Alternatives
TO THE HIGH COST OF LITIGATION
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ADR Process

Neutral Selection: Some Guidance from a Neutral

PETER L. MICHAELSON

The use of ADR in resolving complex commercial disputes is growing substantially, particularly for intellectual property disputes. Undoubtedly, ADR's crucial advantage over litigation, and also the most important decision parties will make in an ADR proceeding, is their ability to select their own neutral. Parties have complete autonomy to select whomever they want as their neutral. But they must be sharply cognizant of a fundamental tenet: the quality of an ADR process is only as good as the neutral conducting it.

There is no "one size fits all" approach for selecting the neutral. The task can be difficult, tedious and even frustrating. Selecting the right neutral may yield substantial cost and time efficiencies and other benefits throughout the entire process, meeting, if not exceeding, the parties' expectations—thus well worth the time and effort expended in selecting that person. Selecting the wrong neutral may well lead to a disaster. Through the prism of my experience as an active arbitrator and mediator handling complex, high-stakes commercial (IP, IT and technology-related) disputes since 1991, I now offer my own perspectives on and general approach to the task of properly selecting a neutral. Though specific qualifications will differ, often quite markedly, based on whether an arbitrator or mediator is being selected, the general approach I present will, with certain exceptions noted, broadly apply to selecting any neutral.

My approach to the task has two basic components: one performed by neutrals, the other performed by the parties.

The author, of Michaelson ADR Chambers, LLC in New York City, is an arbitrator and mediator primarily handling domestic and international IP, IT and technology-related disputes. See www.plmadr.com. He is a panelist for the major institutions, including CPR, AAA and its international division ICDR, WIPO, LCIA, SIAC, KLRCA and HKIAC, as well as various federal and state courts. He is also a Fellow and Chartered Arbitrator of the Chartered Institute of Arbitrators and Chair of its New York Branch, and a Fellow of the College of Commercial Arbitrators. The original version of this article appeared in Just Resolutions, the e-newsletter of the American Bar Ass'n Dispute Resolution Section, March 2014 (bit.ly/1nwXOxq) and a subsequent version will appear in the Dispute Resolution Journal, Vol. 69, No. 1, June 2014 (published for the American Arbitration Association by JurisNet LLC). It is reprinted here with permission.

GETTING THE WORD OUT—THE NEUTRALS' RESPONSIBILITY

Those who hire neutrals need current, accurate, reliable and comprehensive information about prospective neutrals: who they are, their experience and expertise, education, training, language ability, their location, cost, availability, etc.

Once provided, the information can be disseminated to parties through differing pathways: by ADR institutions for panelists on their own lists, and by neutrals themselves and/or their firms, for example, through professional reputation, neutral attendance and presentations at conferences and meetings,

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CPR News

JUNE/JULY MEETINGS AND EVENTS

Committees

CPR member-only committees are the backbone of CPR's thought-leadership and play a critical role in shaping the future of ADR. Committees provide the unique and rewarding opportunity for users and practitioners to convene, collaborate, define best practices and spearhead innovation in commercial conflict management. If you are interested in joining a committee, attending one of these meetings and strengthening your connections, contact CPR's Director of Membership **Terri Bartlett** at tbartlett@cpradr.org or +1.212.949.6490.

- **June 25** - CPR Arbitration Committee Meeting, Time: 12:15–2:00 p.m. (EDT). Location: White & Case at 1155 Avenue of the Americas, New York, NY (Dial-in available).
- **June 25** - European Executive Board Conference Call – 2014, 10:00 a.m. EDT / 3:00 p.m. BST / 4:00 p.m. CEST. Dial-in information provided on committee page: bit.ly/1jarbUq.

Events

- **June 10** - Y-ADR Seminar: "**The Prologue to an Efficient ADR Proceeding: Key Aspects from the Corporate Perspective.**" Time: 5:30 p.m. – 9:00 p.m. EDT. Location: 701 13th St NW, 11th Floor, Washington, DC.

Speaking Engagements

- **June 6–7** - Olivier André will be speaking on "**Developing a Personal Career Plan**" at the ABA Eighth Annual Arbitration Training Institute to take place in **Washington, DC.** To register, visit bit.ly/1gEmFHU.
- **June 17** – Olivier André will speak at the DR Section of the Austin Bar Association, Austin, TX.
- **June 19** – Mara Weinstein will participate in a panel on "**Alternative Careers in ADR**" at the annual meeting of the Association for Conflict Resolution of Greater New York, to be held at the Benjamin N. Cardozo School of Law. For information, visit acrgny.org/annual_conference.

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Arbitration

FINRA's Arbitration Agreement: Second Class Status?

BY ADAM WEINSTEIN AND BETTE SHIFMAN

A trend of court decisions has created a dichotomy in the interpretation of the arbitration agreement imbedded in the code of the Financial Industry Regulatory Authority (FINRA) and all other arbitration agreements. Given the complexity of the securities industry and the many devices that can be employed by firms and brokers vis-à-vis investors, FINRA gives customers an express choice of arbitrating claims against brokerage firms without the need for a direct contractual arbitration agreement between the parties. This is accomplished by the brokerage firm's FINRA membership agreement, whereby all broker-dealers are required to comply with FINRA's Rules, including a requirement to participate in a FINRA arbitration initiated at a customer's request.

In two separate areas, courts have begun to chip away at the protections afforded to investors by FINRA. One area is the continual shrinking of the definition of a "customer," and the other is the interpretation of forum selection clauses so as to deny investors access to FINRA arbitration.

FINRA ARBITRATION

FINRA operates the largest arbitration dispute resolution forum in the securities industry. FINRA's arbitration forum is used to resolve disputes between and among investors, brokerage firms, and individual brokers. FINRA was created in 2007 with the merger of the NASD and NYSE. The FINRA Rules incorporate its predecessor's rules and codes of conduct, and judicial decisions have extended to the FINRA Rules application of cases interpreting similar predecessor provisions.

FINRA's arbitration provision is contained in FINRA Rule 12200 (bit.ly/finra12200), requiring a member to arbitrate a dispute if: 1) the arbitration is requested by a customer; 2) the dispute is between a customer and a member or associated person; 3) it is in connection with the business activities of the member or associated person; and 4) the dispute does not involve insurance business activities. A "customer" is defined under the FINRA Code simply as "not a broker or a dealer."

PRESUMPTION OF ARBITRABILITY

Under the Federal Arbitration Act (FAA), "courts must place arbitration agreements on an equal footing with other contracts . . . and enforce them according to their terms" (see *AT&T Mobility LLC v. Concepcion,* 131 S. Ct. 1740 (2011; bit.ly/att-concepcion2010)). The analysis typically involves two steps. First, a valid agreement to arbitrate must exist, and second, the specific dispute must fall within the substantive scope of that agreement. However, once a court concludes that "the contract contains an arbitration clause," the U.S. Supreme Court has explained that "there is a presumption of arbitrability" and arbitration can only be denied if "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" (see *AT&T Techs., Inc. v. Commc'ns Workers of Am.,* 475 U.S. 643 (1986; bit.ly/atttech-comm1986). In determining the second prong of the analysis, any "[d]oubts should be resolved in favor of coverage," especially when "the [arbitration] clause is as broad…" The Supreme Court has also made clear that "doubts" include "the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability" (see *Zandford v. Prudential-Bache Sec., Inc.,* 112 F.3d 723 (4th Cir. 1997; bit.ly/zandford-prubache1997), *quoting Moses H. Cone Mem. Hosp. v Mercury Const. Corp.,* 460 US 1, 24-25 (1983; bit.ly/mosescone1983)). The Supreme Court's arbitration analysis has remained the same over the last thirty years and is adhered to in non-FINRA arbitration disputes.

