Summer 2012

JAMS DISPUTE RESOLUTION ALERT

An Update on Developments in Mediation and Arbitration

ARBITRATION ALLOWS AD HOC PANEL TO SPRINT TO DECISIONS IN OLYMPIC DISPUTES

IN DEPTH

The Olympics have relied on arbitration as the sole method to resolve disputes that arise during the competition by using a special panel of international arbitrators to hear and rule on athletes' cases.

All disputes referred to arbitration during the Games are conducted according to the Court of Arbitration for Sport's (CAS) (the main judicial body for the Olympics) *Arbitration Rules for the Olympic Games* (Ad Hoc Rules), which were first used during the 1996 Games in Atlanta.

Dr. Dirk-Reiner Martens, an attorney and arbitrator with Martens Rechtsanwälte in Munich and who previously served as an arbitrator on the Ad Hoc Panel, said there really is "no alternative to using arbitration during the Olympics because they are an international business, while national laws and courts vary and can be enforced differently."

See 'Arbitration Allows Ad Hoc Panel to Sprint' on Page 2

WHAT'S INSIDE

IN DEPTH
Arbitration Allows Ad Hoc Panel to Sprint to Decisions in Olympic Disputes..........1

ADR CONVERSATIONS
Colin Rule Discusses the Intersection between ADR and Online Dispute Resolution (ODR)...............................1

> ADR NEWS & CASE UPDATES.................6

DOMESTIC FOCUS
NLRB Ruling Throws Validity of Class Action Waivers into Doubt...................8

GOOD WORKS
ADR Professionals From Around the World Arrive in America.......................9

INTERNATIONAL FOCUS
New York Convention Launches Case Law Website.............................10

WORTH READING
Who Gets What, by Kenneth Feinberg....11

ADR CONVERSATIONS

Colin Rule Discusses the Intersection between ADR and Online Dispute Resolution (ODR)

Colin Rule is the founder and CEO of Modria, an online platform that enables conflicts to be resolved swiftly without human intervention. A spin-off of eBay, Modria resolves more than 60 million disputes a year.

Rule has worked in the dispute resolution field for more than two decades as a mediator, trainer and consultant. For eight years, he served as the first director of online dispute resolution for eBay and PayPal. Before eBay, Rule co-founded Online Resolution, one of the first online dispute resolution providers. He has worked at Mediate.com, the National Institute for Dispute Resolution (now the

See 'ADR Conversations' on Page 4

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Arbitration Allows Ad Hoc Panel to Sprint to Decisions in Olympic Disputes

Continued from Page 1

Dirk-Reiner Martens
Attorney and Arbitrator with Martens Rechtsanwälte in Munich

Martens noted that all athletes who participate in the Olympics must sign an agreement that they will submit all disputes arising during, or just before the start of competition, to arbitration and may not participate unless they agree to arbitration of disputes.

"Most important considerations when appointing arbitrators to serve on a panel are the nationality of the athlete, no matching nationalities of arbitrators and athletes, expertise with the sport and expertise with the type of case to be heard."

Dirk-Reiner Martens
Attorney and Arbitrator

Martens said there are 12 arbitrators on the Ad Hoc Roster and they are selected to provide a cross-representation of the countries participating in the Olympics. The types of disputes generally heard by an Ad Hoc panel involve eligibility to participate in the Olympics or a sport, disputes over results from a specific competition and on rare occasions doping cases, he added.

According to Martens, the "most important considerations when appointing arbitrators to serve on a panel are the nationality of the athlete, no matching nationalities of arbitrators and athletes, expertise with the sport and expertise with the type of case to be heard."

Martens described the process as one of lighting speed, wherein once a case is filed and an arbitrator has been informed that he or she has been selected, they have one hour to get to the site of the arbitration to begin looking at the case and the supporting documents that have been filed. The panel would then schedule a hearing, inform parties and any experts to be called at the time of the hearing, and render a decision within 24 hours, he said, adding that some cases may be decided even faster than the 24-hour period provided for in the Ad Hoc Rules. "National Governing Bodies generally support their athletes during an arbitration, but not always," he noted.

CAS arbitrators are appointed by the International CAS for a renewable term of four years. The rules stipulate that the International Council of Arbitration for Sport (ICAS) must call upon "personalities with a legal training and who possess recognized competence with regard to sports." CAS arbitrators are appointed at the proposal of the International Olympic Committee, the International Federations, and the National Olympic Committees. The ICAS also appoints arbitrators "with a view to safeguarding the interests of the athletes," as well as arbitrators chosen from among personalities independent of sports organizations.

CAS Secretary General Matthieu Reeb said arbitration was selected as the dispute resolution process because it "allows maximum flexibility and is the most adapted to the pace of sports competitions. During the Olympic Games, the CAS implements fast-track arbitration rules in order to provide decisions within the 24 hours from the filing of any request for arbitration. This is an advantage not only for the athletes, but also for the Organizing Committee of the Olympic Games, for the international federations and for the International Olympic Committee to avoid that the Games are disturbed by legal actions and to have final decisions within a very short time frame."

