.4 p.13.

known scientific approach towards a certain issue[12], that does not mean that he is not capable of being impartial and independent. Besides, as it is generally accepted[13] even when selected by the parties the arbitrators "*ought not to consider themselves the agents or advocates of the party who appoints them. When once nominated they ought to perform the duty of deciding impartially between the parties, and they will be looked upon as acting corruptly if they act as agents or take instruction from either side*".

- ***Non – judgmental or Judgmental attitude?***

As already mentioned this is the main difference between mediation and arbitration. The latter ends with an award, therefore the arbitrator is judgmental, however after the end of the hearings. And thus, because during the process the arbitrator should (in the same sense like the mediator) be non – judgmental.

- ***Voluntary nation of the procedure***

Like mediation, arbitration is also based on the will of the parties, with one, however, important difference. Any party of a mediation procedure can unilaterally decide to stop and leave it without consequences. On the contrary, the signing of the arbitration agreement[14] is binding for the parties in the sense that, unless unanimously decided to resolve the dispute in a different way, they should follow the arbitration procedure.

- ***Non – binding or Binding procedure?***

Therefore, unlike, mediation in which binding is only the final mutually accepted agreement, in the case of arbitration binding is the whole process including the rules of the arbitration, the rights and the obligation of the parties etc.

IV. Mediation and Arbitration in Sports

Non – judicial procedures sounds as the ideal solution for resolving sport related disputes, because it fits to the specificity of sport. As it is generally accepted[15] two are the main needs related to sport disputes that led to such a choice: the fact that sport disputes must be solved quickly[16], and the fact that sport activity has a transnational character, is based on a non – national system of rules, knows as the "*Lex Sportiva*"[17], and therefore must be dealt in a transnational way. Athletes, Coaches and generally anyone related to sports activities are supposed to behave in the same way and follow the same rules irrespectively of the place of the venue. Such a uniformity cannot be accomplished by State Courts, simply, because the rules of different States tend to be different; in some cases slightly different, but still different.

Therefore, it is not surprising that arbitration, already successfully "*tested*" in the field of international business disputes it also became the choice of the International Olympic Committee for resolving disputes directly or indirectly linked to sport. A choice that led to the creation of the Court of Arbitration for Sport in 1984[18], which

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[12] See A. Redfern and M. Hunter op.cit 4-52.

[13] See, inter alia, A. Walton QC, M. Vitoria *Russell on Arbitration,* Stevens and Sons, 20th ed. (1982), p. 233.

[14] Irrespectively if it has the form of a clause in a contract, or it is an ad hoc agreement.

[15] See, inter alia, A. Rigozzi *L' arbitrage international en matiere de sport*, HELBING & LICHTENHANH (2005), par. 8 and 330.

[16] Given: a) the strict timetable of the sport events that must be observed and b) the fact that the athletes have a relative short period of "working time".

[17] For a detailed analysis of the meaning or *Lex Sportiva* see, inter alia, D. Panagiotopoulos *Sports Law I*, Nomiki Bibliothiki (2005) pag. 85 et seq.

[18] For the history of CAS see http://www.tas-cas.org/history

after the 1994 reform[19] is placed under the administrative and financial authority of the International Council of Arbitration for Sport (ICAS).

Arbitration, is not, however, the only "method" used by CAS. As pointed out in article S12 of its Statutes[20], CAS's aim, ICAS' aiding[21] is, to provide "*for the resolution by arbitration and/or mediation of disputes arising within the field of sport*".