JUDICIAL INTERPRETATION OF FINRA ARBITRATION RULE

Until approximately ten to fifteen years ago, courts routinely applied the same analysis to FINRA (and its predecessors') arbitration. Under the Supreme Court's arbitration analysis, courts routinely found that, even in the absence of privity and an express contractual arbitration clause, the FINRA rule constituted an agreement in writing, triggering a presumption in favor of arbitration, and subjecting any dispute concerning the scope of the arbitration clause, including in this case FINRA's arbitration rule, to the federal policy favoring arbitration. Citing authority that "well-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties," the court in *Washington Square Sec., Inc. v. Aune*, 385 F.3d 432 (4th Cir. 2004; bit.ly/washsq-aune2004) held that "[t]he NASD Code constitutes an 'agreement in writing' under the Federal Arbitration Act (see also *Spear, Leeds & Kellogg v. Cent. Life Assur. Co.,* 85 F.3d 21, 26 (2d Cir. 1996; bit.ly/spearleedskell1996): "the arbitration rules of a securities exchange are themselves 'contractual in nature,'" *quoting Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Georgiadis,* 903 F.2d 109, 113 (2d Cir. 1990; bit.ly/merrlynch-georgiadis1990) and *Bensadoun*

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Arbitration

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v. Jobe-Riat, 316 F.3d 171 (2d Cir. 2003; bit.ly/bensadoun2003): "interpretation of the NASD arbitration provision is a matter of contract interpretation…[t]he analysis differs from ordinary contract interpretation in that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.")

Courts have recognized that investors were the intended third-party beneficiaries entitled to invoke the FINRA arbitration provision. In *Spear, Leeds* (bit.ly/spearleedskell1996), for example, the court found that "decisional law recognizes that the FAA requires the enforcement of an arbitration agreement not just in favor of parties to the agreement, but also in favor of third party beneficiaries of the members' agreement to abide by the [New York Stock] Exchange's Constitution and Rules when they join." In *Kidder, Peabody & Co. v. Zinsmeyer Trusts P'ship,* 41 F.3d 861 (2d Cir. 1994; bit.ly/kidder-zins1994) a customer was held "entitled to invoke [Rule 10301] as an intended third-party beneficiary," while *Scobee Combs Funeral Home, Inc. v E.F. Hutton & Co., Inc.,* 711 F Supp. 605 (S.D. Fla. 1989; bit.ly/scobee-efhutt1989) found that the intent of the NASD Code was "to promote just and equitable principles of trade *for the protection of investors.*" (emphasis in original).

SHIFT IN INTERPRETATION

However, a recent line of cases has effectively whittled away at FINRA's efforts to provide investors access to the FINRA arbitration forum and has shielded brokerage firms from having to defend themselves in the FINRA forum. The court decisions in *Morgan Keegan & Co., Inc. v Silverman,* 706 F3d 562, 565 (4th Cir 2013) and *Goldman, Sachs & Co. v. City of Reno* (2014 WL 1272784 (9th Cir. Mar. 31, 2014); bit.ly/GoldSachs-Reno2014) typify the new direction.

These decisions stand for the proposition that FINRA's arbitration rule should be narrowly construed, is not entitled to the presumption of arbitrability, and is essentially second class. Though the decisions in a "customer" dispute case and a forum selection case use different reasons for their holdings, the outcome is similar: the elimination of investor choice in resolving securities disputes.

Recently, the Ninth Circuit issued a decision further solidifying the recent trend of cases limiting investor access to FINRA arbitration. In *Goldman, Sachs & Co. v. City of Reno,* 2014 WL 1272784 (9th Cir. Mar. 31, 2014; bit.ly/GoldSachs-Reno2014), the Ninth Circuit reversed the District Court for the District of Nevada's denial of a preliminary injunction in an action brought by Goldman, Sachs & Co. to enjoin FINRA arbitration initiated by Reno in connection with a dispute arising under underwriting and broker-dealer agreements for the issuance of municipal bonds in the form of auction rate securities. The appellate court held that forum selection clauses in the parties' contracts superseded any right to FINRA arbitration. The forum selection clause stated that "all actions and proceedings arising" out of the agreement were to be brought before the "United States District Court for the District of Nevada and that, in connection with any such action or proceeding, the parties shall submit to the jurisdiction of, and venue in, such court."

The panel determined that Reno had disclaimed its right to FINRA arbitration by agreeing to the forum selection clauses in the parties' agreements. The court found that "as a FINRA member, Goldman had a *default* obligation to arbitrate at the request of a 'customer'" (emphasis added). However, the court held that FINRA's arbitration clause was only a default obligation that can be contracted out of by the parties. Once contracted around, "Reno disclaimed any right to arbitrate that it might otherwise have had."

The Ninth Circuit noted that in cases involving nearly identical facts and forum selection clauses, the Fourth Circuit and the District of Minnesota (*UBS Fin.Servs., Inc. v. Carilion Clinic*, 706 F.3d 319 (4th Cir. 2013; bit.ly/ubscar2013) and *UBS Sec. LLC v. Allina Health Sys.*, No. 12-2090, 2013 WL500373 (D. Minn. Feb. 11, 2013; bit.ly/ubsall2013)), had both found that while forum selection clauses were capable of superseding a FINRA member's obligation to arbitrate under the FINRA Rules, the language of the clauses, which referred to "all actions and proceedings," was limited to court proceedings and did not encompass arbitration.

The Ninth Circuit, however, followed the reasoning of two Southern District of New York decisions (*Goldman, Sachs & Co. v. N.C. Mun. Power Agency No. One*, No. 13-CV-1319, 2013 WL 6409348 (S.D.N.Y. Dec. 9, 2013; bit.ly/goldsachsnc2013); *Goldman, Sachs & Co. v. Golden Empire Schools Fin. Auth.*, 922 F. Supp. 2d 435 (S.D.N.Y. 2013; bit.ly/goldsachsgoldemp2013)) that, because the presumption in favor of arbitrability did not apply here, the forum selection clauses needed only be sufficiently specific to impute to the contracting parties the reasonable expectation that they would litigate any disputes in federal court, thereby superseding Goldman's default obligation to arbitrate under FINRA Rule 12200. The dissent found the Fourth Circuit's reasoning in *Carilion Clinic* more persuasive, and would have held that greater specificity was required to waive the right to elect FINRA arbitration.

However, the Ninth Circuit decision rests upon the premise that FINRA's arbitration provision is a "default" contract that a member firm and a customer can contract around. First, as the Second Circuit in *Kidder, Peabody & Co., Inc. v. Zinsmeyer Trusts P'ship,* 41 F.3d 861, 864 (2d Cir. 1994) made clear, customers are "entitled to invoke [FINRA's arbitration clause] as an intended third-party beneficiary, in its dispute with Kidder" (citations omitted).

In *Kidder, Peabody,* the brokerage firm entered into an agreement with the customer to delete the arbitration provision in the investor's agreement with the firm. The firm argued that by deleting the arbitration provision the firm had made clear its intent not to submit the dispute to arbitration. However, the court held that even though Kidder, Peabody, struck the arbitration agreement written in the parties brokerage account agreement, "[t]he elimination of such a superseding clause, however, does not signify an intention to erase a pre-

"[A] recent line of cases has effectively whittled away at FINRA's efforts to provide investors access to the FINRA arbitration forum and has shielded brokerage firms from having to defend themselves in the FINRA forum."

existing obligation" – the NASD's agreement with Kidder, Peabody to submit customer disputes to arbitration at the election of the customer.

Therefore, the forum selection clauses in cases similar to *City of Reno,* ought to have no effect on a contract between FINRA and member firms to allow "customers" to "invoke" arbitration with the member. The holding in *City of Reno,* that FINRA's arbitration provision is a "default" arbitration agreement, is questionable at best. The option of arbitration should not be precluded by forum selection clauses.

Moreover, it is noteworthy that the *Reno* decision shies away from the language of "waiver," referring more often to the issue of "disclaimer" of the FINRA rule. The Supreme Court has held, in Moses Cone . . . ., that FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an *allegation of waiver*, delay, or a like defense to arbitrability" (emphasis added). If waiver is not a threshold issue, it is therefore entitled to the presumption of arbitrability, and a matter for arbitral, as opposed to judicial, determination.

