

TortsCenter | Episode 7

“Fair Game: Diving into Sports ADR”

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Carla Varriale-Barker: Welcome everyone to the next episode of Tort Center. Today, our guest occupies a unique niche in sports litigation and arbitration. Welcome Danielle Manitow. What can I tell you about Danielle? She is my co chair in the New York State Bar Association's Dispute resolution section.

We are in charge of the sports ADR portion of the bar association group. I've gotten to know Danielle a bit through the last couple of months. And let me tell you a few things about her and her practice. Danielle serves as an independent arbitrator, mediator, and tribunal secretary. She'll explain to us what that means.

Danielle's worked in a variety of domestic and international [00:02:00] arbitrations. Her subject matter includes everything from antitrust, breach of contract, breach of fiduciary duty, defamation, personal injury, misappropriation of trade secrets, and a variety of sports related disputes. Before she became a full time arbitrator or having a full time alternative dispute resolution practice, Danielle was a litigator for more than 10 years at Skadden Arps, lived to tell about it, and can tell us a little bit about making the transition from litigator to full time ADR professional.

Welcome, Danielle. Thank you so much,

Danielle Menitove: Carla and Courtney, and thank you so much for having me, and I'm so excited to be here and, uh, talk about a topic near and dear to my heart, sports aDR.

Carla Varriale-Barker: Well, I'm fascinated by the fact that once upon a time you were a litigator, we are litigators. What attracted you to ADR, [00:03:00] and arbitration in particular, and inspired you to make the transition?

Danielle Menitove: Yeah, so in my practice at Skadden, I was in the antitrust and sports practice groups there, and so the antitrust litigation often involved large multi year cases that would go on and on, dozens and dozens of depositions and Expensive discovery and in my sports practice, I had the opportunity to participate in a number of arbitrations.

I participate in arbitrations involving athlete agent disputes. Arbitrations involving anti doping matters, even an arbitration involving the America's Cup sailing competition. And so, the contrast between the arbitration process that I saw in my sports practice, it was expeditious, we got to a quick resolution, it was a lot more flexible than [00:04:00] litigation, and I just, I much preferred the ADR process.

And that really is what interested me in ultimately making the transition from litigator to neutral to help parties achieve really a more efficient and economical resolution of their disputes.

Carla Varriale-Barker: One of the perceptions, and perhaps you can clarify it for us, that arbitration is preferable to litigation because there is an element of confidentiality.

Is that a misperception or is that true?

Danielle Menitove: It really depends on the arbitral forum. It can be true, but it's not necessarily true. And so when we talk about arbitration. I think of it as being a private proceeding. The default rule is that litigation is open to the public. Anyone can come into the courthouse and sit and listen to a court proceeding.

In arbitration, it's a private proceeding. Someone can't just come in from the street and sit [00:05:00] in on your arbitration. It can be confidential, and that really depends on the dispute resolution provider's rules and your arbitration agreement and what it says, because arbitration is a function of contract, and so

it really depends on what your arbitration agreement says and what rules you've decided to be governed by.

Some arbitration institutions have rules that proceedings are entirely confidential. They are confidential for the arbitrator. The parties, the decision might be confidential, but it's not necessarily so. It depends on the rules. There are other arbitral institutions. Where the default rule is that it's confidential with respect to the arbitrator.

So the arbitrator can't go out and talk about the arbitration publicly, but it's not necessarily confidential with respect to the parties. And I think that's really important for parties to understand that they need to be familiar with the rules that they're operating under because. Some parties may operate under that default assumption [00:06:00] that everything's confidential, and then are surprised when there are no consequences if someone speaks publicly.

Parties, of course, can always protect themselves to get additional confidentiality by entering into confidentiality agreements, but I think it's really important for parties to be cognizant of what rules they operate under and what level of confidentiality those rules provide them and whether that really meets their needs.

Courtney Dunn: I have a question about what is arbitrable in the sports world. How do we get to the arbitration itself?

Danielle Menitove: When we talk about sports arbitration, I kind of think of it in the category of international disputes. and domestic disputes. In the world of domestic sports arbitration, the reason we see a lot of arbitration is because all of the major professional sports leagues have entered into collective bargaining agreements with unions.

And those collective bargaining [00:07:00] agreements set forth all the terms and conditions of employment and invariably, they all select arbitration as the exclusive method for resolving disputes between players and their teams in the league. And so there's different forms of arbitration that we see under the professional sports leagues and various leagues.