V. CAS Arbitration vs CAS Mediation

This paper is confined to the examination of CAS' procedure. However, given the role of the CAS in sport we are confident that such an examination is sufficient.

a. Definitions

CAS Statutes does not define arbitration, simply because such a definition is not necessary. On the other hand, Mediation is defined in art. 1 of the "*the CAS Mediation Rules*"[22] as: "*a non binding and informal procedure, based on a mediation agreement in which each party undertakes to attempt in good faith to negotiate with the other party, and with the assistance of a CAS mediator, with a view to settling a sports – related dispute*". CAS' mediation therefore, has all the, generally accepted, characteristics of mediation. It is, to use the expression used for arbitration, a "*true mediation*".

b. Fields of application

i. Arbitration

According to art. R27 of CAS Statutes[23] arbitration can be used to resolve disputes that "*may involve matters of principle relating to sport or matters of pecuniary or other interests brought into play in the practice or the development of sport and, generally speaking, any activity related or connected to sport*", provided[24], of course, that "*the parties have agreed to refer a sports related dispute to the CAS*".

Such a dispute may arise out of an arbitration clause inserted in a contract or regulations or of a later arbitration agreement (ordinary arbitration proceedings) or, even may involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement provides for an appeal to the CAS (appeal arbitration proceedings).

CAS's arbitrators are, therefore, there to deal with almost everything. However, sport federation are, generally not willing to allow CAS to interfere with matters related to

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[19] triggered by the judgment of 15 March 1993 of the Swiss Federal Tribunal in what is known as "*The Gundel case*" (A.T.F. 119 II 271) which although recognised CAS as a true court of arbitration, drew attention to the numerous links between CAS and IOC (CAS was financed almost exclusively by the IOC; IOC was competent to modify CAS' Statute; IOC and its President had considerable power in appointing the members of the CAS). Links that could call into question the independence of the CAS in the event of the IOC's being a party to proceedings before it. As stated by CAS (see http://www.tas-cas.org/history) "*The Federal Tribulal's message was perfectly clear: the CAS had to be made more independent of the IOC both organisationally and financially*"

[20] Op. cit.

[21] According to art. S2 of the Statutes "*of the bodies working for the settlement of sports – related disputes*", available at http://www.tas-cas.org/statutes, ICAS' task is "*to facilitate the settlement of sports-related disputes through arbitration or mediation and to safeguard the independence of the CAS and the rights of the parties*".

[22] available at http://www.tas-cas.org/mediation-rules.

[23] Op.cit.

[24] as expressly stated in the Statutes.

the "*rules of the game*"[25], or of "*purely sporting nature*"[26]. And indeed, CAS accepts[27] that it has jurisdiction to deal with a case in which one of the parties is UEFA as far as that case does not fall in the exception of art. 63 of its Statutes.
The problem, however, occurs with the interpretation of the term "*purely sporting rule*". A term that, cannot be deemed as equal to the term "*laws of the game*" used in FIFA' Statutes, given the use of the wording "*such as*" which implies that the "laws of the game" and the "technical modalities of the competition" are only an example of a "*purely sporting rule*". Are therefore cases, not regulated by the "laws of the game" and the "technical modalities of the competition" that can be considered as of "*purely sporting rule*" and therefore excluded from the CAS' jurisdiction?
According to the minutes of the 8th Extraordinary Congress of UEFA[28] cases "*of a pecuniary natures, and therefore arbitrable, are those relating to contracts, torts, company law, or intellectual property and the like. By contrast, matters of a sporting nature are those relating to the preparation, organization and running of matches, tournaments and competitions, including the Laws of the Game, match-related sanctions etc.*"[29]. Such sanctions, however, can have pecuniary consequences raising the question of the interpretation of this rule in the case of those "mixed" cases, in which the nature of the dispute is contested.