INVESTOR CHOICE

It is also interesting that the courts deciding this issue have paid little or no attention to the investor-protection elements in the rulemaking history of FINRA Rule 12200, or the current popular and legislative debate on investor choice. If fairness requires investors to have a choice of forum in which to pursue complaints against broker-dealers, the FINRA arbitration rule should not be capable of being waived, or any waiver should at least have to be clear and express.

The *Dodd-Frank Wall Street Reform and Consumer Protection Act* (H.R. 4173, 111th Cong. (2010; bit.ly/dodd-frank2010) authorizes the SEC to issue rules limiting, imposing conditions on, or even entirely prohibiting agreements that require arbitration by customers of brokers, dealers, municipal securities dealers and investment advisers, "in the public interest *and for the protection of investors*" (emphasis added). Not content to wait for SEC action, in August 2013, Rep. Keith Ellison (D-MN), introduced in Congress the *Investor Choice Act of 2013* (H.R. 2998; bit.ly/InvestChoice2013). The Act would amend the Securities Exchange Act of 1934 (bit.ly/SEA34) to expressly prohibit mandatory pre-dispute arbitration agreements by brokers and dealers, and modify the Investment Advisers Act of 1940 to make it unlawful for any investment adviser to enter into an agreement with a customer that included a pre-dispute arbitration agreement. Although govtrack.us gives the bill a 1% chance of passage (bit.ly/1jpCur3), it has garnered support, in response to investor concerns about fairness in FINRA arbitration, and the general climate of suspicion surrounding all business-to-consumer pre-dispute arbitration agreements that has prompted introduction of the Arbitration Fairness Act (bit.ly/arbfair).

Thus, at the same time that the legislature is attempting to ensure that investors are not locked into a particular forum or mechanism until a dispute arises, the courts are allowing broker-dealers to foreclose the arbitration option by including forum selection clauses.

CONCLUSION

Recent FINRA arbitration decisions impose unworkable obstacles to resolving investor disputes and needlessly protract, delay, and hinder attempts by FINRA to enforce fair industry practices. FINRA arbitrability decisions now employ a unique second class interpretative model when compared to all other arbitration analysis. Recent decisions not only create an analytical divergence in determining issues of arbitrability between FINRA and non-FINRA arbitration disputes, but also harm investors by limiting their rightful option of arbitration and the enhanced protections for investors afforded under the FINRA Rules.

ADR Process

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publications, legitimate law firm/neutral marketing websites, directories, advertisements, and other appropriate vehicles. Any neutral must ultimately provide sufficient trustworthy information that reaches the hands of those people who will hire him/her. In nearly all situations, the information flows indirectly, through successive paths, from the neutral to that decision-maker—and that often takes considerable time. Occasionally, and particularly for ad hoc matters, counsel or even a disputant will directly contact a prospective neutral of interest to seek needed information about that person, with the resulting information then flowing from that neutral rather quickly back to the inquirer.

SELECTION—THE PARTIES' RESPONSIBILITY

At its crux, the selection process involves the following. A preliminary list of potentially qualified candidate neutrals is first assembled; sufficient information is then obtained on each of them; thereafter, clearly unqualified neutrals are eliminated from the list; the resulting candidates are rank ordered, based on defined selection criteria; and finally a small number of these candidates (to provide alternates) is selected, from the list and in order of preference, to appoint. Far easier said than done.

Each dispute has its own unique characteristics. Even within a common substantive area, two facially similar disputes can have widely divergent characteristics.

Carefully think about, formulate and then follow a selection process that takes into account the primary characteristics of your dispute and matches your neutrals to that dispute. Avoid selecting anyone without adequate forethought. If the results are not what you need, modify the process accordingly and iterate it as often as necessary to yield the desired neutrals.

NEUTRAL QUALIFICATIONS

Specifically, to start the selection process, decide what neutral qualifications you want. Decide if you want a neutral with substantive/legal expertise in the field of the dispute. If you are advocating a position contrary to conventional wisdom in the area or prefer to have someone with no preconceived notions whatsoever based on prior experience, you

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might want someone who has no knowledge of the field/technology in question, which allows the parties an opportunity to educate the neutral. However, if your position comports with conventional wisdom and you want your neutral to quickly and credibly cut through any misconceptions put forth by the other side, look for an expert in your field/technology.

The ADR clause in the governing contract may specify the necessary qualifications. However, those clauses may be too narrowly drawn such that a qualified neutral may be difficult to find or, worse yet, not exist at all. Be realistic in what you seek. If the ADR clause does not specify qualifications, then decide what minimum qualifications you absolutely need (not "want"; in practice, all the qualifications you want may collectively be too restrictive in terms of the neutrals, if any, you actually find). Rank those qualifications in order of descending importance, as you may need to successively relax some of those qualifications from the bottom up later in the process. For a case filed with an institution, ask your case manager to screen potential candidate neutrals on its roster. This often occurs in collaboration with the parties, through carefully and mutually selected keyword searches on the institution's neutral database, sometimes followed by additional screening through specialized queries posed directly by the case manager to those neutrals. Keywords are initially chosen to pull a reasonable number of potential candidates from the database. If that does not happen, appropriately change the keywords accordingly—including using those with increasingly broad meanings—until it does. If your case is non-administered, compile a list, from all available sources, of neutrals with those qualifications. Work with opposing counsel, if need be. The result, however obtained, is a preliminary list of potential candidate neutrals.

> "Selecting the right neutral may yield substantial cost and time efficiencies and other benefits . . . and [is] therefore well worth the time and effort expended in selecting that person."

DUE DILIGENCE

Once you have assembled that list, perform due diligence on each listed candidate. This includes collecting useful information from multiple sources, such as websites misleading, incomplete or just wrong—for that reason, exercise caution toward the ultimate source of the information and skepticism of its content), listings and directories (traditionally in print but now increasingly online). While doing so, remember that such sources, while useful, tend to be somewhat self-serving, as they base their own information on CVs and bios from neutrals or questionnaires completed by neutrals. No numeric third-party mechanism currently exists to rate neutrals in terms of their proven ability. If you do not have enough information from an institution on a potential candidate neutral's background, ask the institution to query the neutral for you, or, if the ADR process is ad hoc, then ask the neutral directly. Find out if the candidate has any published writings of interest or has taken any position on an issue involved in your dispute. Ask your colleagues at law firms for their thoughts on the potential candidates. Most law firms maintain lists of neutrals with whom they have had prior dealings. As many IP disputes tend to be sent these days to large law firms or, for certain narrow practice areas, to specialized boutiques, if your own firm does not have information for any candidate on the list, the odds are that another such law firm will. Get referred to it and others, if need be. As there are relatively few neutrals serving in certain substantive areas (such as highly technical patent disputes), you should be able to quickly reach a firm that has useful information.

Ask each of your candidate neutrals to disclose any conflicts: substantive, relational (affinities including with parties, counsel, witnesses and the institution involved),

FURTHER READING ON NEUTRAL SELECTION

American Arbitration Association, "Fact Sheet: Enhance Neutral Selection Process for Large Complex Cases," bit.ly/1lOnu94.

D. Bishop et al, "Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration," 14 *Arb. Int'l* 395 (1998).

Chartered Institute of Arbitrators "Practice Guideline 16: The Interviewing of Prospective Arbitrators" (2011), bit.ly/QG4Cej.

CPR "Due Diligence Evaluation Tool for Selecting Arbitrators and Mediators," International Institute for Conflict Prevention and Resolution (2010), bit.ly/1nNXmrL.

H. R. Dundas, "Guidelines for Interviewing Prospective Arbitrators," 2 *NY Disp. Res. L.* 33 (Spring 2009).

D. Kahneman, *Thinking, Fast and Slow* (Farrar, Strauss & Giroux 2011), specifically Ch. 21, "Intuitions vs. Formulas."

J. Kichaven, "You're Letting 'em Choose the Mediator? Your Case Isn't That Good! Getting to Settlement Demands Mutual Participation in Selection," 25 *Alternatives* 115 (July/August 2007).