There will be arbitration in some instances before the commissioner of the league. There can be arbitration before what we call a grievance arbitrator, and that tends to be kind of typical employment disputes that you would see between a player and a team. There's a form of arbitration that's referred to as system arbitration in the sports world, and that's really just dealing with the

leagues that have salary caps, and given the complexity of the salary cap system, there is a special arbitrator who is assigned to resolve salary cap disputes.

And so in domestic arbitration, [00:08:00] there's various forms that they can take in their various avenues, but most disputes end up in arbitration because that's what the players and the leagues have agreed to. In international arbitration, how disputes are often resolved is before most organizations select the court of arbitration for sport or cast.

It's kind of the default tribunal to resolve their disputes. It is really the leading international forum for resolving sports disputes. So when we talk about disputes in Olympic years or Olympic eligibility issues, those are resolved by an ad hoc division of the Court of Arbitration for sport. So I think it's sometimes helpful to think of domestic disputes and international disputes separately because the U. S. is somewhat unique relative to the rest of the world in that. the professional sports leagues, their disputes are not being resolved by cast. And that really is a bit of an outlier in the sports world.

Courtney Dunn: Wow. And that's a broad range of different types of disputes to [00:09:00] go to sports arbitration. Some that I wouldn't have thought of.

Danielle Menitove: Yeah, it can vary. Like you said, we see a lot of anti doping disputes would be, you know, one type of dispute that often moves through an arbitration process. One I didn't mention was in certain leagues, not all the leagues, some have salary arbitration where, you know, there can be arbitration of what a certain player's salary will be in a given year.

And that's really unique to Major League Baseball and the National Hockey League. Not all the leagues have that. But that's another type of arbitration that we see in sport, too. So that is definitely unique in terms of the types of arbitration you can see. But even outside of those kind of more nuanced areas, Really any type of sports dispute could be an arbitration dependent on the contract, right?

Any type of commercial contract can have a dispute resolution provision that selects arbitration and or mediation as a means to [00:10:00] resolve the dispute that might arise out of that contract. And so if it's a sports related contract, you see disputes that way as well.

Courtney Dunn: What sounds interesting to me is Olympic eligibility disputes.

Can you tell us what an example of that would be and what the kind of roadmap would be if that went to arbitration?

Danielle Menitove: Yeah. So how those come up. And I think, you know, we, we saw some of those since it was an Olympic year, generally there will be a selection process of who will be eligible to participate in the Olympics and, you know, without fail, some.

People who are not selected are disappointed and may feel for various reasons that they should have been selected or should be able to participate. The national federations have broad discretion when it comes to who is able to participate. And so there were some of those disputes that came up before the CAS ad hoc division during the Olympics.

But unless the [00:11:00] federation is applying its eligibility standards arbitrarily or in bad faith, there's really just broad discretion given to those organizations to apply their eligibility standards. The tribunal typically is not getting involved in that, like you said, absent extraordinary circumstances.

Right. I love Olympic drama. There's always lots of it.

Carla Varriale-Barker: So, Danielle, can you tell us, since you were both a litigator and an arbitrator, are there ways that you would prepare for, let's say, a trial or a hearing that are different than the way that you would prepare for an arbitration? What are some of the ins and outs?

Our listeners should know about

Danielle Menitove: I think it's important for it's often litigators who are representing parties before arbitration panels. And I think it is important for those litigators to remember, this is not just [00:12:00] litigation in a different form. It's ADR. It's an alternative to litigation and there are.

different processes and different mechanisms that you need to follow. You're not going to just necessarily follow the same tried and true path that you see in litigation in state court or federal court. So to start, when you're preparing your case, you need to first keep in mind that there's significantly less discovery that happens in arbitration relative to litigation.

You know, I always think of litigation kind of being like the scorched earth approach of any and all documents, you know, when you're seeking document requests. That is not the type of information exchange that typically happens in

arbitration. It is much more limited. Depositions are infrequent. We are not having dozens and dozens of depositions.

It can happen. Again, I think it's important to always remember arbitration is a function of the party's agreement. So if they agree in their arbitration agreement for some reason to a [00:13:00] lot of depositions, I suppose they could do that. But The idea is that it's supposed to be a streamlined, efficient process.

And so we just don't see the same type of discovery that we would see in court. And I would say when it comes to international arbitration, even more so that there is more limited information exchange than even domestic and now domestic arbitration being significantly more limited than litigation. So I think that's important when you're preparing your piece to not think I will just get all my information from the other side by serving dozens of document requests.

