

ARTICLES

Alternative Dispute Resolution in Sport Management and the Sport Management Curriculum

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INTRODUCTION

The purpose of this article is to provide a fundamental understanding of the different types of alternative forms of dispute resolution (ADR) to those involved in learning about or teaching sport law regardless of their particular formal legal training. Additionally, this article discusses federal and state laws related to ADR, some constitutional concerns regarding the processes, provides sample ADR clauses for the practitioner, offers a sample course outline for the educator, and notes additional ADR resources in the event an ADR course (or the exposure to this concept in another course) might be instituted by the sport law/management program.

Many sport management programs have incorporated the study of law as part of the program's curriculum and justifiably so. Courses are aptly titled "Sports Law" or "Legal Aspects of Sport," for example, and are taught at both the undergraduate and graduate levels. ADR is frequently discussed in such courses but often only minimally unless the course focuses on conflict resolution itself.

Understanding how law affects the sport industry as a whole and how the legal system continues to affect daily decisions by sport managers, coaches, educators, administrators, athletes and many others, is obviously very important. Sport managers are often concerned over liability issues when designing facilities, managing personnel, or installing exercise equipment, for example. Appreciating legal issues and the legal process is vital for the successful individual and organization at any level.

Pedagogically, sport law is typically studied by reading and analyzing reported cases that have been litigated in the courts. Such cases have gone to trial and have resulted in a judge's decision or jury's verdict in the public forum. Analyzing actual case studies, however, is not the only resource to examine disputes involving sport law issues, and ultimately is not the sole manner to introduce students - especially non-law majors - to other methods of dispute resolution in the judicial system. Teaching ADR requires the sport law instructor to re-examine alternatives to litigation and to focus on solutions to issues rather than the problems themselves. ADR can focus more on the parties' needs, rather than the legal process.

ADR GENERALLY

ADR is a general term that refers to procedures for settling disputes by means other than litigation.¹ The two basic forms of ADR are the fundamentally different concepts of "arbitration" and "mediation." The major difference between arbitration and mediation is that in arbitration an arbitrator is a decision-maker, whereas in a mediation session the mediator plays the role of settlement-facilitator.

Unlike ADR, litigation is a form of dispute resolution that uses public adjudication: a judge or jury decides the result of a dispute.² However, litigation is not regarded as the swiftest and most efficient method to resolve disputes, particularly if a party wishes to attempt to settle differences in a non-adversarial manner.³ Traditional litigation can be expensive, time consuming and extremely frustrating for the parties. Additionally, most non-lawyers are unfamiliar with the myriad of rules related to civil procedure, evidence and so forth, and court delays and appeals can be particularly frustrating and foreign for the non-lawyer who may be used to making decisions in a swifter and more efficient manner on a daily basis. Methods such as arbitration, mediation, and other hybrid forms of dispute resolution (such as mediation-

1. Some prefer the phrase "Appropriate" Dispute Resolution rather than "Alternative" Dispute Resolution to emphasize the re-thinking of the litigation concept. Carrie Menkel-Meadow, *Practicing "In the Interests of Justice" in the Twenty-First Century: Pursuing Peace as Justice*, 70 *FORDHAM L. REV.* 1761, 1763 (2002).

2. *BLACK'S LAW DICTIONARY* 33 (7th ed. 2000).

3. Roger Roots, *Of Prisoners and Plaintiffs' Lawyers: A Tale of Two Litigation Reform Efforts*, 38 *WILLAMETTE L. REV.* 210, 215-217 (2002). See also, Samuel R. Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 *MICH. L. REV.* 734 (1987).

arbitration and arbitration-mediation) may be used by unhappy parties to attempt to settle a dispute without the necessity of a trial.⁴

ADR procedures are increasingly being used not only in sport, but also in general business disputes, marital dissolution actions, child custody debates, in a wide variety of tort claims, and in other disagreements that would likely otherwise involve litigation. ADR cases may involve differences over accounting methods, personnel issues, and virtually any other category that the parties agree to settle as a result of a conflict. Knowing ADR and how it differs from litigation can affect how one does business.⁵

ADR is effective in resolving a variety of sport-related disputes. For example, ADR is often used to settle differences in interpretations or applications of collective bargaining agreement (CBA) rules or regulations. Arbitration is common among the major sports of baseball, basketball, football and hockey.⁶ Arbitration clauses in CBA's may address individual athlete actions, medical benefits, freedoms, or salaries. Where no CBA exists, ADR may be introduced by contract and is, ultimately, a creature of contract.⁷

Much of the reason that ADR is so effective is that the emphasis is less on the lawyers and civil procedure, instead it is placed on the "needs" of the parties themselves, particularly in mediation.⁸ ADR does not focus on who is "right" and who is "wrong," which is a significant divergence from traditional litigation.⁹ Additionally, parties should realize that in mediation even if the attempt to resolve differences fails, the courts may often be turned to for subsequent litigation if there is no settlement.¹⁰

As courts become more crowded and access becomes more difficult, arbitration and mediation will play an even greater role in resolving disputes in the sport industry. By all means, however, litigation does play its role in our society and it must be noted that litigation may be the appropriate method of

4. The term "negotiation" is often included in the study of ADR as its own category as well. However, the author believes that this term is so general, so frequently used and informal that an analysis of negotiation in this article would be more of a skills analysis than the study of a formal, alternative process of settling a dispute.

5. Incorporating arbitration and mediation clauses in contracts with patients, clients, vendors, customers and the like, for example.

6. Gil Fried & Michael Hiller, *ADR in Youth and Intercollegiate Athletics*, 1997 B.Y.U.L. REV. 631, 634 (1997).

7. *Id.* at 634.

8. Peter B. Kupelian & Brian R. Salliotte, *The Use of Mediation for Resolving Salary Disputes in Sports*, 2 T.M. COOLEY J. PRAC. & CLINICAL L. 383, 393 (1999).

9. Fried & Hiller, *supra* note 6, at 636.

10. See David S. Winston, Note: *Participation Standards in Mandatory Mediation Statutes: "You Can Lead a Horse to Water. . ."*, 11 OHIO ST. J. ON DISP. RESOL. 187, 190-192 (1996).

dispute resolution in many cases. However, such cases are usually the byproduct of unsuccessful settlement negotiations. An appreciation of the differences among and advantages and disadvantages of litigation, arbitration, mediation and hybrid forms of ADR is essential for the sport law and sport management professor.