H. N. Mazadoorian, "Disclosure Questions for ADR counsel to Ask When Choosing Neutrals or Provider Groups", 14 *Alternatives* 95 (September 1996).

P. L. Michaelson, "Enhanced Tribunals: Why It's Time to Use Personality Screening to Supplement Selection Criteria," 28 *Alternatives* 189 (November 2010) (part 1 of two-part article).

P. L. Michaelson, "Can Conflicting Styles Be Detected? How Personality Screens Make Tribunal 'Matches' for More Effective Arbitration," 28 *Alternatives* 205 (December 2010) (part 2 of two-part article).

D. Rothman and J. Kichaven, "Litigators' Views and Goals Vary on Selecting their Arbitrators," 22 *Alternatives* 13 (January 2004).

M. Young, "Rethinking Mediation: A New and Better Path to Neutral Selection," 30 *Alternatives* 111 (May 2012).

financial and temporal (availability). Inquire about their current caseloads. Be conscious of a marked tendency among busy neutrals to take on too many cases which, when arranging hearings, can cause extended schedule conflicts and often necessitate multiple hearing sessions separated by weeks, if not months, which leads to inefficiency and increased cost.

If you are considering using an ADR institution that is not well known or with which you have no experience, undertake due diligence of the institution itself. You need to gain comfort and repose trust in the institution, not just its neutrals. Find out about the institution's quality and selection of its neutrals, how its neutrals are compensated, if it has any relationships that may cause inherent biases or conflicts of interest with disputants on one side or another in your dispute, its industry reputation, governing ethics rules, organizational longevity, members, support (filing fees, member contributions, etc.) and other factors of interest.

INTERVIEW AND SELECTION PROCESS

Eliminate clearly unqualified neutrals from the list based on qualifications, conflicts and availability. Further, ask what type of demeanor/temperament/perspective you want in your neutral and further narrow the list. Perhaps you need an experienced practicing attorney who has substantial subject matter/industry expertise. Alternatively, choose an ex-judge if you need someone who can command authority and possibly "twist some arms." Such a person may, however, exhibit dictatorial conduct and lack sufficient subject matter/industry experience. For an arbitrator, you might also want someone who remains closely "involved" throughout the proceeding, exercises appropriate but not overpowering "muscular" control, including the ability to make hard decisions throughout so the arbitration doesn't explode or follow a tangential path and who can get it back on its proper track when and if necessary, yet is sensitive to cost and autonomy issues, but is certainly not just a "go along, get along" person. The remaining neutrals are your candidates.

Define interview selection criteria (e.g., potential inter-candidate incompatibilities, temperament, neutral practice preferences, suitability to the particular dispute, views on attaining process efficiencies, etc.), rank order those criteria in descending order of importance, and interview the remaining candidates, whether in person or by telephone (or video web connection), to ferret out and then compile data relevant to these criteria. Interviews are best done inter partes and, if an institution is involved, with the case manager present. A very limited scope of inquiry, not touching on the merits of the dispute, is permitted under applicable standards of ethics. If need be, particularly in an ad hoc process, interviews can be conducted ex parte, though the scope of inquiry, particularly for arbitrators, is further restricted under those standards.

On an ex parte basis, you can discuss the general nature of the case, the candidate's suitability to hear the case, including availability, conflicts, language proficiency (if applicable), references, and, for a tripartite panel where the chair is selected by the co-panelists, your party's preference for the chair. For an inter partes interview, the areas of permissible inquiry are broader than in an ex parte interview. Here, you can also inquire about a candidate's preferred practice on awards if given

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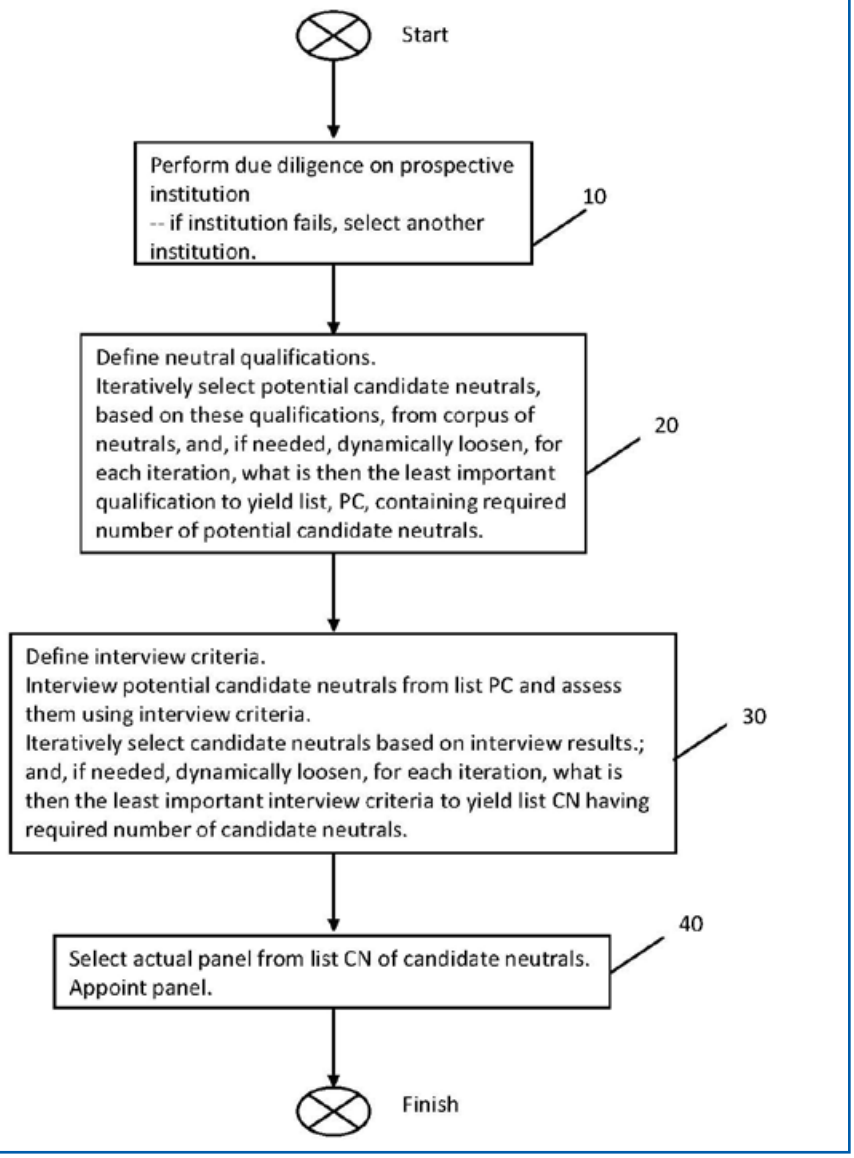
Figure 1. Neutral Selection Approach



ADR Process

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full discretion (i.e., fully reasoned, abbreviated reasoning, bald; providing a draft award to the parties for review, etc.) and his/her views on attaining cost-effectiveness and process efficiencies. For high-stakes arbitrations and/or those with multiple hearing sessions where the arbitrators will need to work together over an extended period of time, consider testing and evaluating your candidates for inter-personal compatibility with each other (even if only informally through assessing contemporaneous temperament and responses to oral inquiries), and taking the results into account when selecting tripartite panels from among your candidates. Also, to improve selection accuracy by eliminating undue reliance on intuition and its inherent biases, consider establishing, for each potential candidate neutral, a statistical, rather than merely intuitive, measure for each interview selection criteria, and an overall numeric score reflective of how well that candidate meets all such criteria. This score can then be compared against a predefined threshold (metric) to select appropriate candidate neutrals.

Do not merely acquiesce in your adversary's selection of a neutral, particularly if you are selecting a sole arbitrator or mediator. While many parties will simply abdicate their responsibility for the sake of signaling goodwill and cooperation to their adversary, if you have strong preferences for your neutral, make them known to the other side and, to the extent reasonable, insist on them: otherwise you may be stuck with a neutral you do not want.