A second difference that's important to keep in mind is that typically strict rules of evidence don't apply in arbitration proceedings. Again, I guess the parties could agree otherwise, but for the most part, it's a little bit more lax in terms of what might come in. Evidence that might be inadmissible in court might be considered by an arbitrator.

But, you know, the arbitrator, of course, is [00:14:00] likely to consider the reliability and veracity of that evidence in deciding what weight to give it. But you're not going to see the same kind of strict rules of evidence applying in terms of what evidence can come in and be considered. One other point to keep in mind when you're preparing your case that makes arbitration that bit unique.

Is that there are really very limited grounds to vacate an arbitration award. This isn't like court where if you you're in a district court and you disagree with the decision or you think the judge got the facts wrong or the law wrong, you have a right to appeal and can kind of work your way through the appeal process.

There are some arbitral institutions that have appellate rules. Those, I think, are very infrequently used. So putting that aside, your grounds to challenge an arbitration award that gets rendered by an arbitrator. Are very limited and so it tends to be things such as the decision was procured by corruption or fraud [00:15:00] or the arbitrator exerted evident partiality and conducting the arbitration, the arbitrary refused to hear pertinent and material evidence.

Or the arbitrator exceeded the scope of their authority that was set out in the arbitration. So those are kind of exceptional circumstances. It's not just the

arbitrator. The facts wrong. Those aren't grounds to overturn an arbitration award. So once an arbitration award is issued, that decision is final and binding.

And for the most part, unlikely to be disturbed by a court.

Courtney Dunn: Is that the same for disciplinary matters as opposed to monetary awards?

Danielle Menitove: Yeah, that's true for all arbitration matters and I think sometimes disciplinary matters even more so. When we talk about, and we'll probably get into this more, but things that are happening on the field or on the court.

There's a doctrine in sports law that we talk about, the field of play doctrine, and that [00:16:00] arbitral tribunals really aren't going to go in and second guess decisions that get made on the field by referees or umpires. That's really not their role.

Courtney Dunn: Yeah, so they kind of say out of game time decisions that are made by the officials, it's more of off field ins and outs that come before the arbiters.

Danielle Menitove: Yeah, when you think about the field of play doctrine, the idea is that arbitrators aren't sufficiently trained in all the rules of all of the different sports, say in the Olympics that, you know, might be happening during the Olympic games. And they're not observing the event in real time. Yeah. And we also, when we get to, when the competition is done, we need finality, we need to know Who won, like, you know, when in the U. S. we often talk about, like, the Monday morning quarterback, Fred, we can't be changing the rulings of how a game was decided after the fact because someone disagrees with a decision a referee or umpire or official [00:17:00] made, that's just absent again, there's limited exceptions, say, something was done fraudulently or in bad faith.

There are exceptions in cases where tribunals may get involved in those type of field of play issues, but for the most part, that is just not really the role that our original tribunals are playing in sports matters.

Courtney Dunn: So obviously they can't know every single rule of every single sport. What qualifications are required to specifically act as a sports arbitrator?

Danielle Menitove: There's no specific qualifications, but I think one of the unique features of arbitration is that often the parties are choosing their

arbitrator. And so you are choosing who your decision maker is and you are often looking for someone with subject matter expertise. Especially in the area of sports law, where there are kind of pockets of law that have developed that are probably not that familiar to [00:18:00] people who are not practicing in that area.

For example, anti doping issues. There's kind of a body of case law that has developed relating to how the sanctions seem to be imposed and how the standards work. And that's just not something that people who are say commercial litigators are probably exposed to. And so I think generally in arbitration, you either have a single arbitrator or you have a panel of arbitrators where each party will select one arbitrator and those arbitrators often then choose a chair for the panel.

Like I said, they don't necessarily have to have a specific criteria, but as the person choosing the arbitrator, you can kind of decide what type of experience you would like your arbitrator to have. Sometimes we see an arbitration agreement. You know that the specific criteria for the arbitrator may be set out in that arbitration.

So it may say we need an arbitrator that has 10 years of experience. [00:19:00] And sports law disputes or something along those lines. That's something parties can always put in their agreement. You know, it's hard to predict in advance what your dispute is going to be often the disputes that arise out of those contracts tend to be normal breach of contract type disputes that don't necessarily involve a lot of sports specific issues.

But they can involve sport specific issues, and so I think your protection in that is in your selection of an arbitrator that you think is going to understand the issues in your case.