Matthieu Reeb
CAS Secretary General

The Ad Hoc Rules govern all disputes that arise during the course of the Olympics and any disputes that arise within 10 days of the opening ceremonies. They provide an extremely rapid arbitration process for athletes by requiring resolution of disputes within 24 hours of filing and allow for an extension of the dispute resolution process only in "exceptional cases."

Once a case has been filed, the parties must submit all evidence they intend to rely on, including all documents and witnesses, and the panel will then conduct a hearing. The panel must issue a written ruling within 24 hours of the filing detailing its reasons for the award. Disputes must be decided based on "the Olympic Charter, the applicable regulations, general principles of law and the rules of law," the

Arbitration provides "consistency of results that are fair, fast and cheap and also helps develop sports law in the process."

Jeffrey Benz
Attorney and arbitrator
with the Benz Law Group
in Los Angeles

Ad Hoc Rules say. The decision of a panel is enforceable immediately and may not be appealed against or otherwise challenged."

"If it considers itself to be sufficiently well informed, the Panel may decide not to hold a hearing and to render an award immediately," the Ad Hoc Rules say.

Arbitration proceedings are free, and athletes may be represented by counsel or assisted by others. National Olympic Governing Body representatives may also attend the hearing.

According to Reeb, "in the period before the Games, we register disputes related to non-selection of athletes, qualification criteria, quotas and nationality. In the second part of the Games, we get more disciplinary matters or also appeals related to field-of-play decisions, even if the CAS does generally not entertain them."

Reeb noted that "the CAS procedure at the Olympic Games is supported by all stakeholders involved in the Games. With the exception of a few negative reactions from certain parties, due to non-favorable results in specific arbitrations, the stakeholders are satisfied that the presence of CAS at the Olympic Games is very beneficial to the sports community compared to the situation where appeals should go before ordinary courts."

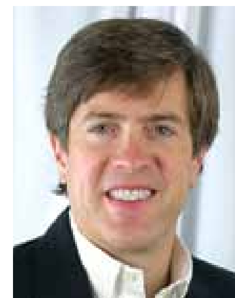
According to Reeb, the average number of cases per Olympic Games is between seven and eight. "The CAS Ad Hoc Division registers more disputes during the Summer Games than during the Winter Games," he said, adding, "the record number of cases registered at one edition of the Olympic Games was in 2000 in Sydney with 15."

Reeb explained that "there is no specific mediation procedure at the Olympic Games, but nothing prevents an arbitral panel from proposing a mediation or conciliation during an arbitration hearing in order to find an amicable settlement."

Jeffrey Benz
Attorney and arbitrator with the Benz Law Group in Los Angeles

Jeffrey Benz, former General Counsel/Managing Director of Legal and Government Affairs at the U.S. Olympic Committee (USOC) and an attorney and arbitrator with the Benz Law Group in Los Angeles, said the process laid out in the Ad Hoc Rules works well because "parties can speak freely, there is speedy resolution to disputes and there are precedents that panels can rely on or cite to when deciding a case."

According to Benz, arbitration provides "consistency of results that are fair, fast and cheap and also helps develop sports law in the process." In addition, arbitration provides parties with a private hearing where the elements of a dispute can be freely presented and considered but, also importantly for sports law and the Olympics, provides public results to the international community of athletes and national governing bodies.



Steven B. Smith
Attorney with Bryan Cave in Colorado Springs

Steven B. Smith, an attorney with Bryan Cave in Colorado Springs who represents National Olympic Governing Bodies, said, "Everybody is on board with the ad hoc arbitration process at the Olympics."

Smith said that in addition to the efficacies of arbitration in general, the Ad Hoc process guarantees that disputes arising during the Olympics will be heard by very experienced arbitrators who have been dealing with sports-related disputes for a long time. "Each sport has its own unique set of issues, and having knowledge of these allows the cases to proceed rapidly and also result in better, more consistent results." ●

"The Ad Hoc Rules govern all disputes that arise during the course of the Olympics and any disputes that arise within 10 days of the opening ceremonies."

Court of Arbitration
for Sport

Colin Rule Discusses the Intersection between ADR and Online Dispute Resolution (ODR) Continued from Page 1

Association for Conflict Resolution) and the Consensus Building Institute. He is co-chair of the advisory board of the National Center for Technology and Dispute Resolution at the University of Massachusetts Amherst and a fellow at the Center for Internet and Society at Stanford Law School. The author of *Online Dispute Resolution for Business*, Rule also blogs at Novojustice.com.

Ten years ago, we heard a lot of skepticism: "That's never going to work. People need to sit across from each other. Technology is a fad." Now, it's a new generation.

Q. How did you learn about the potential for ODR?

A. We're going way back to the dusty corners of my memory. I've been in the dispute resolution field for almost 25 years, before the Internet. I've always been kind of a nerd. I like technology. When the Internet started to come up, I thought, "What about online disputes? We should do something about this. People connect over networks." So I founded Online Resolution. We were inventing the field. We didn't even know what to call it. Eventually, we called it ODR. I wrote a book about it and then got a call from eBay.