In the *Celtic FC case*[30] CAS denied its jurisdiction concluding that "*in the present matter, it appears clearly that the suspension of the team manager of Celtic FC for one match is also mainly a decision of a sporting nature. Considering that no evidence of a possible financial damage has been brought by the Appellants, the direct pecuniary consequences of such suspension are not obvious, at least at this stage of the proceedings*".
In the *Real Madrid case*[31], in which the use of the Santiago Bernabeu Stadium was banned for 2 UEFA matches, CAS also denied its jurisdiction concluding that "*such decision was a sporting sanction and that the consequences of such ban were primarily of a sporting nature*", although it is clear that the ban of the use of a stadium causes pecuniary damage of a certain degree.
Contrary, in the *Addo & van Nistelrooij case*[32] CAS accepted its jurisdiction concluding that "*although the non-qualification of two players is a decision of a sporting nature, it can be also argued that such a decision may have consequences of a pecuniary nature*"[33].

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[25] See, art. 63 par. 3 of the FIFA Statutes (ed. 2009), according which: "*CAS, however, does not deal with appeals arising from:* ***(a)*** *violations of the Laws of the Game;* ***(b)*** *suspensions of up to four matches or up to three months (with the exception of doping decisions);* ***(c)*** *decisions against which an appeal to an independent and duly constituted arbitration tribunal recognised under the rules of an Association or Confederation may be made*".
[26] See, art. 63 par. 1 of the UEFA Statutes (ed. 2010), according which: "*The CAS is not competent to deal with: a) matters related to the application of a purely sporting rule, such as the Laws of the Game or the technical modalities of a competition; b) decisions through which a natural person is suspended for a period of up to two matches or up to one month; c) awards issued by an independent and impartial court of arbitration in a dispute of national dimension arising from the application of the statutes or regulations of an association*"
[27] See, TAS 98/199 (in French), CAS 2004/A/676, CAS 2008/A/1503
[28] Reference taken from TAS 98/199
[29] The original text in French reads as follows : "*Sont de nature patrimoniale et peuvent donc faire l' objet d' un arbitrage les requetes découlant du droit des contrats, de la résponsabilité civile extra – contractuelle, du droits des sociétés, de droit de la personnalité, de la propriété industrielle, de la propriété intellectuelle, etc. En revanche, soot de nature sportice tous les litiges qui concernent l' interpretation et l' application des nomres qui servent à la préparation, à l' organisation et à la réalisation de matches de football, de tournoi, de compétition, etc, qu' il s' agisse de règles du jeu, de sanctions concernant le jeu etc*".
[30] See 2001/A/342.
[31] 1998/199, reference of that case found in the 2001/A/342.
[32] See 2001/A/324.
[33] Eventually, CAS denied the request of the players, but only because it concluded that theirs interests did not outweigh those of UEFA.

In a more recent decision[34] concerning the dispute between the Football Association of Wales (FAW) and UEFA on whether the Wales' or the Russian' football team should compete in the last stages of Euro 2004[35], CAS found that the disputed decision was one of pecuniary nature. As accepted by the Panel in case of exclusion of the Russian team from the Euro 2004 it "*would lose a minimum prize money of CHF 7,5 million paid by the UEFA to each of the 16 finalists. Further to that it can be assumed that bonuses comparable to those of Wales would be lost (in the case of Wales more than GBP 60,000). In addition the effects of the disputed decision involve other interests beyond non-enforceable rules of play, i.e. reputation and credibility of a team, the value of the market of the players and the team etc*".

In its recent decisions, CAS, seems to follow the direction of the 8th Extraordinary Congress of UEFA that in those cases it "*should decide, on a case-by-case basis*", applying "*art. 177.1 of the Swiss Federal Code of Private International Law (LDIP)*"[36] and coming to the conclusion[37] that "*UEFA, obviously wanted to use the Swiss understanding of the term "of a pecuniary nature", which is a wide one, in order to enable as many disputes as possible to be decided by the alternative dispute mechanism of CAS rather that by the Swiss Courts*". Therefore, after taking into account the interpretative principle of "*contra proferentem*"[38] and the relevant jurisprudence of the Swiss Federal Tribunal[39], CAS[40] drawn the conclusion that "*in cases in which it is not clear whether the sporting or the pecuniary nature of the decision is predominant, it should normally be the case that the matter will be considered to be of a pecuniary nature … As a result, a dispute is of a pecuniary nature if an interest of a pecuniary nature can be found in at least one of the parties*"[41].

ii. Mediation

On the other hand, CAS Mediation is provided *solely* for the resolution of disputes related to the CAS ordinary[42] procedure, expressly excluding "*all disputes related to*

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[34] CAS 2004/A/593

[35] the decision was in favour of the Russian team.