Carla Varriale-Barker: So arbitration has been in the news a lot lately, especially with the Olympics just ending fairly recently. Can you talk about some of the high profile cases that have involved arbitration that we've heard about in the news?

Danielle Menitove: Or so I think with respect to the Olympics, certainly the court of arbitration for sport was kind of thrust to the front of, of the news, giving the high profile disputes. [00:20:00] We touched on the, there were some athlete qualification and selection disputes. There were some disputes about whether certain matters could be brought before the ad hoc division of the court of arbitration for sport.

That division is really has limited jurisdiction. And the idea is that during the Olympics, you need arbitrators on the ground to resolve disputes in real time. So they're really there to resolve disputes that either arise during the Olympic game or attend a period before the opening ceremonies. And then there's also an anti doping division.

So we saw some of those disputes. In terms of the highest profile dispute would involve the women's gymnastic controversy involving Jordan Childs. And so as many people have likely read, Jordan Childs was awarded the bronze medal in the Olympics. After her coaches had made a challenge to the difficulty score and [00:21:00] her floor routine, that challenge was accepted.

As a result, her score was increased and she then was awarded the bronze medal based on that increased score. The Romanian Gymnastics Federation and two Romanian gymnasts, The gymnast who had been in third place before the score increased for George Childs, as well as a gymnast who had a relatively close score, but had been deducted for purportedly stepping out of bounds during her routine, sought review before the Cass Ad Hoc Division.

And so the arbitration panel. And we talked about the field of play doctrine and what decisions really can be reviewed by the court of arbitration for sport. And so the panel concluded that a challenge to the timeliness of when the request for review of Jordan Child's difficulty score was made, whether it was the challenge within the time prescribed by the rules, or whether it was made after the time prescribed by the rules.

wasn't a field of play decision. And so [00:22:00] the arbitration panel decided it could review that decision. Whereas the panel said the decision about whether the Romanian gymnast stepped out of bounds was clearly a field of play decision. It was something that her team could have challenged during the competition.

They didn't. But either way, whether someone steps out of bounds or can't, On the field or not. It clearly falls within the field of play doctrine and is just not the type of decision the panel was gonna review. With respect to the timeliness of the inquiry related to Jordan trial score, there's a lot of discussion in the panel's decision about the lack of any process to actually evaluate whether inquiries were being made in a timely manner, and the fact that there was no process in place.

To evaluate whether the rule was being complied with about getting your inquiry in time took up a lot of the discussion of the panel, but ultimately the

outcome was that because [00:23:00] the panel said evaluating whether the inquiry was made in a timely manner was not a field of play issue. They said the evidence before the panel at that time was that the inquiry had not been made in a timely manner and it exceeded the time limit and therefore it shouldn't have been accepted or reviewed as a result during which score went back to the score.

It was before the inquiry. And the bronze medal was revoked ultimately as a result. So it really has garnered a lot of attention for people like myself who watched it in real time. You know, you saw the gymnasts and you saw gymnasts who thought they were going to be awarded medals and then weren't. And then later on, the plot was that seeing a gymnast who had been awarded a medal and it being taken away, I think really was, was heartbreaking for a lot of people.

I'll never want to read this. It's just a bad situation will ramp. I would say we are not at the end of this dispute and Jordan Childs is seeking review of the [00:24:00] cast decision before the Swiss Federal Tribunal. So perhaps more to come there and potentially still to be determined who will ultimately have that bronze medal.

That's from the Olympic perspective. I would say there are some interesting cases going on in the domestic sports CDR world. And in particular, the authority of a commissioner to serve as the arbitrator in disputes and so we talked about briefly that the U. S. professional sports leagues don't have their disputes resolved by the court of arbitration for sport.

They have them disputes resolved through their own internal processes. Under their collective bargaining agreements, and when it comes to individuals who are not players, such as employees of teams, there are often arbitration agreements in their employment contracts saying any and all disputes related to this employment relationship will be resolved.

Through the NFL or, you know, whatever leagues dispute resolution process. [00:25:00] And so that really has come under a microscope recently with two cases that have been filed. The first is by Brian Flores, who is the former head coach of the Miami Dolphins, and he accused the NFL and his clubs of racially discriminatory hiring practices.

So the NFL and the clubs moved to compel arbitration, relying on language in his employment contract that the dispute should be resolved before the commission. The district court largely agreed that the dispute related to Mr. Flores employment and therefore was subject to arbitration. And in ruling on a

motion for reconsideration that it denied, the judge rejected the argument that the commissioner would necessarily be a biased arbitrator.