FEDERAL AND STATE MODELS

In the past decade much emphasis has been placed on the role of ADR including the federal government's enactment of The Administrative Dispute Resolution Act of 1990 (ADRA) that requires all federal agencies to establish policies for the use of ADR.¹¹ The ADRA requires federal agencies to appoint a dispute resolution specialist to consider whether, and in what circumstances, ADR procedures may benefit the general public and also help that particular administrative agency to fulfill its statutory duties more effectively. Each federal agency must develop an ADR policy following an examination of possible uses of ADR in formal and informal adjudication, rulemakings, enforcement actions, the issuance and revocation of licenses or permits, contract administration, litigation brought by or against the agency, and other agency actions.¹²

Prior to the ADRA, the Federal Arbitration Act¹³ (FAA) and the model Uniform Arbitration Act¹⁴ (UAA) encourage the use of ADR to resolve disputes. The FAA, which was first enacted in 1925, applies to all contracts that have an arbitration clause, excluding only those that involve transportation workers.¹⁵ The UAA has been adopted in 35 states at present since its model inception in 1955.¹⁶ The UAA creates a process whereby the existence of an agreement to arbitrate requires a court to compel arbitration on one party's motion and then requires the court to step back and take a hands-off attitude during the arbitration proceeding, reentering the dispute only to confirm,

11. 5 U.S.C.A. §§571-583 (1990). The ADRA was amended in 1996. Additionally, the Alternative Dispute Resolution Act of 1998 requires all federal district courts to provide at least one form of ADR. *See* 28 U.S.C.A. §651 et. seq. (1998).

12. *See also* U.S. Department of Labor: Office of the Secretary, *Overview of Alternative Dispute Resolution*, (September 1995), at <http://www.dol.gov/asp/programs/adr/adrbrief.htm>.

13. 9 U.S.C.A. § 1 et seq. (2002).

14. 4 Am.Jur.2d *Alternative Dispute Resolution* § 28 (Cumulative Supp. 2002).

15. *Circuit City Stores, Inc. v. Saint Clair Adams*, 532 U.S. 105 (2001). *See also, however, Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

16. For an historical review of these acts, *see*, American Arbitration Association, *Past, Present and Future: Building on 70 Years of Innovation-The AAA Looks to the 21st Century*, 51 DISP. RESOL. J. 109 (1996).

modify, deny, or vacate the arbiter's award. The court does not lose its jurisdiction, but it may not interfere with the arbitration proceeding during the hands-off period.¹⁷

ARBITRATION

Arbitration is the more often used form of ADR to resolve conflict in sport.¹⁸ Arbitration involves the submission of a dispute to a neutral decision maker (an arbitrator) for a final resolution of a disagreement.¹⁹ Arbitration is characterized as "binding" or "non-binding" and either "mandatory" or "voluntary" depending upon the agreement between the parties. This agreement to arbitrate can be contained in a clause in an individual contract between the league and athlete as per the CBA, or possibly in an Olympic organizing committee's constitution and bylaws such as the United States Olympic Committee.²⁰ Arbitration may mimic a trial and is adversarial in nature, but the rules of evidence and civil procedure are relaxed and the arbitrator is in control of process of the proceeding without judicial review of his or her decisions.²¹ In fact, binding arbitration precludes any challenge to the decision in court, unless the arbitrator abused his or her discretion by having committed fraud or other misconduct.²² Whether arbitration will be binding or nonbinding is determined at the outset of the arbitration process in the contractual agreement.²³ Arbitrator's interpretations and applications of the law are generally not subject to review and their award may be made without explanation.²⁴

Arbitration has long been used in labor, construction, and securities regulation, but is now gaining popularity in other more fundamental and general business disputes. In 2000, the American Arbitration Association (AAA) noted that there were 198,491 arbitration cases filed. This was the sixth year in a row for a record caseload.²⁵

17. 4 Am.Jur.2d *Alternative Dispute Resolution* § 28.

18. Fried & Hiller, *supra* note 6, at 641.

19. BLACK'S LAW DICTIONARY 79 (7th ed. 2000).

20. U.S.O.C. CONST., art. IX, §2 (2002).

21. Fried & Hiller, *supra* note 6, at 638.

22. *Id.* 9 U.S.C.A. § 10 (a) for grounds to vacate arbitration awards.

23. *Id.*

24. Wilko v. Swan, 346 U.S. 427 (1953).

25. AMERICAN ARBITRATION ASSOCIATION, PROUD PAST, BOLD FUTURE: 75TH ANNIVERSARY: 2000 ANNUAL REPORT 5, available at http://www.adr.org/upload/LIVESITE/About/annual_reports/annual_report_2000.pdf (2000).

Where a collective bargaining agreement exists, either both sides agree on one arbitrator, or each side selects one arbitrator and the two arbitrators elect the third to comprise what is known as a panel. Arbitration hearings usually last only a few hours and the opinions are not public record. Selection of the panel should be a joint process in which both parties have input. For example, the arbitration procedure followed by one company might provide that the employee and the company will select the arbitrator by taking turns striking names from a list obtained from a neutral administering agency (such as the AAA) until only one name remains. An arbitration policy could also specify certain requirements for the arbitrator, such as minimum years of experience as an arbitrator or in the particular field or industry involved in the dispute. Having an arbitrator in whom both parties have trust might assist in bringing an end to the dispute. Another option would be to follow the panel structure used in labor disputes under collective bargaining agreements. Here each party selects an arbitrator and the selected arbitrators then select a neutral chairperson.²⁶

MEDIATION

Mediation is the submission of a dispute to an impartial facilitator who assists the parties in negotiating a voluntary, consensual settlement of their dispute.²⁷ The parties in a mediation session are virtually in complete control of the process and may walk away at any time.²⁸ Mediation focuses on creating an environment leading to a settlement: it is ultimately about compromise and focuses substantially on the emotional needs of the parties.²⁹ In order to determine the parties' needs, a mediator may have to confidentially ask, for sensitive information about actual goals, needs and desires of the parties.³⁰ Such delving into extremely sensitive issues can open lines of interpersonal communication where none may have existed before allowing parties to transform and re-characterize the nature of their dispute in order to resolve their differences. It can establish a base for the future relationship between the parties and can help them create empathy for one another.³¹ In

26. Elissa M. Meth, Comment: *Final Offer Arbitration: A Model for Dispute Resolution in Domestic and International Disputes*, 10 AM. REV. INT'L ARB. 383, 399 (1999).