[36] According which "*all pecuniary claims may be submitted to arbitration*" (Toute cause de nature patrimoniale peut faire l' object d' un arbitrage).

[37] CAS 2004/A/593 par. 6.

[38] Also known as "*contra stipulatorem*", according which ia case of doubt, a clause ought to be interpreted against the person who drafted it and in favour of the persion who contacts the obligation.

[39] As quoted in the decision CAS 2004/A/593 par. 5 (with further reference to Patocchi/Geisinfer, Arbitrage International, Lausanne 1995, 439 f.) "*the term "nature patrimoniale", which means in English "of a pecuniary nature" is unéderstood by the Swiss Federal Tribunal as follows" 'Est de nature patrimoniale au sens de cette disposition toute prétention qui a une valeur pécuniaire pour les parties, à titre d' actif ou de passif, autrement dit tous qui présent, pour l' une au moins des parties, un intérêt pouvant être apprécié en argent' (see ATF 118 II 353, 356 = JdT 1994 I 125 as quoted by Patocchi/Geisinfer, Arbitrage International, Lausanne 1995, 439 f). The Swiss Federal Tribunal has also explicitly stated that disciplinary sanctions imposed by sports organizations are arbitrable under art. 177 par. 1 LDIP if: (i) the sanctions do not involve the rules of play* stricto sensu, *(ii) the sanctions concern the association's life or participation in competitions, and (iii) some personal and financial consequences arise for the sanctioned person or entity (see ATF 119 II 271 ff).*

[40] CAS 2004/A/593 par. 6.

[41] We should not however forget, that, as stated in TAS 98/1999 par. 20, and followed by CAS 2004/A/593 CAS does not intend "*to express a general principle for interpeting that provision*", nor that "*the arbitrators must decide which aspect is predominant*" but rather that he "*shoud take it into account*".

[42] As opposed to the "Appeal Procedure" pursuant to which CAS' Panel will have the responsibility to resolve disputes "*concerning the decisions of federations, associations or other sports - related bodies, insofar as the statutes or regulations of the said sports-related bodies or a specific agreement so provide*" (art. S12 b of the Statutes).

disciplinary matters as well as doping issues". Therefore, CAS Mediation is provided for cases such as[43]:

- The relationships between the Federations such as the suspension of a national federation[44], or the rules of membership[45], or the way of issuing[46] or modifying[47] its rules (regulations, statutes etc).
- The system used by the Federation for the qualification of athletes in order to participate in official sport events[48].
- The organiser right to allow or to refuse the participation of a team in a sport event[49].
- The validity of an sport agent contract[50].
- Issues of labor nature for athletes such as the "*training compensation*"[51], transfer[52], the right to breach a contract for "*just cause*"[53].
- Issues of labor nature for coaches[54].
- Issues of pure economic nature such as sponsoring[55].

It must be noted that according to the "preamble" of art. 13 of the 2007 Constitution of the International Triathlon Union (ITU): "*Any dispute, any controversy or claim arising under, out of, or relating to this constitution or any subsequent amendments of or in relation to this constitution,* ***including but not limited to, its formation, validity and binding effect, interpretation, performance, breach or termination, as well as non-contractual claims****, shall be submitted to* ***mediation*** *in accordance with the CAS Mediation Rules. … Where a settlement of the dispute is not reached within 90 days of the commencement of the mediation, or if, before the expiration of the said period either party fails to participate in the mediation, the dispute shall, upon the filing of a request of Arbitration by either party, be referred to and finally settled by CAS arbitration pursuant to the Code of Sports related Arbitration. When the circumstances so require, the mediator may, at his own discretion or at the request of a party, seek an extension of the time limit from the CAS President*" (emphasis added).