Q. How has technology changed society?

A. Ten years ago, we heard a lot of skepticism: "That's never going to work. People need to sit across from each other. Technology is a fad." Now, it's a new generation. Everyone is using iPads, iPhones. People use technology all the time. It's just like when ATMs came out, people used to say, "No one's going to use those."

Technology has irreversibly changed a number of industries, including dispute resolution. The new tools are so powerful. It's the parties who are driving it. Society's expectations are changing.

Q. How does ODR work?

A. In pre-negotiation, before the complainant even notifies the respondent, it can help with problem diagnosis.

We also provide technology-assisted direct negotiation using an algorithmic approach. In that case, technology is the fourth party. It can't be biased because the program just runs. ODR can include online mediation with audio/video conferences. ODR is really a continuum of different processes.

Q. What kind of dispute is ODR best for?

A. The list is growing all the time. Ten years ago, it was just transactional cases, especially cases where the parties never met and the dispute arose online. So ODR was a no-brainer for eBay and PayPal and their low-value transactions.

Now, even in a face-to-face case, parties want to work it out online. People are more comfortable communicating over the Internet, especially in high-volume cases like disputes with a cable company, a cell phone company, a health insurance company or a tax bill dispute with the IRS. Those are cases where the party doesn't want to go to court, but the issue is annoying enough to not want to let it go.

Similarly, for companies, ODR works great for nuisance cases, like something worth $250,000. They don't want to just pay a settlement, which provides a perverse incentive for similar cases.

Q. What are the advantages for businesses?

A. Providing effective redress is important for keeping customers happy.

Sometimes customers get a refund but think, "This was such a pain." Customers want a ready mechanism to resolve disputes. It improves loyalty and satisfaction, which increases reactivation rates. We saw that in studies at eBay. Users were much more active on the site after a dispute.

When companies have to pay for customer support—an 800 number with employees sitting on the phone—it costs a lot of money and annoys customers. Instead, companies need a software-based process. Providing a streamlined, simple process—a "resolve" button right there—enhances loyalty, which can mean millions more in profit.

Providing a streamlined, simple process—a "resolve" button right there—enhances loyalty, which can mean millions more in profit.

Q. What are the advantages for individuals?

A. Some of them are the same: rapid resolution, an easier user experience. In the class action realm, individuals receive some measure of justice, but it's expensive and can take a long time. Customers don't want that. They want an expedited process. Studies at eBay found that customers would rather lose a case quickly than win but have it take a long time, which outweighs the amount of the initial harm.

Q. How does ODR work in conjunction with traditional ADR?

A. Parties now want mediation because it's more expedited. The beauty of an online process is the opportunity to really streamline an arbitration. At a low level, you can have a documents-only, no-hearing decision. It could be a one-month process—allow a few weeks to upload documents, a week for Q&A. You can dial it up or dial down, adding hearings, discovery, decision review. Geography isn't an issue because neutrals can be from anywhere. We have a panel of thousands of people, so conflicts are not a problem. We're sanding the corners off the process. ODR works the way business works. We can custom-design the process.

Q. You've said the Internet is like a country. Explain.

A. eBay has 250 million users. I realized that what we were doing there was creating a civil justice system and a criminal justice system. I have a public policy background, so I looked at it as building a system with incentives and a level playing field.

Q. How is Modria unique?

A. Modria is a spin-off from eBay, which handles 60 million disputes a year with only 25,000 employees. Software resolves the mass majority of those cases. No other system does that volume, so we have a big head start, a big leg up. We invited the leading minds in this space to join us.

The Internet mobilizes millions of people, and we can use technology to aggregate their smarts by using crowd sourcing. We can collect juries, just like we did at eBay, having a large panel of users help decide certain disputes. It would be impractical in the face-to-face world, but online it's easy.

Technology is going to change everything about our society. We need to think about it in an active, not a passive, way.

What technology does well is it frees up people to do what people do best, which is to exercise judgment. That's why we're not planning robot arbitrators.

Q. What is the future of ODR?

A. If you squint and look into the future, it's hard to tell the difference between ADR and ODR. Five to 10 years out, it'll be a no-brainer to have HD video conferences with parties. There will be no "Where should we meet?"

Technology is going to change everything about our society. We need to think about it in an active, not a passive, way. Practitioners should learn what technology can do for them. You don't have to use it, but you need a full toolbox. You might decide to use it in the right dispute.