27. Kupelian & Salliotte, *supra* note 8, at 384.

28. Fried & Hiller, *supra* note 6, at 636.

29. Karin S. Hobbs, *Attention Attorneys! How to Achieve the Best Results in Mediation*, 54 DISP. RESOL. J. 43 (1999).

30. *Id.* at 44.

31. *Id.*

essence, the parties reach a decision for themselves although they may ask the mediator for proposed solutions to the issues.

While lawyers may be present during a mediation session, the mediator plays the vital role in coordinating the process. The mediator is trained to assist and guide the parties to hopefully come to a resolution of their disputes, though there is no one "best" way to conduct a mediation session. Some mediators may refuse to allow the lawyers to speak during a session. Other mediators may encourage the lawyers to speak on behalf of their clients.

Mediation is extremely flexible and may use "shuttle diplomacy" by using private caucuses (i.e., meetings) in separate areas with the parties.³² In these private meetings, the mediator explores various options for resolving the dispute. During a caucus, each party has the chance to suggest possible solutions to the conflict and the mediator's skills are useful in engaging with the parties to explore numerous options and suggestions for an ultimate compromise to the dispute.

Some states require a mediator to be certified in order to handle a mediation session.³³ The private and confidential characteristic of mediation cannot be over-emphasized by the mediator in order to encourage an open and revealing discussion leading to a possible settlement.³⁴ All conversation and materials produced during a mediation session are strictly confidential and the wise mediator has the parties sign a written statement attesting to the same. Such an agreement usually states that the mediator will not be called as a witness if there is subsequent litigation between the parties. The mediator agrees not disclose or discuss with anyone outside of the mediation session anything that occurred between the parties, while the parties agree in writing not to disclose any information regarding what happens in the mediation session without the consent of the mediator and the other party.

A mediator does not have the authority to impose a solution or make a decision regarding the parties but empowering the parties and separating the

32. Kupelian & Salliotte, *supra* note 8, at 92.

33. As a general rule, mediators do not have to be attorneys but they may be required to have some form of formal training under state or federal law. However, the fact that licensed attorneys are bound by either the Model Code of Professional Responsibility or the Model Rules of Professional Conduct may create an environment even more conducive to confidential negotiations since licensed lawyers could theoretically lose their license for a violation of ethical rules. *See also*, Fiona Furlan, Edward Blumstein & David N. Hofstein, *Ethical Guidelines for Attorney-Mediators: Are Attorneys Bound by Ethical Codes for Lawyers When Acting as Mediators?*, 14 J. AM. ACAD. MATRIM. LAW. 267, 287 (1997).

34. A confidentiality agreement should be executed by the parties at the onset of mediation and then again if a settlement is reached.

"person" from the "issues" are keys to success.³⁵ Ultimately, the terms of a successful mediation will be reduced to a written contract between the parties the breach of which could then lead to litigation if either party fails to live up to its end of the bargain.

MED-ARB/ARB-MED AND MINITRIALS

Mediation-Arbitration, also known as Med-Arb, is a hybrid of mediation and arbitration.³⁶ Med-Arb is used when there are complex disputes that involve numerous issues.³⁷ The parties generally agree to resolve disputes first during a mediation phase but unresolved issues may then be presented to an arbitrator. Sometimes, the parties agree that the mediator will also serve as the arbitrator but that is not always the case and may, in fact, be unwise.³⁸ Arb-Med is the same as Med-Arb, but the process is reversed.

A minitrial is a structured dispute resolution method in which senior executives or the parties involved in legal disputes meet in the presence of a neutral advisor and, after hearing presentations of the merits of each side of the dispute, attempt to formulate a voluntary settlement.³⁹

CONSTITUTIONAL CONCERNS

While arbitration and mediation have gained great strides in the American legal system, mandatory, binding arbitration in particular has presented certain constitutional challenges for the participants, specifically in employment relationships. While Congress enacted the FAA to encourage the use of arbitration in labor contracts and other contracts affecting commerce, the FAA has been recently characterized as a tool for employers to abuse the rights of employees by requiring up front that employees relinquish their right to pursue otherwise legitimate claims in a court of law by engaging in arbitration as their sole and exclusive remedy.⁴⁰

35. Fried & Hiller, *supra* note 6, at 638.

36. *Id.* at 641.

37. See, e.g., Susan Haslip, *A Consideration of the Need for a National Dispute Resolution System for National Sport Organizations in Canada*, 11 MARQ. SPORTS. L. REV. 245, 270 (2001).

38. *Id.* at 270.

39. BLACK'S LAW DICTIONARY 809 (7th ed. 2000).

40. Sen. Russell D. Feingold, Policy Essay: *Mandatory Arbitration: What Process is Due?*, 39 HARV. J. ON LEGIS. 281 (2002).

Mandatory, binding arbitration clauses are no longer scarce provisions in employment contracts.⁴¹ Concerns over mandatory, binding arbitration clauses in employment agreements have created a heightened awareness that arbitration in such contracts might be grossly unfair to employees. In *Southland Corp. v. Keating*, the United States Supreme Court held that the FAA actually preempts state laws such as Wisconsin's Arbitration Act.⁴² Also, in *Gilmer v. Interstate/Johnson Lane Corp.*,⁴³ the Supreme Court held that compulsory employment arbitration agreements can even trump the remedies available under age discrimination laws.

Arbitration also presents an interest twist with regard to the constitutional right to a trial by jury. The Sixth Amendment to the Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . ." ⁴⁴ The Seventh Amendment provides, "In suits at common law, the right to a trial by jury shall be preserved."⁴⁵ While, as a general rule, ADR does not apply to the criminal law, concerns over conflict between constitutional rights and waiving those rights as a condition of employment are warranted.