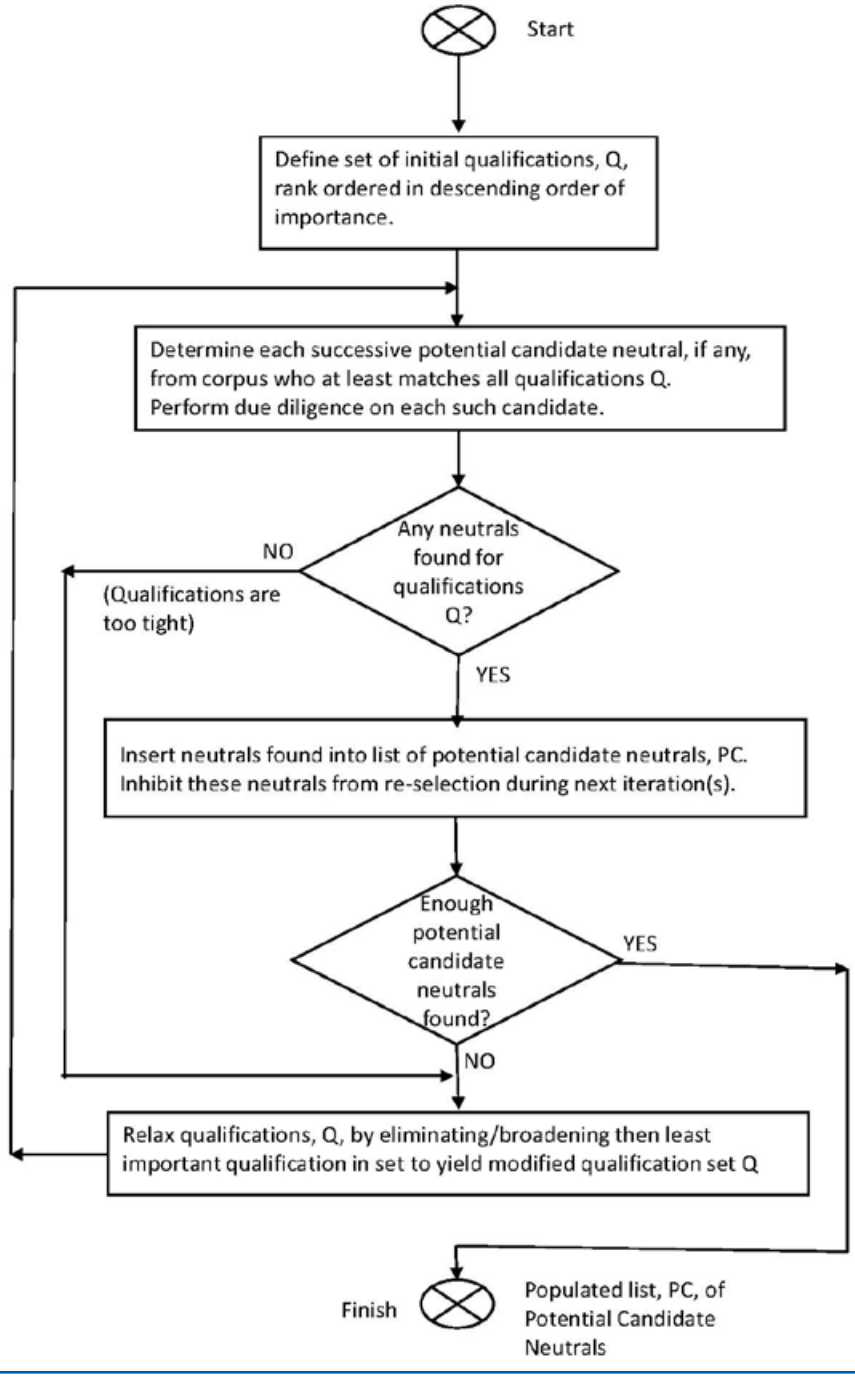
For mediation, try to identify the underlying driving causes of the dispute (e.g., relational, psychological, substantive, financial, etc.) and an appropriate skill set to deal with them. Choose mediators from among your candidates who possess most, if not all, of those skills.

When assessing neutrals, trust your instincts. If, after doing all your due diligence and owing solely to your own intuition, you just do not have a good feeling about a particular candidate but cannot articulate the reason, strike that candidate from your list and move on to the next person.

Using your interview data and criteria, compare your candidates and rank them in order of your preference. Then, select the top ranked candidates as those you want appointed. If you do not get useful results, modify the process, including your neutral requirements and interview selection criteria, as needed, and repeat the process, or appropriate parts of it, as often as necessary until you get the neutrals you want.

To enhance understanding, an illustrative, though simplistic, implementation of this approach is diagrammatically shown in flowchart form in accompanying Fig-

Figure 2. Potential Candidate Neutral Selection (20)



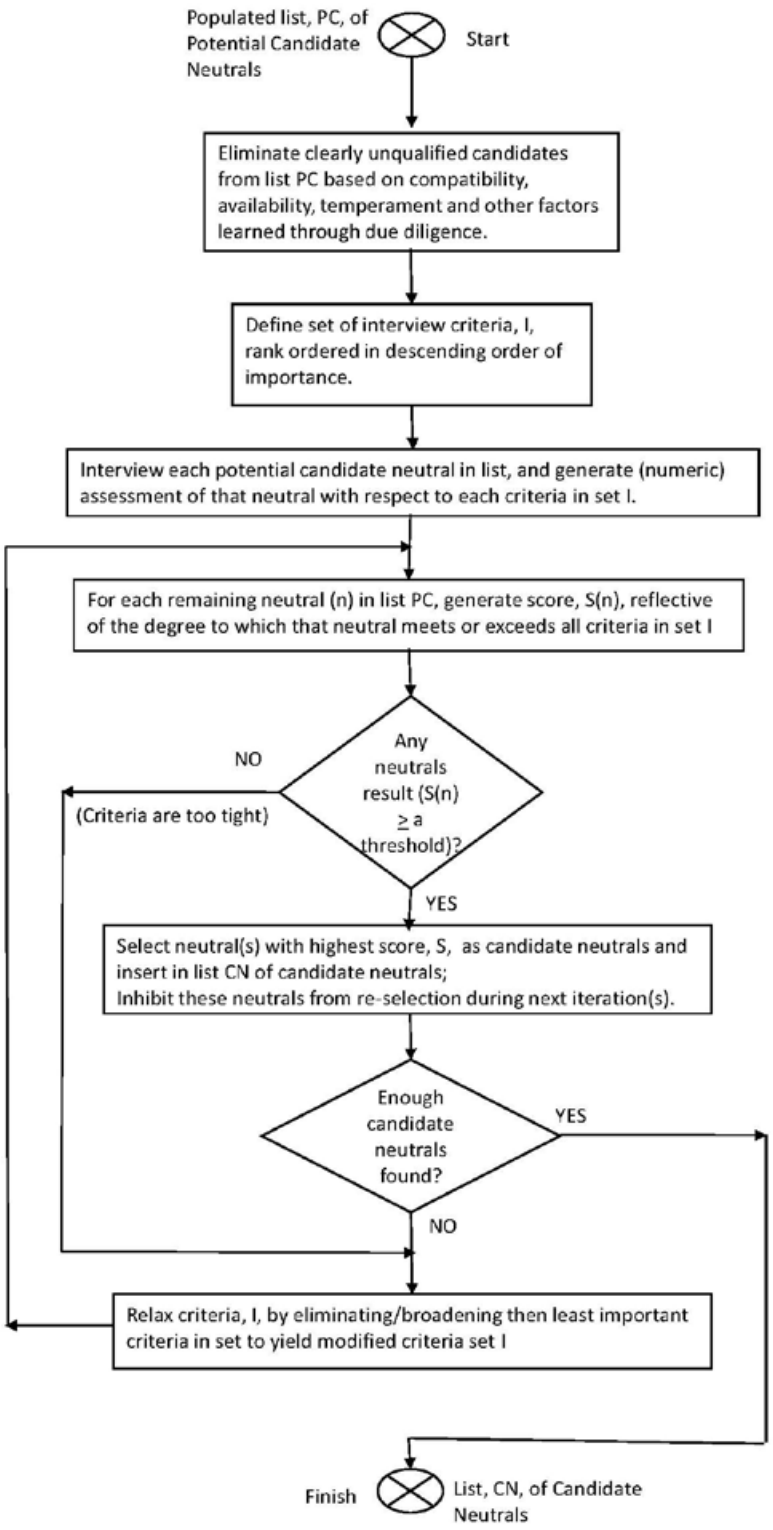
ures 1–3. The overall process, shown in Figure 1, consists of four basic blocks (processes) 10–40.