The third-year law students I meet at Stanford, Hastings and Santa Clara have been using technology since they were 2-years-old. When they're running the system, there's no question they're going to be using technology. So my bailiwick is "What does it look like between now and then?" ODR is inevitable. It's just a question of pace. ●

FEDERAL CIRCUIT COURTS

Ambiguities in Arbitration Clause Relieves Employee of Obligation to Arbitrate

Gove v. Career Systems Development Corp.
2012 WL 2892472 C.A.1 (Me.), July 17, 2012

When Career Systems Development (CSD) took over a significant portion of Ann Gove's employers' work, CSD offered to interview and hire affected employees. Gove click-signed her assent to a clause which read as follows:

If there is any dispute between you and CSD with respect to any issue prior to your employment, which arises out of the employment process… it should be resolved in accord with the standard Dispute Resolution Policy and Arbitration Agreement adopted by CSD for its employees. Therefore, your submission of this Employment Application constitutes your agreement that the procedure set forth in the Arbitration Agreement will also be used to resolve all pre-employment disputes.

At her interview, Gove was visibly pregnant and was asked if she had other children (she did). She was not hired by CSD although CSD continued to look for candidates to fill Gove's position. After Maine's Human Rights Commission concluded that Gove was unreasonably denied employment, Gove filed suit in federal court. CSD moved to compel arbitration. The district court denied the motion, reasoning that it was ambiguous whether Gove was covered by the clause.

On appeal, CSD argued that under Maine law Gove was covered by the clause even though she was not an employee. The United States Court of Appeal for the First Circuit noted that "nothing in the arbitration clause refers to 'applicants.' Instead, every reference is to 'your employment,' 'the employment process,' or 'pre-employment disputes.'" The Court found that under Maine law, ambiguities are strictly construed against the drafter. Therefore, Gove was under no obligation to arbitrate.

Ability to Control Employees Enough to Require New Firm to Arbitrate FINRA Claims Against Employee of Old Firm

Waterford Investment Services, Inc. v. Bosco
2012 WL 2354453 C.A.4 (Va.), June 21, 2012

The Boscos invested a substantial portion of their life savings with George Gilbert, an employee of the CBS brokerage. The Boscos' investments turned out to be Ponzi schemes and most of their money was lost.

CBS closed its doors and Gilbert was offered a job with Waterford, a brokerage owned by the same parent as CBS and with which CBS shared space and management.

The Boscos filed a FINRA arbitration action against Waterford, CBS, Gilbert and others. Waterford moved in district court for a declaratory judgment, arguing that it owed no duty to the investors. The magistrate ruled that Waterford was a continuation of CBS and was obliged to arbitrate.

On appeal, the U.S. Court of Appeal for the Fourth Circuit determined that the question was not whether Waterford exercised control over Gilbert, but whether it had power to exercise such control. The Court found that "the significant degree of overlap between the two firms in terms of their majority owner, officers and directors, and shared resources, establishes that various players at Waterford had the potential power to control Gilbert as well."

The Court concluded that Waterford had the power to exercise significant control over Gilbert and affirmed that the Boscos could compel Waterford to arbitrate their claims.

"Binding Mediation" Meets Standards Required to Enforce Settlement

Bowers v. Raymond J. Lucia Companies, Inc.
2012 WL 1939722 Cal.App. 4 Dist., May 30, 2012

Ryan Bowers sued the Lucia Companies for various torts. The trial court determined that the case was required to be arbitrated. After days of arbitration but before the panel had reached a decision, the parties asked the panel to dismiss the claim as they had agreed to a med-arb procedure. Part of the transcript of that discussion is reproduced here:

Defendant's Counsel: *We've been able to resolve this arbitration to the parties' satisfaction. As a consequence, Lucia is dismissing all claims against the plaintiffs, with prejudice… and we are agreeing to bring that case to binding mediation with a component which, if it's not resolved at mediation, rolls over to arbitration. I guess it's—it's mediation with a binding arbitration component following.*

Chairman: *Med/Arb.*

Plaintiffs' Counsel: *The mediator has the ability to decide the case at the end of the day.*

Defendant's Counsel: *Correct.*

Plaintiffs' Counsel: *if the parties don't resolve it.*

Defendant's Counsel: *We're agreeing to go mediate with a mutually-acceptable mediator. To the extent we don't resolve it that day, it becomes a mediation—an arbitration with a range of between $100,000 and $5 million as the range that he will then have the freedom to choose after we present our cases to him or her during mediation.*

At the end of the day of mediation, there was no agreement and the neutral ordered a payment of $5 million. Defendant fired his lawyer. New counsel requested that the mediator re-open the case, but the mediator declined. The trial court granted plaintiff's motion to confirm.

On appeal, the defendant argued that the term "binding mediation" was too uncertain to be enforceable, and that binding mediation is not among the constitutionally accepted methods allowing for waiver of jury trial rights.

The California Court of Appeal concluded "there is substantial evidence to support the trial court's determination the defendant agreed to the binding mediation procedure utilized in this case. We further conclude that the binding mediation provisions in the parties' settlement agreement were not too uncertain to be enforceable. Finally, we conclude binding mediation is not a constitutionally or statutorily prohibited means of waiving jury trial rights where, as here, the parties have agreed to settle their dispute in a nonjudicial forum."