The Supreme Court has held that an individual may waive their constitutional rights.⁴⁶ At issue is whether an upfront contract between an employer and employee (or even a health club and a member for example) should remain valid if the individual is essentially coerced into waiving certain rights and submitting to mandatory, binding arbitration by signing the agreement. Further, while concepts such as the Fifth Amendment's "Due Process" clause are likely to be included in a negotiated CBA between management and labor, it is very possible that due process rights might be waived where there is no union representation in an employment agreement, particularly where there is unequal bargaining power and the employee must accept the contract in a "take-it-or-leave it" scenario.⁴⁷

41. *Id.* at 281.

42. 465 U.S. 1.

43. 500 U.S. 20 (1991).

44. U.S. CONST. amend. VI.

45. U.S. CONST. amend. VII.

46. *Patton v. U.S.*, 281 U.S. 276, 298 (1930); *U.S. v. Moore*, 340 U.S. 616, 621 (1951); *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938).

47. Feingold, *supra* note 40, at 291. The Fifth Amendment states, ". . . nor shall any person. . . be deprived of life, liberty, or property, without due process of law. . ." U.S. CONST. amend. V.

ADR IN PROFESSIONAL SPORT

Professional Sport Arbitration

An arbitration clause is found in the respective collective-bargaining agreements in the four major professional sports (Major League Baseball (MLB), National Basketball Association (NBA), National Football League (NFL), National Hockey League (NHL)).⁴⁸ These arbitration clauses deal with grievances and salary issues. The players are then represented by the players associations when a grievance is filed.⁴⁹ Unlike arbitration, mediation is used rarely in team sport disputes since the collective bargaining agreement mandates arbitration as the means of settling disputes.⁵⁰ Still, mediation might be first resort (or required) by a contractual agreement between another private sponsor and a professional athlete.⁵¹

In Major League Baseball (MLB) arbitration is used to resolve salary disputes between owners and players.⁵² In addition to contractual grievance arbitration, the CBA between the Major League Baseball Players Association and the owners provides for arbitration of salary disputes. While these arbitrations are basically a form of labor arbitration in the sport context, the arbitrator is not permitted to fashion remedies or write opinions. The CBA requires "last best offer" arbitration, in which both the team and the player involved submit their last offers to an arbitrator, who must pick one of the submitted figures.⁵³ The arbitrator is limited in their ability to encourage compromise since the arbitrator is the decision-maker only.

48. Heather R. Insley, Comment: *Major League Umpires Association: Is Collective Bargaining the Answer to or the Problem in the Contractual Relationships of Professional Sports Today*, 29 CAP. U. L. REV. 601 (2001).

49. Scott Baglio, Note: *The Muhammad Ali Boxing Reform Act: The First Jab at Establishing Credibility in Professional Boxing*, 68 FORDHAM L. REV. 2257, 2268 (2000).

50. Insley, *supra* note 48, at 613.

51. A bicycle manufacturer that sponsors a racer by providing the racer with a bike and money in order to have the right to use the athlete's name in advertising might, for example, ask for mediation or arbitration to resolve a contract dispute over failure of the racer to use the bike during a competition instead of first resorting to litigation.

52. Sometimes called "Baseball Arbitration." See also, Kupelian & Salliotte, *supra* note 8, at 383.

53. Fried & Hiller, *supra* note 6, at 639.

The CBA between the National Football League Players' Association and the National Football League (NFL) provides for arbitration of what are again essentially labor disputes between the team and a player.⁵⁴

The agreement between the National Basketball Association (NBA) and the players' association provides for arbitration of general grievances over discipline, fines, etc.⁵⁵

The National Hockey League (NHL) collective bargaining agreement provides for salary and other arbitration and emphasizes the selection of an impartial arbitrator just as in the other CBA's.⁵⁶

Mediation is not often used by the major professional sport leagues in the United States. Collective bargaining agreements focus on arbitration rather than mediation. Moving from the arbitration model to the mediation model would cause professional sport leagues to re-examine its relationship between players and owners and likely force these parties to agree that they are partners in a multi-billion dollar industry rather than adversaries who merely participate as the result of a temporary collective bargaining agreement that will expire at some point in the future.

ADR IN AMATEUR SPORT

National Collegiate Athletic Association

The National Collegiate Athletic Association (NCAA) is the premier governing body for intercollegiate athletics.⁵⁷ Since student athletes are not yet considered employees by United States courts and may not bargain collectively, not much attention has been given to an alternative dispute

54. Jeffrey D. Meyer, Note, *The NFLPA's Arbitration Procedure: A Forum for Professional Football Players and their Agents to Resolve Disputes*, 6 OHIO ST. J. ON DISP. RESOL. 107 (1990).

55. The NBA's Collective Bargaining Agreement is over 300 pages and is so complex that it has been referred to as a "cornucopia" for lawyers. Jeffrey Mishkin, *Dispute Resolution in the NBA: The Allocation of Decision Making among the Commissioner, Impartial Arbitrator, and the Courts*, 35 VAL. U. L. REV. 449, 451 (2001).

56. COLLECTIVE BARGAINING AGREEMENT BY AND BETWEEN THE NATIONAL HOCKEY LEAGUE AND THE NATIONAL HOCKEY LEAGUE PLAYERS' ASSOCIATION Art. 17: Grievances, Arbitration, Impartial Arbitrator (June 25, 1997).

57. For further discussion on the NCAA, see, e.g., Greg Heller, *Preparing for the Storm: The Representation of a University Accused of Violating NCAA Regulations*, 7 MARQ. SPORTS L. J. 295, 298 (1996). But see, Jason Gurdus, Note: *Protection Off the Playing Field: Student Athletes Should be Considered University Employees for Purposes of Workers' Compensation*, 29 HOFSTRA L. REV. 907 (2001).

resolution process among student-athletes.⁵⁸ However, some authors have noted that student-athletes do have a contractual relationship with the NCAA in the form of a grant-in-aid (usually called a "scholarship").⁵⁹ Accordingly, more than one author has suggested that ADR models might be an appropriate method to resolve disputes among student-athletes who are participants on intercollegiate athletic teams.⁶⁰