Such a provision, can only, to the writer's opinion, be accepted with enthusiasm as an auspicious occasion. Not only, because another method of dispute resolution is placed there to be used, but also, because mediation, as we will see, is a method that "suits" (in many occasions) sport.

c. Pros and Cons

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[43] The following examples, available at http://jurisprudence.tas-cas.org/sites/caselaw/help/home.aspx, are arbitral awards issued following the "*Ordinary Procedure*". Therefore, cases of such nature can all be resolved by mediation.

[44] See CAS decision 2010/O/2039 FASANOC v. CGF.

[45] See CAS decision 2002/O/410 The Gibraltar Football Association (GFA) v. UEFA.

[46] See TAS decision 2003/O/450 Federation Suisse de Sports Equestres (FSSE) c. FEI.

[47] See TAS decision 99/O/229 FFESSM, FEDAS, FPAS, FAAS, et FCDS c. CMAS.

[48] See CAS decision 2008/O/1455 Boxing Australia v. AIBA.

[49] See TAS decision 2006/O/1111 ASO c. Active Bay SL.

[50] See TAS decision 2007/O/1310 Bruno Heidrscheid c. Frank Ribery.

[51] See CAS decision 2003/O/527 Hamburger Sport-Verein e.V. v. Odense Boldklub.

[52] See TAS decision 2003/O/530 Aj Auxerre c. FC Valence & S.

[53] See CAS decision 2003/O/482 Ariel Ortega v. Fenerbahce & FIFA.

[54] See TAS decision 87/10 X. c. HC Y.

[55] See TAS decision 2001/O/319 X. Sarl c. Federation Y.

Mediation should not be considered as an opponent to arbitration. Mediation is simply another, a different, method for resolving sport related disputes. As a result, it is the writer's opinion that they should not be compared in order to find out which of these two methods is the best (as a method), but rather in order to find which of these methods "suits" better in each particular case. While in the example of the orange (in the preamble of this paper) mediation was proven to be the best method, since in that case at the end both parties were happy, that cannot always be the case. In the case, e.g. of doping, it would, at least, be inappropriate to negotiate, provided the breach of the anti-doping rules, the length of the penalty, or even the kind of the penalty.

Therefore, the pros and cons of Arbitration and Mediation are closely connected with the characteristics of its particular case and of course (and that is of paramount importance) the will of the parties to truly settle the dispute. And thus, because, as already said although both arbitration and mediation are based on the will of the parties, in the case of mediation their "will" is not only the base, but also the corner-stone of the whole process. Everything is based on the will, and in particular in the "good" will of the parties. As a result, what seems to be the advantage of mediation in relation to arbitration (in the sense that the parties do their best to settle the dispute), can at the same time, become its Achilles' heel, if the opposite party chooses mediation only as a tactic to gain time, or to "intercept" (if we could use such an expression) information, acting during the mediation as an "intelligence officer".

However, and this is actually the greatest advantage of mediation comparing not only to arbitration but to any other way of dispute resolution (including litigation), when both parties come to table in good will, with a sincere intention to find a solution, it is almost certain that the final solution will leave all parties happy. And thus, because during a mediation procedure, the parties (unlike arbitration in which the parties and the arbitrator stick to the facts of the case) are free (and actually are driver by the experienced and clever mediator) to use the four most important methods of negotiation[56], i.e.:

- to "*separate the people from the problem*", in order to avoid misunderstandings, caused by our personal (not necessarily objective) opinion for the other party and try to really understand the issue, the problem at stake.
- to "*focus on interests, not positions*", i.e. to read between the lines in order to, actually, define the problem.
- to "*invent options for mutual gain*", in order to, actually "*expand the pie*".
- to "*insist on using objective criteria*" in order to reach a fair agreement based on fair standards, fair criteria and following a fair procedure.