Sanctioned Attorney May Be Prohibited from Mediating in Circumstances in which He Will Draw on His Legal Education and Experience

In re Bott
462 Mass. 430, 2012 WL 1970456
Mass., June 05, 2012

In 2005, as settlement of a disciplinary matter, attorney Anthony Bott agreed to resign from practice. Later, Bott completed mediation training and requested permission from a county court to practice as a mediator. The judge asked Bott to state what the nature of his mediation practice would be and before making a decision, reported the matter to the Massachusetts Supreme Judicial Court (SJC).

The SJC acknowledged that mediation "is not generally subject to regulation or licensure in Massachusetts," but found that the court-referred nature of Bott's practice was guided by SJC Rule 1:18. The Court concluded that "as a general proposition, a person does not engage in the practice of law when acting as a mediator in a manner consistent with the Uniform Rules."

However, the Court found that in some situations, Bott might draw on his education, experience or legal judgment to address the needs of the parties in mediation. The Court noted that the conflict is greatest when Bott would mediate cases in similar areas to those in which he practiced while an active member of the bar.

The Court concluded that "an attorney who has resigned while the subject of disciplinary investigation, or who has been disbarred or suspended from the practice of law, may be prohibited, in some circumstances, from acting as a mediator." The matter was returned to the court below for fact-finding about the kinds of cases Bott would mediate and the kinds of cases he handled as a lawyer.

QUEBEC COURT – CANADA

Quebec Court of Appeal Adopts Federal Court of Canada Decision that Class Action Waivers Are Valid

Telus Mobilite v. Comtois 2012
QCCA 170, January 27, 2012

In 2008, Karine Comtois filed a putative class action against her mobile phone provider, Telus Mobilite. The trial court denied the authorization to proceed on a class basis. However, in 2010, the Quebec Court of Appeal reversed the trial court and authorized a class action for all persons overcharged for roaming fees. While the case was pending, the Supreme Court of Canada decided the case of *Seidel v. Telus* (2011 SCC 15) and held that in the absence of a contrary provision of law, arbitration clauses should be given deference by the courts.

Following the Seidel decision, the Quebec Court of Appeal reversed itself and concluded that the commercial wireless customers of Telus were prohibited from class actions because of an arbitration clause and class action waiver in their contracts with Telus. The Court held that the Quebec Consumer Protection Act, which prohibits pre-dispute arbitrations, does not apply to commercial transactions. It wrote "the nullity of arbitration clauses in consumer contracts as set out in the recent amendment to the Consumer Protection Act does not apply here since the contracts with legal persons are not consumer contracts. Accordingly, the arbitration clause in the service contracts with corporate customers is legally valid."

NLRB Ruling Throws Validity of Class Action Waivers into Doubt

The enforceability of class action waivers in arbitration agreements is questionable after a January ruling of the National Labor Relations Board (NLRB). In *D.R. Horton, Inc. and Michael Cuda*, 357 NLRB No. 184 (2012), the NLRB held that employers cannot prevent workers from filing work-related class actions.

The case arose when a superintendent at homebuilder D.R. Horton alleged the company had misclassified a group of employees as exempt to deprive them of Fair Labor Standards Act protections like overtime pay. The Board held that the National Labor Relations Act (NLRA) protects workers' rights to engage in concerted action, which trumps any arbitration agreement that bars employees from bringing group claims. The D.R. Horton decision applies to non-management private sector workers, whether or not they're unionized.

The Board stated, "To find that an arbitration agreement must yield to the NLRA is to treat it no worse than any other private contract that conflicts with Federal labor law. The Mandatory Arbitration Agreement at issue would equally violate the NLRA if it said nothing about arbitration, but merely required employees, as a condition of employment, to agree to pursue any claims in court against their employer solely on an individual basis."

According to the Board, employers aren't required to permit class-wide arbitration, but they can't bar class arbitration and class action lawsuits, leaving employees without any outlet for collective action. The Board explained, "We need not and do not mandate class arbitration in order to protect employees' rights under the NLRA. Rather, we hold only that employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in all forums, arbitral and judicial. So long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of class-wide arbitration. Employers remain free to insist that arbitral proceedings be conducted on an individual basis."

In making this ruling, the Board's key determination was that employees' ability to engage in collective and class actions qualifies as a "concerted activity" under section 7 of the NLRA. As a result, the arbitration agreement resulted in "interference," which is unlawful under the NLRA.

The Board distinguished last year's U.S. Supreme Court decision, *AT&T Mobility v. Concepcion*, which had enforced a consumer arbitration agreement that contained a class action waiver. In that case, the Supreme Court held that the Federal Arbitration Act preempts state laws that invalidate class action waivers in arbitration agreements. But in *D.R. Horton*, the NLRB noted that its decision was based on federal, not state, law and held that the the FAA doesn't override the NLRA.