ADR has also been used by the NCAA itself. In *Law v. NCAA*, the NCAA announced that it had reached a \$54.5 million settlement in the restricted-earnings coaches case via mediation.⁶¹ The basis of this case was that "restricted earnings" coaches were limited to compensation of \$12,000 during the academic year and \$4,000 during the summer by member NCAA institutions as a matter of policy.⁶² This policy was found to have violated federal antitrust laws.⁶³ The NCAA had filed an appeal with the 10th Circuit Court of Appeals based upon what it argued were mistakes made by the District Court in the damages phase of the trial.⁶⁴ An agreement was later reached through mediation by both parties. After mediation, the plaintiffs and the NCAA agreed upon \$54.5 million as damages.⁶⁵

The United States Olympic Committee (USOC)⁶⁶

Arbitration is the method of choice for conflict resolution in the Olympic Movement. With the enactment of the Amateur Sports Act of 1978, the United States Congress created several organizations, including the USOC, to

58. See, e.g., Gurdus, *supra* note 57, at 916, particularly regarding issues such as worker's compensation.

59. Administered by the Collegiate Commissioners Association via the "National Letter of Intent Program." See also, Fried & Hiller, *supra* note 6, at 643.

60. *Id.* at 651. See also, Eric Galton, *Mediation Programs for Collegiate Sports Teams*, 53 DISP. RESOL. J. 37 (1998).

61. *Law v. Nat'l Collegiate Athletic Ass'n.*, 902 F.Supp. 1394 (D. Kan. 1995). ; see also, Marc R. Leduc, Note: *Law v. National Collegiate Athletic Association: A Guide to How Courts Will Treat Future Antitrust Challenges to NCAA Regulations*, 26 J.C. & U.L. 139 (1999).

62. *Law*, 902 F.Supp. at 1400.

63. *Id.* at 1410.

64. *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010 (10th Cir. 1998).

65. Blair Kerkhoff, *Dempsey to Leave NCAA; President Who Moved Organization from KC; Retiring*, THE KANSAS CITY STAR, Jan. 16, 2002, at D1.

66. The United States Olympic Committee "USOC" had previously been called the United States Olympic Association, but the name was changed to in compliance with Pub. L. No. 88-407, 78 Stat. 383 (1964).

organize and promote the U.S. Olympic effort.⁶⁷ The USOC has the power to appoint an amateur sports organization as the National Governing Body (NGB)⁶⁸ for any sport included in the Olympics or the Pan-American Games. The purposes of the USOC were refined in the Ted Stevens Olympic and Amateur Sports Act ("Act"), which amended, renamed, and re-codified the Amateur Sports Act of 1978.⁶⁹

The Act provides that the USOC is to afford "swift resolution of conflicts and disputes involving amateur athletes, national governing bodies, and amateur sports organizations. . ." ⁷⁰ The Act now requires an NGB to allow aggrieved athletes an opportunity for a hearing and to present evidence, and a swift and equitable resolution of their disputes under Article IX of the Act.⁷¹ The Act requires the NGB to "establish and maintain provisions in its constitution and bylaws for the swift and equitable resolution of disputes involving any of its members and relating to the opportunity of any athlete to participate in the Olympic Games."⁷² This requires the NGB's to "submit to binding arbitration in any controversy involving . . . the opportunity of any amateur athlete . . . to participate in amateur athletic competition."⁷³ Article IX, § 2 of the USOC Constitution provides that the case filed against the NGB, not against any other athlete in stating that any "claim against such USOC member will be submitted to arbitration."⁷⁴

INTERNATIONAL ADR: COURT OF ARBITRATION FOR SPORT

In 1983, the International Olympic Committee (IOC) established the Court of Arbitration of Sport (CAS) to resolve issues under its jurisdiction in order to assist the process of litigation by athletes and countries for numerous disputes

67. Michael Steadman, Casenote: Lindland v. United States of America Wrestling Association: *The Role Of Arbitration and Federal Courts in the Making of an Olympic Success*, 11 DEPAUL - LCA J. OF ART & ENT. L. 133, 135 (2001).

68. USA Triathlon is the NGB for the sport of Triathlon in the United States, for example.

69. 36 U.S.C. § 220501, et. seq. (2002).

70. *Id.* § 220503(8).

71. *Id.* § 220509(a). *See Also*, Steven J. Thompson, *Olympic Team Arbitrations: The Case of Olympic Wrestler Matt Lindland*, 35 VAL. U. L. REV. 407 (2001).

72. *Id.* § 220509(a).

73. *Id.*

74. U.S.O.C. CONST., art IX §2. (These are often referred to as "Article IX arbitrations"). *See*, James A.R. Nafziger, *Arbitration of Rights and Obligations in the International Sports Arena*, 35 VAL. U. L. REV. 357, 362 (2001)

arising out of the Olympic Movement.⁷⁵ The CAS was designed to be a sports-specific forum, and to be the only means for Olympic athletes and the international sports federations to resolve their disputes through this final, neutral decision-making body using arbitration as the method of ADR.⁷⁶

The International Council for Sports Arbitration (ICAS) was established to oversee the CAS to avoid perceived conflicts of interest. There are three venues to resolve disputes under the CAS: Lausanne, Switzerland, Sydney, Australia and New York, United States.⁷⁷

CAS cases are fundamentally based upon submission to arbitration by contract.⁷⁸ For instance, all athletes who participated in the 2000 Sydney Olympic Games were required to sign this agreement. The form contains the clause:

I agree that any dispute in connection with the Olympic Games, not resolved after exhaustion of the legal remedies established by my NOC, the International Federation governing my sport, the Sydney Organizing Committee for the Olympic Games (SOCOG) and the IOC, shall be submitted exclusively to the Court of Arbitration for Sport (CAS) for final and binding arbitration⁷⁹

CAS arbitrators are bound by the procedures and rules found within its "Code" which follows rules according to the Swiss Federal Code. Arbitrators must be familiar with sports law particularly at an international level. Decisions made by arbitrators are not published but they may be if both parties agree.

HUMAN RESOURCE MANAGERS

ADR is not restricted to amateur and professional athletes, teams and leagues. Using ADR is effective in any employment relationship, including for those who work in the sport and recreation industries and especially for those in charge of hiring and termination. Human resource managers in sport must be aware of federal and state laws and their applicability to the workplace. After all, approximately 90% of businesses will be sued at least

75. Richard H. McLaren, *Introducing the Court of Arbitration for Sport: The Ad Hoc Division at the Olympic Games*, 12 MARQ. SPORTS L. REV. 515 (2001).