That leads not only to a mutually accepted agreement, but also (and this is in the long-term, even more important) helps to built relationships based on strong foundations. It must, however, noted that the settlement agreement is just an agreement, and, although, as expressly provided by CAS Mediation Rules[57] "*in the event of any breach, a party may rely on such copy before an arbitral or judicial authority*" and ask for its execution (based on the generally accepted principle of *pacta sunt servanda)*, it does not have by itself the same "force" as the arbitral award.

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[56] See, inter alia, R. Fisher and W. Ury, supra note 1, p. 15 et seq.

[57] See art. 12 of those rules.

Another advantage of mediation is that in some cases, it might be the only way to resolve the dispute. And thus because a dispute is not necessarily caused because of the breach of a rule of a regulation or of a term of a contract, is not necessarily a matter of interpretation of a rule; it might just be a difference during negotiations, a difference that, if not solved, could lead e.g. to a strike by the players or even a lock out by the League. That was the case in the dispute between the NHL (National Hockey League) and its players which, on September 2004, led to the lock out of NHL' players and eventually (five months later and hundreds cancelled games) to the cancelation (for the first time in US major league sports history) of the 2004 – 2005 season[58]. According to experienced negotiators[59], this dispute came to such a disastrous for all parties end because of what is called as "*the vividness bias*"; at a certain point not all parties were able to look at what was really important for them (in other words to identify their real interests) and as a result clung on their original ideas, leading the negotiations to a dead-end. An experienced mediator could have foreseen such a danger and could have avoided such an end.

On the other hand, the arbitral award notified by the CAS Court Office shall, as expressly provided by CAS Statutes[60], "*be final and binding upon the parties. It may not be challenged by way of an action for setting aside to the extent that the parties have no domicile, habitual residence, or business establishment in Switzerland and that they have expressly excluded all setting aside proceedings in the arbitration agreement or in an agreement entered into subsequently, in particular at the outset of the arbitration*". This is

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[58] For a detailed analysis of the NHL Lock Out, see D. Malhotra and M. H. Bazerman *Negotiation Genius* Harvard Business School, Bantam Books, 2007, with further references, p. 105 et seq. The story of the Lock Out, quoted by this book, is the following: "*Under the leadership of Commissioner Gary Bettman, the NHL expanded ambitiously throughout the 1990s, adding nine new U.S. teams, building new arenas, generating publicity, and increasing television time for the sport. But in its quest to ramp up its visibility and profits, NHL management allowed player salaries to reach unsustainable heights. By 2003, according to the league, salaries were 75 percent of NHL revenues-a 34 percent increase from the 1990-91 season. By comparison, the National Football League paid its players 64 percent of revenues; the National Basketball Association paid 57 percent. By 2004, the NHL could no longer ignore its growing financial dilemma. Nineteen of thirty franchises lost money during the 2003-04 season; the league claimed to have lost $225 million in this same period. The sale of television rights was also disappointing. As a result, NHL management decided to take a hard line at the start of the 2004-05 season. The league sought a reduction in average player salary from $1.8 million to $1.3 million. In addition to salary rollbacks, Commissioner Bettman demanded "cost certainty," a salary cap limiting payrolls to a maximum of 55 percent of team revenues. On December 9, 2004, the NHL Players' Association (NHLPA) agreed to a 24 percent rollback of existing salaries but refused to link payroll to revenue. Bettman set a mid-February deadline for reaching agreement or canceling the season. On February 14, 2005, NHL owners proposed a salary cap that did not tie payroll to revenue. After further negotiation, the owners' salary cap offer stood at $42.5 million per team. The NHLPA came down from demanding a $52-million-per-team cap to $49 million, with certain exceptions. "To be this close, they have to make a deal," Mighty Ducks player Mike Leclerc told the* Los Angeles Times *as Bettman's deadline approached. "It would be disgraceful to cancel the season."[4] Yet the deadline passed without agreement, and Bettman officially announced that the season had ended before it even began. Almost 400 of the NHL's 700-plus players defected to European teams for the season; older players found their careers suddenly cut short. Many felt betrayed by both their union and their team owners. Public sentiment was divided early on but quickly turned against the players, who were viewed as unrealistic and greedy. On July 21, 2005, the NHL and the NHLPA finally ended the 310 day lockout and set the 2005-06 hockey season in motion by ratifying a collective-bargaining agreement. Backed by nearly 90 percent of NHL players, the agreement called for a $39-million-per-team salary cap—a $10 million decrease in the NHLPA's previous demands—and* lower *than what the league had offered five months earlier. Other cost- certainty measures were also included: payrolls would not exceed 54 percent of team revenues, all current player contracts were rolled back by 24 percent, and the arbitration clause was changed to make it less advantageous to the players. The players received only nominal concessions in return (e.g., a guaranteed salary minimum per team). Major league hockey, a "gate-driven" sport that earns about three-fifths of its revenue from ticket sales, was now faced with the uphill challenge of luring fans back into stadiums in significant numbers*".