The Board specifically addressed the Supreme Court's concern that the "switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality." The Board stated that "the weight of this countervailing consideration was considerably greater in the context of *Concepcion* than it is here" because the employment agreement in *D.R. Horton* was markedly different from the consumer contract at issue in *Concepcion*. Employment class actions tend to be narrower than consumer class actions, so interference with the FAA policies is limited, the Board reasoned.

The timing of the *D.R. Horton* decision poses procedural questions. The decision was released after Member Craig Becker's term expired, when the Board lost its quorum, arguably prohibiting it from acting. The decision also came after President Obama's announced plan to appoint members to the Board, despite ongoing Congressional sessions that might actually preclude such appointments.

Importantly, since January, the *D.R. Horton* decision has been disregarded or distinguished by several federal district courts that have been asked to enforce arbitration agreements with class and collective action restrictions. But until a circuit court resolves the issue, the waters remain murky.

The NLRB decision applies only to employers and employees covered by the NLRA and doesn't affect collectively bargained waivers of employees' rights to bring class or collective actions. However, pursuant to the *D.R. Horton* decision, arbitration agreements must provide a way for individual workers to bring group claims. As a result, employers should consider whether to revise mandatory arbitration agreements to eliminate class action waivers.

ADR Professionals From Around the World Arrive in America

The JAMS Foundation recently selected 10 fellows from more than 100 applicants for the **2012 Weinstein International Fellowship program**. The program, named to honor the contributions of JAMS mediator Hon. Daniel Weinstein (Ret.), provides opportunities for ADR professionals from throughout the world to learn more about dispute resolution in the United States. Under the guidance of JAMS and seasoned JAMS panelists, Weinstein Fellows pursue projects of their own design that advance ADR practices in their home countries.

"These JAMS Fellows will play a leading role in advancing the effective use of ADR worldwide," said Chris Poole, JAMS president and CEO. "We thank Judge Weinstein and the JAMS Foundation Board for their generosity and support for this program and are excited by the talent and knowledge each of the fellows possesses."

"Now in its fourth year, this class of Fellows includes a broad group of nationalities and experience," said Jay Folberg, executive director of the JAMS Foundation. "We appreciate the level of discussion and sharing that results from such a diverse group of people and look forward to the opportunity to learn from them."

After arriving in the U.S., each fellow will be based in a JAMS Resolution Center, and their fellowship will last between one month and one year.

Meet the 2012 Weinstein International Fellows:

• **María Rosario García Alvarez** *(Spain)*
Ms. Alvarez serves as the President of the Second Section of the Labor Division of the Madrid High Court of Justice. During her fellowship, she will study at UC Hastings Center for Negotiation and Dispute Resolution as a visiting research scholar and attend ADR courses at the Gould Center for Conflict Resolution at Stanford Law School. Ms. Alvarez intends to broaden her understanding of effective models of court-connected ADR and develop best practices for the management of an ADR service provider in Madrid.

• **Ivan Bimbilovski** *(Macedonia)*
Mr. Bimbilovski is a certified mediator and vice dean of the Faculty of Law at the European University in the Republic of Macedonia. Following his fellowship, Mr. Bimbilovski plans to establish law school mediation clinics and provide mediation training for ADR professionals, as well as reform Macedonia mediation laws.

• **Olurotimi Williams Daudu** *(Nigeria)*
Mr. Daudu works as a principal judicial officer and special assistant to the President of the National Industrial Court of Nigeria. While in the U.S., Mr. Daudu will develop his expertise in ADR and mediation. Following his return, he plans to work to provide greater access to justice in Nigeria through the establishment of ADR centers under the auspices of the National Industrial Court.

• **Thierno Diallo** (Senegal)
Mr. Diallo is the general manager of the Mediation, Arbitration and Conciliation Center in Dakar, Senegal. He plans to use his fellowship to master mediation procedures in order to train mediators in Senegal and the West African subregion. Additionally, he would like to introduce mediation as a mandatory course at the University of Dakar.

• **Livia Angela Giordano** (Switzerland)
Ms. Giordano is an employment attorney in Zurich and an LL.M. candidate in dispute resolution at Pepperdine University School of Law. Following her fellowship, she plans to open an ADR training center and work in the diplomatic field in order to contribute to peaceful conflict resolution and international understanding.

• **Kathy Alicia Maria Gonzales** *(Trinidad)*
Ms. Gonzales is the founder and CEO of Janus Conflict Management Services. She will research successful court-connected mediation programs in the U.S. in order to design a dispute resolution system to be used in family courts in Trinidad & Tobago. She will also study other uses of mediation, such as prisoner re-entry mediation, in order to develop similar programs throughout the Caribbean.

• **Enga Kameni** *(Cameroon)*
Mr. Kameni is an attorney with Jing and Partners and a doctoral candidate in international arbitration at the University of Pretoria, South Africa.

See "2012 Weinstein International Fellowship" on Back Cover

New York Convention Launches Case Law Website

A recently launched website, www.newyorkconvention1958.org, features case law on the application and interpretation of the New York Convention from national courts in jurisdictions all over the world. It was created to host information on the implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on June 10, 1958, with the goal of promoting its uniform application throughout the world.

