

President's Message

Carte blanche for Mr Feinberg

In June of this year, the creation of a fund for the settlement of claims from the victims of the catastrophic oil spill in the Gulf of Mexico was announced; the fund is intended to provide rapid compensation for their losses. British Petroleum, the operator of the wrecked platform and of the gushing oil well at the bottom of the sea, committed to provide US\$ 20 billion for the compensation of the tens of thousands of people having suffered losses from the oil spill.¹

The design of the fund and its mechanism for implementing the compensation scheme was entrusted to Kenneth R. Feinberg, a Washington lawyer. "The Leader in Mediation and Alternative Dispute Resolution", as one can read on his website,² Mr Feinberg is credited for the successful administration of similar schemes, for instance the "September 11 Victim Compensation Fund", that awarded US\$ 7 billion to some 5'500 claimants, or the programs for the Vietnam veterans' claims concerning Agent Orange, for asbestos claims and for other class action programmes.

Two months after this announcement the Fund is operational, receives claims from victims and announces payments to them within a few days after their applications have been checked. The Fund provides six months interim relief for individual or corporate victims or a lump sum settlement of all claims.³

For the international arbitration practitioner, this example might appear rather exotic. But it provides at least two lessons for us. The first one relates to the speed and responsiveness with which the fund was created: examining a conflict situation and providing the most effective solution within a short time is the challenge which we face as providers of dispute resolution services. The mechanism now created leaves it open to the claimants to resort to the courts with the time consuming luxury of a full service judicial procedure; but it offers an alternative in the form of simplified proceedings with the expectation of rapid and effective relief.

The other lesson concerns the person in charge of the system and his appointment. As Mr Feinberg explained, the entire agreement which is at the

¹ See for instance Philip Rucker: Earning trust is biggest obstacle in disbursing \$20 billion BP Escrow Fund, *The Washington Post*, 19 June 2010.

² www.feinbergrozen.com.

³ Zahlungen für BP Geschädigte – Büros am Golf für Mexico nehmen Anträge entgegen, *Neue Zürcher Zeitung* 24 August 2010.

root of this vast enterprise “is basically a handshake between the Obama administration, BP and me”.⁴ It is remarkable that the responsibility for setting up and operating such a system, responding to a vast number of people and awarding to them a very large sum of money has been granted to a single person, selected in such an informal manner, and entrusted with seemingly unrestricted powers – *carte blanche* for Mr Feinberg.

The lesson for us is that the foundation for alternative dispute resolution must be the trust in the fairness and competence of the person responsible for it. The claimants, who turn to the newly created fund rather than seeking their chance before the courts, and BP as the respondent, have confidence that the system which has been created and the manner in which it is operated is sufficiently fair to justify a simplified procedure in the interest of speed and efficiency. In this case, the trust was placed in Mr Feinberg. In the procedures with which we have to deal in our practice, other women and men receive such trust. The example in the Gulf of Mexico may serve as a reminder of the foundation of our work and the directions in which we should look when faced with criticism and challenges against arbitration as a form of alternative dispute resolution: rather than regulating in advance all aspects of the procedure to the point of imitating the courts and seeking to provide fail-safe mechanisms against all conceivable forms of abuse, our goal should be responsiveness to the issues and creativity in the design of the process; and we should see how best to build the trust in the persons responsible for the case, protecting this trust and ensuring that it is merited.

Geneva, August 2010

MICHAEL E. SCHNEIDER
ASA PRESIDENT

SAVE THE DATES

ICCA 50th Anniversary Conference “Arbitration the next 50 years”

Geneva, 19-21 May 2011

For more information see www.icca50.org

The 15th Geneva Global Arbitration Forum “Ahead of the Curve”

Geneva, 8 and 9 December 2010

For more information see www.ggaf.ch and p. 685.

⁴ Jackie Calmes, For Gulf Victims, Mediator With Deep Pockets and Broad Power, New York Times, 22 June 2010.