The reaction is how could the league or the commissioner serve as a fair, independent arbitrator when they're so involved in the process in the decision making, or the allegations relate to things that they have done. The judge [00:26:00] certainly expressed some concern about the fairness of the process. But held that as a matter of law, she couldn't prejudge the commissioner's actions as an arbitrator.

So it would have to assess whether, you know, the commissioner demonstrated evident partiality in presiding over the arbitration. And that evident partiality standard is the one that we, we talked about previously as one of the grounds for vacating an arbitration award. So that's something that could be judged later once the arbitration proceeding has happened, but not in advance.

The second challenge is by former head coach John Grunin against the NFL. He had brought a case against both the NFL and the commissioner, alleging that the leak had cost him millions of dollars by leaking inflammatory emails that he had previously sent. So, McClure's the NFL sought to move the case to arbitration, because his employment contract contained an arbitration clause.

So in a 2 to 1 decision, the Nevada Supreme [00:27:00] Court ruled the case had to proceed to arbitration before the commission. The dissent, I think, felt fairly strongly that the arbitration clause was unconscionable and that should be unenforceable and focused on how to put an arbitration in which the commissioner is named as a defendant be heard by the commission.

Earlier this month, the Nevada Supreme Court actually granted en banc rebut. So that's another case that's actively challenging the commissioner's arbitral authority that that's still ongoing and certainly worth keeping an eye on.

Carla Varriale-Barker: Any idea where you think that case will go?

Danielle Menitove: That's always a tricky question.

You know, I think it's interesting because when there have been challenges previously to the commissioner serving as the arbitrator, um, I think in those familiar with deflate gate, the Tom Brady case that ultimately was before the second circuit, there was a case with Adrian Peterson that was before the eighth circuit and there were challenges [00:28:00] to.

The commissioner being biased or allegations the commissioner would be a biased arbitrator. And in the context of athletes, the circuit courts have not been that receptive to that argument because the arbitration process is part of the collective bargaining agreement. The parties have negotiated over what the process is.

And so the courts have kind of said, you get the level of impartiality that you've agreed upon in the contract. You can't agree to a process. That you know, we'll have the commissioner or his designee serve as an arbitrator. And then after the fact complain, well, that's not impartial enough. That's the process you agreed upon.

You know, it's a little bit different with the employees. Perhaps I'd meet or at least I could see a factual distinction in that these provisions are part of their employment contracts. It's not part of a big back and forth and a collective bargaining agreement. Those, those negotiations go on for extended periods of time.

And so it's hard to say because I, I would say that. The leagues see the benefits [00:29:00] and I think the union see the benefits of having their disputes result internally. With that said, at least I know in the Brian Flores case, the NFL has appointed a third party arbitrator to hear the dispute. Flores has argued that, well, is that third party arbitrator truly neutral when it's, he's been appointed by the NFL?

I, yes. Reasonable minds could differ and disagree. I think people serving as neutrals like myself take that responsibility very seriously and would be hesitant to allow any type of influence or external influence in their decision making, but we kind of see different approaches with the Nevada Supreme Court with the Gruden case and with the Flores case.

So I think hard to say where they'll come out and I don't know that one decision will be all the decisions will come in the same place.

Carla Varriale-Barker: So now might be a good time to talk about the alternative dispute resolution section for the New York State Bar Association. [00:30:00] Why should people get involved in that?

What types of activities and educational opportunities are there? My dear co chair.

Danielle Menitove: Yeah, well, I certainly encourage everyone to get involved with the dispute resolution section and the sports ADR subcommittee in particular, and you know, we're a relatively new committee and so we are open to discussion.

Any, you know, if people are interested in different topics and panels on different topics, we are eager to provide that type of education. I think we were talking about the Jordan Childs dispute earlier today, and upcoming on November 7th, we have a guest speaker plan, a former gymnast, who is really going to understand the intricacies of.

The decision making process on the ground when the competition is happening and can really dissect those details for us. I think it's that on November 7th at 5 p. m. will be our sports ADR committee meeting and we're going to have that discussion. So I think [00:31:00] if you are interested in these types of issues of what are the hot topics in sports ADR, what are the pieces to know about to really keep yourself informed, being involved in the sports ADR committee is a great way to do that.

Courtney Dunn: Sounds great. And they have some good co chairs leading the way. Thank you so much, Danielle. You gave us a lot to keep our eye on in the news and a lot to think about in the sports arbitration world. Thank you to our listeners for tuning in. As always, you can listen to us on Podbean and Apple Podcasts.