76. *Id.* at 516.

77. McLaren, *supra* note 75, at 519. Lausanne is the primary office. The New York office used to be in Denver, Colorado.

78. *Id.* at 523.

79. Melissa R. Bitting, *Mandatory, Binding Arbitration for Olympic Athletes: Is the Process for Better or for Worse: "Job Security"?*, 25 FLA. ST. U. L. REV. 655, 663 (1998).

once.⁸⁰ Such managers should also become familiar with the role that ADR plays in employment relationships and the differences between arbitration and mediation and the benefits and procedures of ADR. Many organizations have hired an "in-house neutral" or "ombudsman" to play mediatory functions within an organization.⁸¹

Laws such as Title VII of the Civil Rights Act of 1964⁸², The Civil Rights Act of 1991,⁸³ the Age Discrimination in Employment Act of 1967,⁸⁴ Section 505 of the Rehabilitation Act of 1973,⁸⁵ the Americans with Disabilities Act of 1990,⁸⁶ the Equal Pay Act,⁸⁷ and the Family and Medical Leave Act,⁸⁸ serve to protect against forms of discrimination in the workplace. Managers who require employees to submit to mandatory, binding arbitration clauses in employment contracts should be aware that such clauses have been upheld by the courts, and therefore, human resource managers are wise to use such clauses whether in government work, private companies, and other organizations including non-profits. Since "at-will" and other non-union employees may only look to state or federal law claims for support against discrimination, harassment, and other claims, it may be wise for managers to require non-negotiable upfront contracts that require submission to ADR rather than litigation as it is likely more cost effective.⁸⁹

DISPUTE RESOLUTION AND CYBERSPACE

The Internet has affected the way society conducts and transacts business and has created a new marketplace of conflict.⁹⁰ Arbitration, mediation and their hybrid forms should be considered when dealing with disputes related to cyberspace. The Internet has led to legal battles over domain name disputes, listserv debates, email harassment, and fraud, slander and libel claims.⁹¹

80. James H. Keil, *"Hybrid ADR" in the Construction Industry*, 54 DISP. RESOL. J. 14, 20 (1999)

81. Mark R. Sherman, *Is There a Mediator in the House?*, 50 DISP. RESOL. J. 48 (1995)

82. 42 U.S.C.A. § 2000a, et. seq. (2002).

83. 42 U.S.C. § 1981, et. seq. (2002).

84. 29 U.S.C.A. § 621, et. seq. (2002).

85. 29 U.S.C.A. § 701 et. seq., § 794 (a) (2002).

86. 42 U.S.C. A. § 12101, et. seq. (2002).

87. 29 U.S.C.A. §206(d) (2002).

88. 29 U.S.C.A. § 2601, et. seq. (2002).

89. *Circuit City Stores*, 532 U.S. at 109.

90. M. Ethan Katsh, *Dispute Resolution in Cyberspace*, 28 CONN. L. REV. 953 (1996).

91. *See, e.g.*, WIPO Arbitration and Mediation Center, Nat'l Collegiate Athletic Ass'n v. Gregory Freedman, Case No. D 2000-0841 (November 10, 2000).

Protection of intellectual property such as copyrights and trademarks on the Internet has essentially forced individuals and organizations to address the role that ADR⁹² might play both nationally and internationally.⁹³

With the advent of email and the Internet access to ADR has increased significantly. As a natural consequence, forms of online dispute resolution services have emerged. These "virtual" services are designed to mimic the role of human interaction to settle disputes. Theoretically, the arbitrator or mediator communicates with each side using email, an "on-line" chat session, or electronic conferencing and videoconferencing, when the parties have the required equipment. Some notable online ADR dispute resolution projects have included the Virtual Magistrate Project, the BBB Online Project, the Online Ombuds Office at the University of Massachusetts and America Online's "24-hours in Cyberspace" Promotion.⁹⁴

While such electronic form of ADR can be successful, online ADR clearly has its advantages and disadvantages.⁹⁵ Advantages include convenience, cost and time reductions, and reduction of the likelihood of physical or verbal intimidation. Disadvantages include possible electronic security breaches, the failure to recognize the importance of face-to-face contact, lack of tone or inflection of voice and facial features, and potential misinterpretation of terms.⁹⁶ Whether online dispute resolution in cyberspace works is still an uncertain venture at least due to problems with the availability of technology at this point in time. Still, there is no reason why online ADR will not have its place in the administration of ADR in certain circumstances.⁹⁷

WORLD INTELLECTUAL PROPERTY ORGANIZATION

Headquartered in Geneva, Switzerland, the World Intellectual Property Organization (WIPO) Arbitration and Mediation Center was established in 1994 to offer arbitration and mediation services for the resolution of

92. At least one author proposes that "ADR" should be "IDR" for Internet Dispute Resolution. Richard Michael Victorio, *Internet Dispute Resolution (IDR): Bringing ADR into the 21st Century*, 1 PEPP. DISP. RESOL. L. J. 279 (2001).

93. Mishkin, *supra* note 55, at 458.

94. George H. Friedman, *Alternative Dispute Resolution and Emerging Online Technologies: Challenges and Opportunities*, 19 HASTINGS COMM/ENT. L. J. 695, 700-707 (1997), for in-depth discussion of the differences and similarities.

95. Blake Edward Vande Garde, *Alternative Dispute Resolution Becomes Online Dispute Resolution*, at <http://www.ku.edu/~cybermom/CLJ/vande/vande.html>.

96. Katsh, *supra* note 90, at 973.

97. Friedman, *supra* note 94, at 711.

international commercial disputes.⁹⁸ This Center has focused on establishing a legal framework for the administration of disputes related to the Internet and electronic commerce (e-commerce). Recent issues related to disputes involving sport domain names have been arbitrated by the WIPO.

