

Arbitrating Disasters

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The use of arbitration in large scale disasters – both natural and financial has increased in recent years. Alongside this increase has been the growing use of arbitration to resolve an increasingly wide array of claims in insurance, tort, and emergency public assistance.

In the realm of financial claims, arbitration is used widely in the United States, Hong Kong, and Singapore as examined in Consumer Financial Dispute Resolution in a Comparative Context. Drawing on empirical findings from a multi-jurisdictional survey, research has found that many of the advantages considered when selecting arbitration in consumer financial claims included the finality of claims, speed and the expertise of the neutral. However, these considerations do not always take precedence, as in the case of financial claims arising in Shanghai, where a high volume of consumer financial disputes are resolved through specialized litigation in financial courts. At the same time, arbitration had a key role to play in resolving the claims arising from the devalued Lehman Mini-bonds sold to Hong Kong investors beginning in late 2008.

In the case of natural disasters, arbitration is used largely in insurance and public assistance claims [fn]John W. Cooley and Steven Lubet, Arbitration Advocacy, LexisNexis; National Institute for Trial Advocacy; 2nd edn: 2003, p 1[/fn] in which the Federal Emergency Management Agency (FEMA) is a party. The arbitration body for these cases is the United States Civilian Board of Contract Appeals (CBCA), which is an independent tribunal that presides over various disputes involving Federal executive branch agencies in the United States. It is primarily responsible for resolving contract disputes between government contractors and agencies under the Contract Disputes Act. In addition to the hearing of contractual disputes, the CBCA also hears and decides various other classes of cases, including requests for arbitration under section 601 of the American Recovery and Reinvestment Act of 2009, Public Law 111-5 (ARRA), to resolve disputes between applicants and the Federal Emergency Management Agency regarding funding for public assistance following Hurricane Katrina and Rita. While section 601 of the ARRA requires the President to establish an arbitration panel under the FEMA public assistance program to expedite the recovery efforts from Hurricane Katrina and Rita, it would appear that arbitration is not mandatory in these cases. It is an option which applicants may choose when they have a dispute with the FEMA.

Here, we will examine a few of the arbitration cases brought before the United States Civilian Board of Contract Appeals. In the arbitration case of In the Matter of Forrest County Board of Supervisors CBCA 1772-FEMA 3/3/10, the claimant, the Forrest County Board of Supervisors (BOS) argued for public assistance and contended that the courthouse, a historic structure built in 1910, suffered damage from mold growth due to high interior temperatures and humidity during the nine-day loss of electrical power necessary to run the air conditioning system following Hurricane Katrina. The issue in the case was whether FEMA properly determined that no award of public assistance was warranted. To qualify for public assistance, there would have to be a finding that the repairs were required as a result of the major disaster and not a result of the claimant's own negligence. The panel of arbitrators

found that 40% of the mold damage was related to Hurricane Katrina and so the award of public assistance would be 40% of proven costs for mold remediation minus insurance for mold damage.

In the Matter of Sewerage and Water Board of New Orleans CBCA 1761-FEMA 2/4/10, a claim arose regarding the damage caused to the Plant of the Sewerage and Water Board of New Orleans, Louisiana (S&WB) as a result of Hurricane Katrina on 29 August 2005. The issue here was whether the corrosion of the steel components was due to the Hurricane or S&WB's own negligence. The panel considered that the steel components were approximately 35 years old at the time of Katrina and that they had a normal useful life of approximately 50 years and that no corrosion-prevention measures had been taken during the 35 years. The panel was of the view that the corrosion to the steel as a result of Katrina would be more than merely negligible since the steel components already had some pre-existing corrosion. However, the panel found that the submersion in the salt water for between 45 to 75 days would have caused only minimal additional corrosion and that S&WB's failure to mitigate damages after Katrina and the normal aging process of steel submerged in sewage for 40 years were overriding factors. Accordingly, the Applicant was entitled to recover any costs it incurred repairing or replacing the applicable steel components from the date Katrina struck the Plant to 17 July 2006. This was thought to be a reasonable time period in which the Applicant should have recoated the steel to prevent further corrosion, and repaired or replaced those components that hindered the proper functioning of the clarifiers after the Plant become operational again. Any failure of the steel components after 17 July 2006 were thought not to be attributable to the effects of Katrina.

Finally, In the Matter of St. Tammany Parish CBCA 1778-FEMA 12/3/10, St. Tammy requested public assistance to fund the removal of 99,000 cubic yards of debris from the Coin du Lestin (CDL) canals which were located in the Parish. The issues before the arbitral panel were: 1) whether the CDL canals qualified as an eligible facility for the purpose of receiving public assistance; and 2) whether the removal of further silt, sediment, and marsh grass from the canals constituted eligible emergency work. The panel was of the view that the absence of evidence reflecting any routine maintenance of the canals pre-Hurricane Katrina meant that maintenance of the canal, if performed at all, was performed only on an as-needed basis to remove reported obstructions. Occasionally removing obstructions from the canal at a homeowner's request was considered not to constitute routine maintenance. The Parish also failed to present any reliable evidence on the condition of the canals immediately prior to Hurricane Katrina other than that they were being used. Therefore, the canal did not fall under the definition of a facility under the FEMA Public Assistance Guide. The panel was also unconvinced that the removal of further silt, sediment, and marsh grass from the canals would eliminate a significant threat and contribute to improved property and public health and safety in the event of a flood within a five year period. As a result, the work did not fall under eligible emergency work for public assistance. Accordingly St. Tammy's request for public assistance under the Stafford Act for additional debris, silt, sediment, and marsh grass removal from the CDL canals was denied.

In reviewing the role of arbitration in disaster cases above, we see in general, a growing use of arbitration to resolve both financial, insurance and tort claims arising from natural disasters and financial meltdown. In both cases, we also see the importance of a clear role for the regulatory body and the arbitration tribunal, the former overseeing policy questions and the latter focusing on dispute resolution. These roles overlap to some extent in the context of Ombuds services such as those found in the UK and Australia, however with the overlap, additional checks are provided to the claimant in the form of decisions rendered without prejudice, allowing recourse to the courts if necessary. Future work may continue to examine the benefits and challenges of using arbitration in wide scale disasters, alongside other dispute resolution mechanisms such as special claims administrators, ombudsman and specialized courts.

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