The site features judgments from common law jurisdictions such as Australia, Canada, India, Hong Kong, the U.K. and U.S., as well as civil law jurisdictions such as Brazil, China, Colombia, Egypt, France, Germany, Switzerland and the OHADA countries (which have subscribed to the business law system created by the Organization for the Harmonization of Business Law in Africa).

The website was developed by Shearman & Sterling LLP, Columbia Law School and UNCITRAL.

Case law from other jurisdictions will be uploaded to the website throughout the year and continuing thereafter. Those using the site will be able to search judgments by jurisdiction, articles of the convention or keywords. Judgments are available in their original language and, typically, in English. An accompanying summary highlights the interpretation and application of specific provisions of the convention.

The New York Convention was drawn up at a UN diplomatic conference in 1958. A statement put out by the creators of the website says that for more than 50 years, the convention "has provided a common set of standards for the recognition and enforcement of foreign arbitral awards in a wide range of jurisdictions counting today 146 states."

"Since 1958 numerous judges and lawyers in one part of the world have been called upon to answer precisely the same questions as their colleagues located thousands of miles apart, often without having the benefit of sharing their colleagues' knowledge or simply observing the diversity of approaches to the same problem as the one they are faced with," the statement continues.

It explains that the website is "part and parcel" of an article-by-article guide to the New York Convention that UNCITRAL commissioned from Shearman & Sterling's head of international arbitration, Emmanuel Gaillard, and Columbia Law School professor George Bermann.

Although the drafters are not due to present the guide to UNCITRAL until 2013, they decided there was no reason to delay the launch of the website, which was conceived as "an essential tool to every judge, arbitrator, practitioner, academic and government official interested in the application of the New York Convention."

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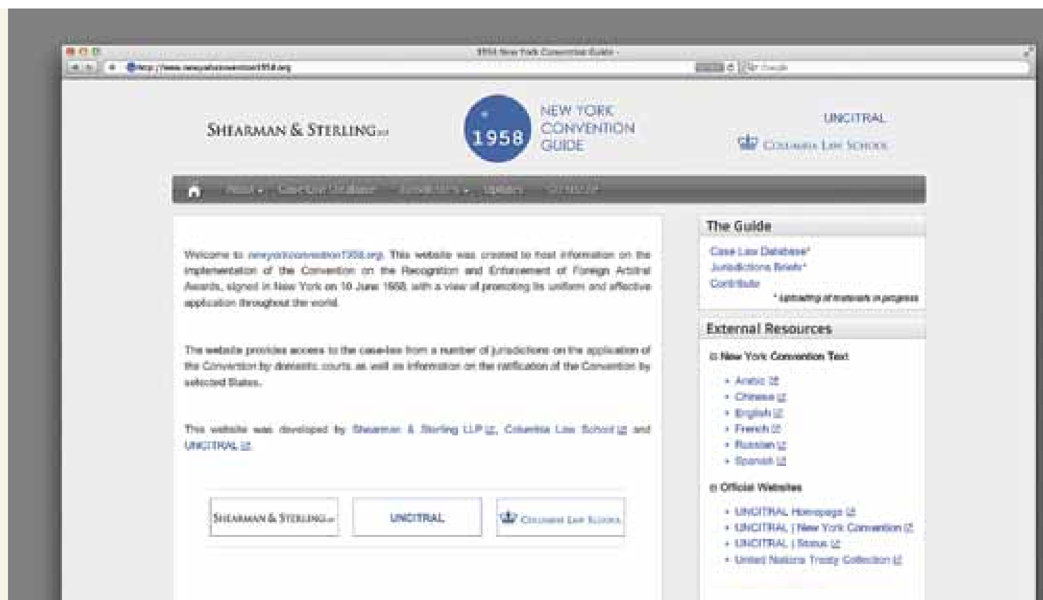
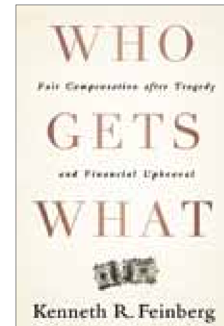
Shearman & Sterling LLP, Columbia Law School and UNCITRAL



www.newyorkconvention1958.org

Who Gets What: Fair Compensation after Tragedy and Financial Upheaval



By Kenneth R. Feinberg

REVIEWED BY RICHARD BIRKE

Mass disasters are mercifully rare. However, when one occurs, many lives are altered in one stroke. These tragedies call for special care and expertise in determining whether and how anyone involved will be compensated.

The United States is fortunate to have an individual who has been called upon to develop precisely this expertise and who has written a book describing the inner workings of his professional life. The individual is Kenneth Feinberg, and the book is aptly titled, *Who Gets What* (hereinafter WGW).