First, through block 10, institutional due diligence, if necessary, is performed. Then, through block 20, neutral qualifications are defined; and potential candidate neutrals are then selected based on how well each neutral in a corpus matches (or exceeds) all the qualifications, and, if an insufficient number of potential candidate neutrals results, the qualifications, starting with those which are then the least important, are successively eliminated or relaxed, with the selection and qualification modification steps iteratively continuing in tandem until enough potential candidate neutrals have been selected. This eventually yields a list of potential candidate neutrals, PC. Thereafter, block 30 is performed, through which interview criteria are developed; each potential candidate in list PC is interviewed and assessed using these criteria; and candidate neutrals are then selected based on how well each potential candidate neutral matches (or exceeds) all the criteria, and, if an insufficient number of candidate neutrals results, the criteria, starting with those which are then the least important, are successively eliminated or relaxed, with the selection and criteria modification steps iteratively continuing in tandem until enough candidate neutrals have been selected. This yields a list of candidate neutrals, CN, from which, via block 40, actual neutrals are selected and appointed to the panel.

Further details of blocks 20 and 30 are shown respectively in Figures 2–3. The selection and qualifications/criteria modification steps in each block are implemented through very similar loop operations. Depending on the qualifications and criteria chosen and the degree to which the neutrals in the corpus actually meet either or both of those, either the qualifications or criteria may be dynamically eliminated or relaxed to a considerable extent through operation of blocks 20 or 30, respectively. As the remaining details of these two figures are quite self-evident, no further explanation is needed.

No selection process can guarantee good results. However, where potential neutrals have made sufficient trustworthy information about themselves readily available, then, by following my perspectives, you are more likely than not to find the right neutral(s) who will run a high-quality ADR process to the benefit of all concerned.

Figure 3. Candidate Neutral Selection (30)



The Master Mediator / Part 2

Looking My Way: Thinking Fast and Slow . . . and Mediator Sense

BY ROBERT A. CREO

MEDIATOR SENSE BECOMES BEST PRACTICES

A foolish consistency is the hobgoblin of little minds.

— Ralph Waldo Emerson.

Mediator Sense involves mediators taking deliberate process and communication actions, such as proposals, directives or inquiry. Mediation is not mechanical or formulaic and does not follow a consistent procedural course of conduct. Mediation involves a series of strategic macro and micro choices by the mediator. Macro choices involve the next "goal" or "choice point," while micro action involves the steps or tools necessary to reach the goal. Christopher Moore in his seminal book, *The Mediation Process: Practical Strategies for Resolving Conflict* (Jossey-Bass; 3rd Edition Revised (2003), describes these as "moves" made by the mediator in response to the situation. These "moves" are based upon heuristics of Mediator Sense. Some of the most common tenets may be articulated as:

- Engagement between mediator and all participants consists of listening to the individual and collective narratives;
- Attention control becomes routine; complex facts are absorbed into memory;
- Authenticity builds rapport and trust with the participants;
- Initial divergent perspectives are acknowledged, validated and legitimized as reflecting the positions, interests, emotions, and values of the participants;
- Multiple, and even inconsistent, outcomes are recognized as being within the range of possibility, without endorsement by the mediator;
- Transparency, especially on procedural issues, is effective;
- Flexibility and creativity are honored; improvisation is encouraged;
- Expectations and risk tolerances are accessible and weighed appropriately;
- Empathy and compassion are innate and expressed appropriately;
- Respect for past, present and future relationships is respected by every move;
- If not now, when? can be addressed with confidence;
- Pause, patience and pacing are effortless;
- Silence is comfortable;
- The mediator becomes an alternate or surrogate speaker for a participant, so that adverse and difficult messages may be conveyed in a productive manner.

The author is a Pittsburgh attorney-neutral who has served as an arbitrator or mediator in thousands of cases in the United States and Canada since 1979. He conducts courses on negotiation behavior that focus on neuroscience and the study of decision-making, and was recently recognized by *Best Lawyers in America* as 2014 Mediator of the Year for Pittsburgh. He is the author of "Alternative Dispute Resolution: Law, Procedure and Commentary for the Pennsylvania Practitioner" (George T. Bisel Co. 2006). He is a member of *Alternatives*' editorial board, and the CPR Institute's Panels of Distinguished Neutrals.

Examples of Mediator Sense in action include:

The Best Next Move: Your Fault?

A motor vehicle accident case involved four parties: two plaintiffs and two defendants in a case scheduled for trial a short time after the mediation session. The expert physician retained to testify agreed to extend the period for cancellation of his appearance without a fee until 4:00 p.m. on the day of the mediation session. The defendants were willing to pay what most participants considered to be in excess of the case value, which was $10,000 less than one of the plaintiffs' bottom line. The plaintiff instructed the mediators to present her demand on a "take it or leave it" basis. Although her counsel agreed with our recommendation against taking and presenting that position, I indicated that it would be done, though I did not expect the defense to meet her final demand and thought the resulting impasse would cause the shift to focus on the other claimant. After the expert deadline passed, and we entered the room to touch base for a final time, the plaintiff greeted us with an exhortation that "you have just cost me thousands of dollars in expert fees." I acted in an authentic and transparent manner by immediately pushing back and challenging her accusation. I responded that if there was a problem, it was based upon her own choice, which went against the recommendations of the mediator and her own counsel. I was direct and forceful in my meaning and the language used to convey it. She indicated that she would now accept a lower settlement, but only if she did not have to pay the expert fee! Fortunately, despite the late hour, her counsel was able to work it out with the physician and the case settled.

Robert A. Creo

I did not spend any time reflecting upon my response or carefully weighing each word. I confronted her baseless accusation directly, while engaging her in a respectful manner. I did not apologize or attempt to justify process choices or pacing. I explained that she took the risk of presenting an ultimatum to the defen-

dants despite clear communications and advice to the contrary.

To Tell the Truth

Medical malpractice claims usually require consent of the physician to settle. In a catastrophic loss case, the physician participated during the entire process. During the caucus, the physician refused to respond to the plaintiff's demand with an economic proposal, since he was convinced he was going to prevail at the upcoming trial. I did the usual exploration with his two counsel, who advised him that the verdict could be for the plaintiff in an amount substantially more than the current demand. After further exploration, it was clear that the physician expected to win the case before the jury based upon his testimony. He had gone to trial once before and won. I doubted he would be a good witness and thought that the jury would more likely than not intensely dislike him.

My Mediator Sense told me that he should be confronted directly and told in no uncertain terms that this risky strategy was unlikely to be successful, in light of the experts, the highly sympathetic plaintiff, and the key undisputed facts. I interpreted both counsels' demeanor as indicative of agreement with my assessment. I asked if I should state my own view on his credibility as a witness and his ability to carry the case to victory. The eager response of his counsel confirmed that this was the Best Next Move. As a process point, I had considered having a meeting with counsel only, to explore this approach, but decided the optics were against it. I did not want the physician to feel that his own counsel was conspiring against him or were involved in scripting what I was going to say. This also allowed them cover, since they could disagree, disavow, or spin my message, and if the case did not settle they would not have undermined his ability to be an effective witness by aligning against him in the mediation. I provided them further cover by stating that I did not want them to comment or respond to my statement, which would be directed only to the physician. I offered to leave the room immediately after, which would permit them to have private conversations and give the physician time to reflect upon my words. This might also permit the physician to save face when reversing the position he had been taking for several years of refusing to consent to settle.