For example, cybersquatters have often purchased domain names ending most often with .com., .net or .org. The cybersquatters intent of is to resell the name for a profit. Often, the cybersquatter may have violated a trademarked name or phrase of another company or organization in the process. When a dispute over a domain name arises, the WIPO is called into play to resolve it.⁹⁹ In one case, for example, the WIPO ordered a private company that registered the domain name "usolympicstore.com" to surrender the name to the USOC after a hearing on the matter.¹⁰⁰

SAMPLE CLAUSES FOR ADR

Understanding the process and types of ADR requires a fundamental knowledge of contracts. For the contract drafter, the ADR clause may be one of the most important clauses found in the contract. Since a contract represents the "meeting of the minds" of the parties, agreeing ahead of time to submit to ADR may save time, money and energy in the event there is a dispute over a contractual issue.¹⁰¹ Foresight by the contract drafter can avoid situations where "mad dog" litigators foam at the mouth to win at all costs in a lengthy litigious battle.¹⁰² The following clauses may serve as a "model" guide for the contract drafter when drafting an ADR clause:¹⁰³

98. Robert H. Smit, *General Commentary on the WIPO Arbitration Rules, Recommended Clauses, General Provisions and the WIPO Expedited Arbitration Rules*, 9 AM. REV. INT'L. ARB. 3 (1998).

99. Christopher S. Lee, *The Development of Arbitration in the Resolution of Internet Domain Name Disputes*, 7 RICH. J. L. & TECH. 2, 44 (2000), at <http://law.richmond.edu/jolt/v7i1/article2.html>.

100. *United States Olympic Committee v. MIC*, Case No. D2000-0189 (May 4, 2000).

101. Steven W. Feldman & James A. Delaris, *Resolving Contractual Ambiguity in Tennessee: A Systematic Approach*, 68 TENN. L. REV. 73, 92 (2000).

102. Peter A. Carfagna, *"Show Me the Money:" In Lucrative Sports Contracts, an ADR Clause Makes All the Difference*, 57 DISP. RESOL. J. 9 (2002)

103. See the American Arbitration Association's website for additional forms and clauses, available at <http://www.adr.org/>.

Arbitration Clause:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial [or other] Arbitration Rules [including the Emergency Interim Relief Procedures], and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Baseball Arbitration Clause:

Each party shall submit to the arbitrator and exchange with each other in advance of the hearing their last, best offers. The arbitrator shall be limited to awarding only one or the other of the two figures submitted.

Mediation Clause:

If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Rules before resorting to arbitration, litigation, or some other dispute resolution procedure.

Mediation-Arbitration (Med-Arb):

If a dispute arises from or relates to this contract or the breach thereof, and if the dispute cannot be settled through direct discussions, the parties agree to endeavor first to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Rules before resorting to arbitration. Any unresolved controversy or claim arising from or relating to this contract or breach thereof shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. If the parties agree, a mediator involved in the parties' mediation may be asked to serve as the arbitrator.

*Online Arbitration Clause*¹⁰⁴

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by [name of administering organization, such as the AAA] under its Commercial Arbitration Rules then obtaining, with the following procedural exceptions:

- (1) Cases shall be heard and determined by one arbitrator knowledgeable in the area of the dispute from the special online panel established by the Association. Panel members will be on-call to respond by e-mail and otherwise to any dispute assigned to them.
- (2) Each party shall be deemed to have consented that any notices, or process necessary or proper for the initiation or continuation of a proceeding under these procedures; for any court action in connection therewith; or for the entry of judgment on any award made under these rules may be served by electronic mail ("e-mail") on a party by e-mail addressed to the party or its representative at the Internet e-mail address provided at the commencement of the arbitration. In the event a party does not have e-mail capability, the AAA shall make alternate arrangements consistent with the expedited nature of this program.
- (3) There will be no oral hearing unless requested by any party, in which case the hearing may take place telephonically or by video conference. In all other cases, the parties will communicate their positions and evidence via e-mail. The arbitrator shall establish a fair procedure for all parties to present their case, consistent with the expedited nature of arbitration.
- (4) Generally, the award shall be transmitted to the parties within forty- eight hours of the appointment of the arbitrator although failure to meet this deadline shall not invalidate the award. The award shall be accompanied by a brief explanation. Awards shall be made publicly available via the Internet and the World Wide Web, but any party may request redaction of its name. Unless the parties agree otherwise, the arbitrator shall set the place of the hearing in the award, for purposes of enforcement. Judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

104. Friedman, *supra* note 94, at 717.

CONCLUSION

Litigation is the conventional method for settling disputes. However, not all disputes require the adversarial approach to be successfully settled or to come to a resolution. An understanding of the differences between arbitration, mediation and their hybrid forms is important to students, educators and practitioners. While the study of case law in sport is effective, incorporating the study of ADR as a significant part of a sport law course (or as its own course) will allow for further discussion and re-examination of the adversarial nature of the legal system.

In recent years, there has been an increased emphasis on using ADR to settle a variety of issues at international, federal and state levels. While traditional litigation is often the more frequent method to resolve disputes, ADR has become a widely popular and preferred method to reach legal solutions for many involved in sport. Arbitration and mediation are usually more efficient, less costly, and often more effective than litigation. While arbitration and mediation are not without their own problems, an understanding of their role in the legal system is vital to the sport manager, sport educator, and sport lawyer.

The professional sports leagues and the Olympic Movement utilize ADR as a preferred method of resolving numerous contractual and other issues, and therefore, understanding ADR concepts in a relevant sport management course is vital. The advent and growth of the Internet has provided a market for the natural evolution of online ADR, though non face-to-face settlement negotiations have both advantages and disadvantages for the arbitrator or mediator.

ADR is not a perfect system and presumes, especially in mediation, that both parties wish to explore a compromise. ADR advocates focus on the parties, not the lawyers. In ADR, less emphasis is placed on "win at all costs" and more emphasis is placed on problem-solving and settlement. In the end, the parties are more likely to feel satisfied with the end result especially if they are willing to compromise from the commencement of an ADR session.

ABOUT THE AUTHOR

ADAM EPSTEIN earned his B.A. (Classics, M.B.A. (Management) and J.D. from the University of Tennessee. He currently serves as the Chair of the Legal Studies Department at South College in Knoxville. He has served as an adjunct assistant professor at the University of Tennessee and Pellissippi State Technical Community College in Knoxville. Mr. Epstein is a Rule 31 General

Civil Mediator in Tennessee as well. He has represented numerous professional athletes over the years including several national champions primarily in the sports of swimming and triathlon. He has authored *Sports Law* (1st Ed., 2003) from Delmar Publishers, co-authored *Sports Law and Legislation: An Annotated Bibliography* (1991), and has authored numerous articles that have been featured in the *Tennessee Bar Journal*, *The Paralegal Educator*, and the National Sports Law Institute's *For The Record* newsletter. He has also served as a text reviewer for numerous other textbooks.