[59] Op. cit, p. 112 et seq.

[60] See art. R46 of the "*Statutes of the Bodies Working for the Settlement of Sports-Related Disputes*".

some cases might be considered as an advantage, especially given the fact that the Statutes (or Constitutions) of the International Federations, which have recognised CAS as an independent judicial authority and as the only authority to resolve appeals, after the exhaustion of the internal appeals, against the decision of their organs, contain express provisions[61] helping the execution of CAS' arbitral award.
Finally, maybe the most important advantage of arbitration for resolving sport related disputes, is the fact that it promotes uniformity. While mediation can deliver an plead of solution for the same matter, arbitration is most likely to deliver the same one, irrespectively of the arbitrator. And, thus, because, as already mentioned, the arbitrator sticks to the merits of case and does not have the freedom to be imaginative. And although imagination might sounds tempting it might cause problems if instead of resolving disputes, it "surprises" the parties by causing the rendering of unexpected awards.

VI. Conclusion

Arbitration is, undoubtedly, the preferable method for resolving sport related disputes. CAS is a specialized arbitral tribunal on resolving those disputes. It is fast, it is efficient, it has gain the most important "bet" for every arbitral tribunal: the

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[61] See art. 59 of the 2008 Statutes of International Boxing Association (ABIA), art. 10 of the Constitution of the Badminton World Federation (BWF), art. 35 of 200 Statutes of the Federation Equestre Internationale (FEI), art. 26 of the 2006 – 2010 Statutes of International Basketball Association (FIBA), art. 7.2.7 of the 2009 Statutes of the Federation Internationale d' Escrime (FIE), art. 62 of the 2008 Statutes of the Federation Internationale de Football Association (FIFA), art. 36 of the 2009 Statutes of the International Federation of Associated Wrestling Styles (FILA), art. 25 of the Statutes of the Federation Internationale de Natation (FINA), art. 55of the 2009 Statutes of the Federation Internationale des Societes d' Aviron (FISA), art. 1.30 of the 2008 Constitution of the Federation Internationale de Tir a l' Arc (FITA), art. 2.7.2 of the 2005 Constitution of the International Volleyball Federation (FIVB), only however for doping violations, art. 21 of the 2009 Statutes of the Federation Internationale de Gymnastique (FIG), art. 15 of the 2009 Statutes of the International Association of Athletics Federations (IAAF), art. 43 of the 2008 Statutes of the International Canoe Federation (ICF), art. 8 and 38 of the Legal Provisions and By-Laws respectively of the 2007 Statutes of the International Handball Federation (IHF) only, however "*in exceptional cases (problems arising in connection with doping abuse, complaints from individual athletes*", art. 21 of the 2008 Statutes and By Laws of the International Hockey Federation (FIH), art. 29.5 of the 2009 Statutes of the International Judo Federation (IJF), only, however, until the establishment of the IGF Arbitral Tribunal, art. 80 of the 2010 Constitution of the International Sailing Federation (ISAF), only, however, in case of appeal against the decision of the Review Board and only "*(a) In any case involving accredited Olympic Competitors, in which the Court of Arbitration for Sport has properly established its jurisdiction under the Olympic Code for Sports, (b) In any other case in which a competitor consents to the jurisdiction of the Court of Arbitration for Sport in respect of the appeal*", [It must be noted that according to art. 2.2 of the Constitution