I sat across from him and started by noting the important and excellent work that he had been doing on a daily basis for decades to heal numerous people. I explained that he routinely made life and death decisions and that sometimes, when he believed he had made a competent choice of treatment, there may in fact have been a better alternative course of action. This was one of those cases were he would be in the courtroom defending before the jury actions that could be viewed as questionable or wrong in the context of an unexpected and catastrophic outcome to a human being. I noted that the context was going to be his self-defense of his decision to protect his reputation and the economics of his practice, balanced against the plaintiff's narrative of suffering and loss, with experts testifying that his treatment fell below the standard of care. I then told him point blank that what I had observed of his demeanor, personality, and how he articulated his position did not impress me. I was blunt and said the jury may intensely dislike him. I apologized for my directness and explained that although other mediators may disagree, I believed it was part of my job to convey my evaluation—based upon my own assessment and experience—for him to consider, accept or reject. I asked if he had any questions or comments before I left the room. He looked at me and said, no, that it was not necessary for me to leave or for him to consult again with his lawyers. He consented to settlement and thanked me.

And Do This, Now!

A commercial case between a real estate developer, a vendor and a municipality primarily involved fees for services provided by the vendor to the citizens and businesses. At the start of the mediation, counsel for the developer indicated that they would not participate unless a majority of the elected officials were present as decision makers. Mediator Sense concluded that appropriate representatives were present and that the mediation should not be postponed. I noted that any settlement required approval at a public meeting and compliance with all "sunshine" or other laws requiring public view and input. There were concerns about violating the sunshine law, and no votes could be taken at the mediation session. Despite my impeccable logic, counsel insisted that her side would not go forward without the majority of officials from the nearby municipal building being present.

Since the other two parties were present and ready to participate, I calmly informed counsel that we could not compel her participation as we went forward that day. They were welcome to stay and participate at any time. And, by the way, could we use the offices all day, since this firm was hosting the mediation? After a short private discussion between counsel and the developer, we started the mediation with their full participation. The case settled at the end of the day and the municipality approved the settlement in the appropriate manner at its next scheduled meeting.

SUMMARY

Each case is unique and calls upon a wide variety of tools. Mediators are invitees into the gravitas of human tragedy or economic conflict and must remain conscious of their status as brief guests in the story of the disputants. Mediation is a complex, non-linear system. Mediator Sense navigates the various approaches and expectations of mediation to facilitate effective choices by humans acting under stress and uncertainty. Professor Kahneman has provided the scientific framework to explain Mediator Sense. Mediators focus their System 1 and System 2 processes in response to what is happening at the table. Mediators have seconds to react and form an appropriate response to participant statements and actions. System 1 recognizes the patterns and cues from prior experience and formulates a rapid response which System 2 then filters and modifies to refine it to the unique dynamics at play. Awareness of cognitive distortions becomes integrated into the Mediator Sense, so that as experienced practitioners we have automatically adjusted or substituted some tactics or selected a particular way to frame the language to account for potential bias.

Next month's column will look at cognitive bias and other psychological aspects of decision making, staring with a consideration of what information is available in mediation and how it affects the choices made by the mediator and the participants.

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NEW RULE ON ACCELERATED ADJUDICATION PROCEDURES IN NEW YORK STATE COURTS

New York has recently adopted a new Rule of Practice for the Commercial Division (22NYCRR §202.70(g)) (Rule 9; bit.ly/1okztc4 and see box) relating to the use of "accelerated adjudication procedures," which will take effect on June 2, 2014.

The new Rule 9 allows the parties to any commercial dispute exceeding $500,000 to resolve their dispute more expeditiously and cost effectively by including in their contract specific accelerated adjudication procedure language:

"Subject to the requirements for a case to be heard in the Commercial Division, the parties agree to submit to the exclusive jurisdiction of the Commercial Division, New York State Supreme Court and to the application of the Court's accelerated procedures, in connection with any dispute, claim or controversy arising out of or relating to this agreement, or the breach, termination, enforcement or validity thereof."

The parties may also agree to accelerated adjudication procedures by filing a stipulation with the court once a dispute has arisen.

Unless otherwise modified by the contracting parties, Rule 9 provides for: 1) trial by judge instead of jury; 2) significant limitations on discovery; 3) waiver of punitive and exemplary damages; 4) that the case be ready for trial within nine months of a request for judicial intervention; and 5) waiver of interlocutory appeals and of objections based on lack of personal jurisdiction or *forum non conveniens*.

Rule 9 was designed "to provide the parties with an alternative to arbitration while still guarantying important procedural pro-

NEW RULE 9 OF SECTION 202.70(G) OF THE UNIFORM RULES FOR THE SUPREME AND COUNTY COURTS (RULES OF PRACTICE FOR THE COMMERCIAL DIVISION)

Rule 9. Accelerated Adjudication Actions.

(a) This rule is applicable to all actions, except to class actions brought under Article 9 of the CPLR, in which the court by written consent of the parties is authorized to apply the accelerated adjudication procedures of the Commercial Division of the Supreme Court. One way for parties to express their consent to this accelerated adjudication process is by using specific language in a contract, such as: "Subject to the requirements for a case to be heard in the Commercial Division, the parties agree to submit to the exclusive jurisdiction of the Commercial Division, New York State Supreme Court, and to the application of the Court's accelerated procedures, in connection with any dispute, claim or controversy arising out of or relating to this agreement, or the breach, termination, enforcement or validity thereof."

(b) In any matter proceeding through the accelerated process, all pre-trial proceedings, including all discovery, pre-trial motions and mandatory mediation, shall be completed and the parties shall be ready for trial within nine (9) months from the date of filing of a Request of Judicial Intervention (RJI).

(c) In any accelerated action, the court shall deem the parties to have irrevocably waived:

(1) any objections based on lack of personal jurisdiction or the doctrine of forum non conveniens;

(2) the right to trial by jury;

(3) the right to recover punitive or exemplary damages;

(4) the right to any interlocutory appeal; and

(5) the right to discovery, except to such discovery as the parties might otherwise agree or as follows:

(i) There shall be no more than seven (7) interrogatories and five (5) requests to admit;

(ii) Absent a showing of good cause, there shall be no more than seven (7) discovery depositions per side with no deposition to exceed seven (7) hours in length. Such depositions can be done either in person at the location of the deponent, a party or their counsel or in real time by any electronic video device; and

(iii) Documents requested by the parties shall be limited to those relevant to a claim or defense in the action and shall be restricted in terms of time frame, subject matter and persons or entities to which the requests pertain.

(d) In any accelerated action, electronic discovery shall proceed as follows unless the parties agree otherwise:

(i) the production of electronic documents shall normally be made in a searchable format that is usable by the party receiving the e-documents;

(ii) the description of custodians from whom electronic documents may be collected shall be narrowly tailored to include only those individuals whose electronic documents may reasonably be expected to contain evidence that is material to the dispute; and

(iii) where the costs and burdens of e-discovery are disproportionate to the nature of the dispute or to the amount in controversy, or to the relevance of the materials requested, the court will either deny such requests or order disclosure on condition that the requesting party advance the reasonable cost of production to the other side, subject to the allocation of costs in the final judgment.

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tection, such as the right to appeal the final judgment" noted Hon. James M. Catterson, former Justice of the Appellate Division, First Department. In addition, it should also encourage contracting parties to choose New York law as the governing law and New York courts as a timely and cost-effective "forum" to resolve their disputes.