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Sample Course Outline

ALTERNATIVE DISPUTE RESOLUTION AND SPORT

Credit Hours:	4
Class Hours per week:	4
Prerequisites:	Senior Level Standing
System:	Quarter
Date:	September 2002

TEXT: Barbara A. Nagle Lechman, *Conflict and Resolution*, Aspen Law & Business (1997). [Other possible texts might include Martin A. Frey, *Alternative Methods of Dispute Resolution*, Delmar Learning (2003) and Stephen J. Ware, *Alternative Dispute Resolution*, West Group (2001).]

COURSE DESCRIPTION:

This course involves the study of procedural and substantive legal principles of alternative forms of dispute resolution. Students will explore such procedures as negotiation, mediation, arbitration, fact finding, and grievance resolution in the both the private and public sectors.

COURSE OBJECTIVES:

A the completion of the course, the student should be able to:

1. Define conflict and discuss how it is perceived and its impact especially in sport.
2. Identify sources of conflict such as miscommunication, anger, mistrust, fear, expectations, etc.
3. Provide an overview of conflict resolution processes (negotiation, mediation, arbitration, the court system) and distinguish between each process in amateur and professional sport.
4. Describe negotiation theories and the preparation and process for negotiation.
5. Identify mediation methodology.
6. Explain essential steps in the mediation process.
7. Identify process involved for arbitration and its application.

8. Identify and discuss other forms of ADR such as private judging, med-arb, final-offer arbitration, minitrial, summary jury trial, focus groups, neutral expert fact-finding, ombudsperson, conciliation, and facilitation.
9. Appreciate the international organizations and processes involved in ADR.
10. Discuss policy, ethical, and practical issues involved in dispute resolution.

EVALUATION REQUIREMENTS:

Midterm Exam	25%
Final Exam	25%
Paper	20%
Case Study	20%
Attendance	10%

WEEK	CHAPTER	TOPIC
1	1	INTRODUCTION Conflict's Impact and the Necessity of Understanding Conflict <ol style="list-style-type: none"> A. Conflict in Pervasive B. Reaction to Conflict C. Sources of Conflict Overview of Conflict Resolution Process Negotiation Mediation Arbitration <ol style="list-style-type: none"> D. Other Processes E. The Court Process
2	2	CONFLICT <ol style="list-style-type: none"> I. What is Conflict and How is it Perceived? II. Sources of conflict <ol style="list-style-type: none"> a. Miscommunication b. Differences c. Anger, Mistrust, and Fear d. Responsibility

- e. Expectations and Roles
- d. Resources
- e. Difficult People

3	3	<p>NEGOTIATION</p> <p>I. Negotiation Theories</p> <p>a. Competitive Approach</p> <p>b. Cooperative Approach</p> <p>c. One-Text Approach</p> <p>II. Preparation for Negotiation</p> <p>III. Essential Steps in the Process</p> <p>IV. Communication Skills</p> <p>V. Applications</p> <p>Negotiation Role Playing Exercises</p>
4	4	<p>MEDIATION</p> <p>I. Preparation for Mediation</p> <p>II. Methodology</p> <p>III. Essential Steps in the Process</p> <p>IV. Facilitative Skills</p> <p>V. Application</p> <p>VI. Ethics</p> <p>Instructor Prepared Materials</p> <p>Mediation Role Playing Exercises</p>
5	5	<p>ARBITRATION</p> <p>I. Private and Court Annexed Arbitration</p> <p>II. How do Disputants Come to Arbitration?</p> <p>III. Binding and Non-Binding Arbitration</p> <p>IV. Mandatory and Voluntary Arbitration</p> <p>V. Applications</p> <p>VI. Understanding the Process</p> <p>VII. The Arbitrator's Role and Ethics</p> <p>Exercises</p>
6	6	<p>OTHER FORMS OF DISPUTE RESOLUTION</p> <p>I. Adjudicative Processes</p> <p>II. Court-Related Non-adjudicative Processes</p>
7		
8		

III. Non Court-Related Non-adjudicative Processes Exercises

- 9 **Other Materials**
 Student Presentation of Case Studies
- 10 Student Presentation of Case Studies
- Final Exam Review
- 11 FINAL EXAMINATION

SOME ADR RELATED SPORT CASES

- Foschi v. United States Swimming, Inc. 916 F. Supp. 232 (1996)
- Lindland v. United States Wrestling Ass'n, 230 F.3d 1036, 1038 (7th Cir. 2000)
- Sharpe v. National Football League Players Ass'n, 941 F. Supp. 8 (D.D.C. 1996)
- Sprewell v. Golden State Warriors, 231 F.3d 520 (9th Cir. 2000)
- Reynolds v. Int'l Amateur Athletic Fed'n, 23 F.3d 1110 (6th Cir. 1994)

ADR WEB SITES THAT OFFER MEDIATION AND/OR ARBITRATION:

- <http://www.internetneutral.com>
<http://www.123settle.com>
<http://www.eresolution.org>
<http://www.onlineresolution.com>
<http://www.webdispute.com>
<http://www.mediate-net.org>

OTHER SELECTED ADR RESOURCES

American Arbitration Association
335 Madison Ave., Floor 10
New York, NY 10017-4605

800/778-7879

Fax 212/716-5905

Web site: www.adr.org

American Bar Association Section of Dispute Resolution

740 15th St. NW

Washington, DC 20005-1009

202/662-1680

Fax 202/662-1683

E-mail: dispute@abanet.org

Web site: www.abanet.org/dispute

Federal Center for Dispute Resolution

American Arbitration Association

601 Pennsylvania Ave., Suite 700

Washington, DC 20004-2676

888/873-0000

Fax 202/737-9099

Web site: www.adr.org/focus/federal/focus-federal.html

Office of Dispute Resolution

U. S. Department of Justice

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Washington, DC 20530-0001

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Web site: arbiter.wipo.int/center/index.html