of ISAF "*Any Disputes relating to the validity or construction of the ISAF Constitution or Regulations or any other rules or regulations made there under (together, the 'ISAF Regulations'), and any disputes relating to the application of the ISAF Regulations or the exercise of powers there under, shall be subject to the exclusive jurisdiction of the courts of England and Wales and their principles, and shall be governed by English law, excluding English choice of law principles*"], art. 1.3.16.1 of the 2009 Constitution of the International Shooting Sport Federation (ISSF), art. 33 of the 2009 Constitution of the International Tennis Federation (ITF), art. 13 of the 2007 Constitution of the International Triathlon Federation (ITF), art. 8 and 13 of the 2009 anti-doping policy of the International Weightlifting Federation (IWF), only, however for cases of doping offences and only in relation to international events or international athletes, art. 85 of the 2009 Constitution of the International Cycling Union (UCF), only, however, when the said regulation provide as such [art. 85 reads as follows: "*UCI Regulations established by the Management Committee and especially Drug Test Regulations, may provide for appeal to the Court of Arbitration for Sport in Lausanne*". In must be noted that according to art. 2.2.010 bis of the Regulation no. 2 about Road Races: "*in case of the Tour de France, the dispute shall be placed before the Chambre Arbitrale du Sport (Sports Arbitration Chamber)*"], art. 9.1 of the 2009 Statutes of the Union Internationale de Pentathlon Moderne (UIPM).

feeling of confidence, the feeling of rapport towards it. Its awards are respected, even when –and this very important– they don't have the expected content. The reaction, e.g. of FIFA in the *Webster case* is characteristic on that matter. Although –to use its own wording[62] – "*dismayed*" with this decision because "*CAS did not properly take into consideration the specificity of sport*", its reaction was to analyze and understand the decision. At no point did FIFA questioned the role of CAS as the "*tribunal of last instance*".

On the other hand, Mediation is the alternative process. It is a process that suits better in "*negotiable*" cases, i.e. in cases in which the parties have enough space to move. However, given the fact that mediation is a non binding and informal process, it can be used as a step before arbitration. As expressly stated in the CAS Mediation Rules "*The parties may have recourse to arbitration when a dispute has not been resolved by mediation, provided that an arbitration agreement or clause exists between the parties. The arbitration clause may be included in the mediation agreement. In such a case, the expedited procedure provided for under article 44, paragraph 4 of the Code of Sports-related Arbitration may be applied*". This clause sounds like what is known as Med-Arb[63], a process that gives[64] the parties the opportunity to reach a settlement, and then rely on a decision by a neutral if there are issues on which no agreement can be reached. This process encourages parties to create their own best settlement in the knowledge that an arbitrator will, otherwise, impose a decision.

To conclude, we can only say that, irrespectively of which of arbitration or mediation suits better in a said case, it is great for the parties to have more than one option to settle their dispute. And therefore, the adoption of mediation by CAS, as another tool next to arbitration, can only be applauded.

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[62] See Media Release of 31 January 2008.

[63] Short for Mediation – Arbitration.

[64] See *The CEDR Mediator Handbook*, supra note 4, p. 13.