In WGW, Feinberg details his involvement in five enormous crises. These are, in order, (1) the settlement of the so-called "Agent Orange" case in which veterans and their families sought compensation for chemical exposure–related problems from the companies responsible for the production of defoliation chemicals used during the Vietnam War; (2) the administration of the 9/11 fund, intended to compensate the families of occupants of the World Trade Center and responders to the tragic attacks on the Twin Towers in New York City on September 11, 2001; (3) the distribution of charitable donations to the families of people killed or those affected by the rampage shooting spree that occurred on April 16, 2007, on the campus of Virginia Tech; (4) the payments to various executives of companies that received TARP bailout funds during the financial crisis of 2008; and (5) the administration of the $20-billion assessment against BP for its role in causing the environmental and financial catastrophe in the Gulf of Mexico known as the Deepwater Horizon.

The first chapter—titled, "The Professor, the Judge, the Lawyer, and the Senator—is an extended thank-you card to Feinberg's great mentors: law professor Robert Pitofsky, the Honorable Jack Weinstein, now-U.S. Supreme Court Justice Stephen Breyer and the late U.S. Senator Ted Kennedy. Feinberg describes the debt he owes to each of these men, and following Kennedy's advice about the "advantages of sharing credit with others," he begins by thanking the mentors who made his career possible.

In Chapter Two, "Agent Orange," Feinberg discusses how between two and three million soldiers and eight to 10 million family members were implicated in litigation over negative consequences stemming from the use of the defoliant Agent Orange. Five years into difficult litigation, Judge Weinstein appointed Feinberg a special master in the case and asked that he come up with a mechanism to distribute $180 million offered by the chemical companies (primarily Dow Chemical) to settle the case. Traditional tort law would require calculations of causation and damage that were impractical in this case. After extensive rounds of conversations with the vets, Feinberg proposed that only claimants who had illnesses—not injuries—associated with Agent Orange would be compensated and that approximately one-quarter of the money be dedicated to a fund that would be used for advocacy, insurance and other social services for anyone affected by Agent Orange. Judge Weinstein openly praised his special master's ingenious combination of an insurance-like apportionment of the bulk of the fund and a foundation that would address a wider set of needs. Feinberg learned that a good, creative solution will enjoy the support of those in charge, if not necessarily the traditionalists in the bar.

Chapter Three, "The September 11th Victim Compensation Fund," is full of heart-rending quotes from surviving family members and details of insider discussions with government players desperately trying to prevent the airlines from being sued into bankruptcy. More than $7 billion was distributed to more than 5,500 claimants.

Chapter Four, "The Hokie Spirit Memorial Fund," involves a much smaller amount of money and a smaller pool of affected parties, but the massacre on the Virginia Tech campus affected college students and their families everywhere. Feinberg describes all the complexities of determining whether nightmares caused by seeing the events are as compensation-worthy as physical injuries that came from being wounded.

Chapter Five, "Paying Wall Street Executives," and Chapter Six, "Oil Spill in the Gulf of Mexico" (with images of gushing wells and BP's top executive racing his private yacht), are equally compelling in ways that are simultaneously intellectual, political and profoundly personal.

Feinberg takes a first-person approach to his writing, and the reader is given an inside account of the people, ideas and arguments at the core of each of these complex issues of compensation. The book provides a terrific narrative of some of America's hardest-to-solve problems and an even deeper insight into the mind of the man who brought resolution to each of them. *Who Gets What* may be a tough question, but here's an easy solution: You get this book. Highly recommended. ●

Continued from Page 9

2012 Weinstein International Fellowship

Upon his return, Mr. Kameni will develop a training manual on arbitration and mediation to be used by law schools and bar associations in the English-language provinces of Cameroon. Mr. Kameni also hopes to further promote the use of ADR in Cameroon and neighboring West African countries as a viable alternative to violent conflict.

• **Lejla Bratovic Mavris** *(Bosnia-Herzegovina)*
Ms. Mavris is the Director/Co-Founder of Global Majority, an international nonprofit organization dedicated to the promotion of nonviolent conflict resolution. Ms. Mavris intends to mediate cross-border disputes and promote the use of mediation as a preferred method of conflict resolution internationally.

• **Tolegen Myrzabayev** *(Kazakhstan)*
During his Fellowship, Mr. Myrzabayev will attend Columbia Law School as a visiting scholar to conduct research on international arbitration. Upon his return to Kazakhstan, he will establish a training center for mediators and teach ADR to law students.

• **Blažo Nedić** *(Serbia)*
Mr. Nedić is the director of Partners for Democratic Change Serbia and the regional mediator for the World Bank Group for Serbia, Croatia, Bosnia and Herzegovina, Montenegro, Macedonia, Bulgaria and Albania. His fellowship will help further his efforts with the national Chamber of Mediators to promote and develop commercial mediation in Serbia. ●

HAVE A BRIGHT IDEA FOR A STORY?

The *Dispute Resolution Alert* is always looking for new and interesting article ideas and suggestions. Please email them to Victoria Walsh at vwalsh@jamsadr.com. We hope to hear from you.

JAMS DISPUTE RESOLUTION
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An Update on Developments in Mediation and Arbitration

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