According to the Task Force on Commercial Litigation in the 21st Century, which developed Rule 9, many proposals were evaluated to limit discovery and streamline the process while still providing certainty, including the extensive Addendum Preliminary Conference Order currently used by Justice Charles E. Ramos, New York County Supreme Court (bit.ly/1nhJQjS). Justice Ramos' Addendum was closely modeled on the Economic Litigation Agreement (ELA), issued by CPR Institute [publisher of *Alternatives*] in 2010 to provide the parties to a commercial dispute with a cost-effective alternative to binding arbitration (bit.ly/1lXruQ3). A means of containing civil litigation costs, an ELA is a hybrid of civil litigation and arbitration, where parties agree to use finite, defined and proportional discovery procedures in lieu of conventional discovery. Companies can incorporate the model agreement by reference into contracts with partners, suppliers and other B2B customers at the start of a business relationship. Colloquially known as a "litigation prenup," the model ELA includes a mandatory pre-litigation dispute resolution section, as well as fee-shifting in discovery disputes decided by an ELA arbitrator.

It is interesting—and encouraging—that courts are now adopting rules and procedures inspired by a CPR model intended for use in commercial contracts.

— Lia Iannetti, CPR Institute

HOW MUCH LITIGATION WAIVES RIGHT TO ARBITRATION?

According to the Third Circuit, two months may be enough, at least on the very specific facts in *Supermedia v. Affordable Electric, Inc.*, 2014 WL 1690749 (3d Cir. April 30, 2014; 1.usa.gov/1oX5w4n).

Supermedia sued Affordable Electric (AE) in district court, alleging breach of a contract for advertising services. Over a period of nearly one year, AE moved unsuccessfully for dismissal, answered the complaint, and participated in discovery, all without raising the existence of an arbitration agreement as an affirmative defense. One defense AE did raise was that Martin Morley, who had signed the contract on behalf of AE, did not have authority to bind the company. Several months after its first suit, AE also sued Morley directly for breach of warranty based on representations he made in forming the advertising contract, and the district court consolidated the cases.

Only then did Morley and AE move to compel arbitration, which the district court denied, finding that both AE and Morley had waived any right to arbitrate. The Third Circuit affirmed.

The court noted that "[c]onsistent with the strong preference for arbitration in federal courts, waiver is not to be lightly inferred, and . . . will normally be found only where the demand for arbitration came long after the suit commenced and when both parties had engaged in extensive discovery." (citations omitted). In making its determination, the court applied the Third Circuit's non-exclusive list of factors set out in *Hoxworth v. Blinder, Robinson, & Co.*, 980 F.2d 912, 926-27 (3d Cir. 1992; bit.ly/SoGI86):

(1) the timeliness of the motion to compel arbitration;

(2) the degree to which the party seeking to compel arbitration has contested the merits of its opponent's claims;

(3) whether the moving party provided sufficient notice to the nonmoving party of its intention to seek arbitration;

(4) the extent of the moving party's non-merits motion practice;

(5) whether the moving party has assented to the court's pretrial orders; and

(6) the degree of discovery engaged in by the parties.

The appellate court had little difficulty finding that AE had waived arbitration, not only by vigorously pursuing litigation—including a motion to dismiss—for eleven months without invoking the arbitration agreement, but also by challenging the enforceability of the same arbitration provision in a related state-court proceeding.

Morley, however, had moved to enforce the arbitration agreement only two months after Supermedia's complaint against him directly, making his situation, according to the court, "a closer call," and he had not engaged in significant discovery. The court nevertheless found waiver for three reasons:

Morley, along with AE, elected to engage in litigation on the merits by filing a third-party complaint against Supermedia and two of its employees, prior to filing his motion to compel arbitration, and replied to the third-party answer;

In his reply to the third-party answer, Morley expressly "denied there is a contract and/or that there is any binding agreement … to arbitrate disputes;" and

Morley participated in the pre-trial conference and acquiesced in the consolidation of the cases.

The court could also have found that —regardless of whether or not he was authorized to bind AE—Morley was not a party to the Supermedia contract and was therefore not entitled to invoke that contract's arbitration provision. Because its finding that both Morley and AE had waived arbitration applied to any right they *might* have had, the appellate court found it unnecessary to address this issue, and affirmed the district court's denial of the motion to compel arbitration.

— Bette Shifman, CPR Institute

MANIFEST DISREGARD—ALIVE IF NOT WELL?

Judicial review of arbitration awards in federal court is narrow and courts generally defer to arbitral tribunals. According to the U.S. Supreme Court in *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008; 1.usa.gov/1jyYiAK), the limited grounds for vacating awards enumerated in the Federal

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Arbitration Act (FAA) are exclusive. Prior to *Hall Street,* most federal courts also recognized "manifest disregard of law" as a common law ground for vacatur, independent from the enumerated FAA grounds. The ruling in *Hall Street* cast doubt on the continued availability of the manifest disregard ground, without expressly eliminating it, and federal appellate courts remain divided in their application—and interpretation—of it.

Manifest disregard of the law is generally established when an arbitral tribunal recognizes the law applicable to a dispute but disregards it. A mere misinterpretation is insufficient, and the party challenging enforcement bears a heavy burden. Thus, vacatur on this ground is rare, even in circuits in which manifest disregard is seen as surviving *Hall Street*.

In recent case law, the Fourth Circuit the District of Connecticut vacated arbitral awards for manifest disregard of the law, while the Sixth Circuit set a high bar and did not vacate.

In *Dewan v. Walia*, 2013 U.S. App. LEXIS 21970; 2013 WL 5781207 (4th Cir. Oct. 28, 2013; 1.usa.gov/1bzfamA), an unpublished opinion without precedential value, the Fourth Circuit remanded with instructions that the district court vacate, holding that an arbitral award in favor of a former employee who had executed a release agreement with his former employer was the product of an arbitrator's manifest disregard of the law. According to the court, "a manifest disregard of the law is established only where the arbitrator understands and correctly states the law, but proceeds to disregard the same," [*citation omitted*] and "[m]erely misinterpreting contract language does not constitute a manifest disregard of the law." Here, the appellate court emphasized that the former employee, Arun Walia, executed a release agreement releasing and discharging his former employers from all claims related to his employment in exchange for $7,000, regardless of forum, and that the arbitrator held the release valid and enforceable. In nevertheless making an award to Walia on claims arising out of his employment, the arbitrator manifestly disregarded the law.

Judge James A. Wynn, Jr. dissented, positing that the arbitrator did not "disregard or modify unambiguous contract provisions" because "the arbitrator *reasonably interpreted* the agreement to release suits in court but not disputes in arbitration" (emphasis added).

On December 13, 2013, Walia filed a petition for certiorari with the U.S. Supreme Court, on the question "[w]hether and when the Federal Arbitration Act permits a court to vacate an arbitral award as the product of 'manifest disregard of the law.' A group of prominent arbitration practitioners and academics submitted an amicus curiae brief in support of certiorari (available at bit.ly/1l4aQh1), arguing, inter alia, that upholding manifest disregard as an independent basis for setting aside arbitral awards may deter arbitration users from selecting the U.S. as an arbitral forum. On April 7, 2014, the Court denied certiorari, despite an apparent split among U.S. circuit courts on the continued viability of the manifest disregard doctrine as grounds for vacating arbitral awards.

In *Sotheby's Intl Rlty, Inc v. Relocation Group LLC et al,,* 2013 U.S. Dist. LEXIS 180040; 2013 WL 6704876 (D. Conn. Dec. 5, 2013), the District of Connecticut—which is in the Second Circuit—vacated an arbitral award issued in a property sale commission dispute, finding that the arbitral tribunal manifestly disregarded the law when it issued an award in favor of a party that had failed to meet the statutory preconditions for bringing an action to recover a real estate commission. Notable in this case is that the court was able to make this finding even without insight into the arbitrator's legal analysis, as the award was not required to, and did not, provide reasons. Manifest disregard has been interpreted in the Second Circuit as applying to "those exceedingly rare instances where some egregious impropriety on the part of the arbitrator is apparent" [*citation omitted*]. According to the Second Circuit, manifest disregard does not exist upon "[a]n arbitrator's mere commission of error in understanding the relevant law, or her reasonably disputed interpretation of the meaning and applicability of said law to the issues presented." Here, the District of Connecticut found that the prevailing party in the arbitration "neither strictly nor substantially complied" with the applicable law, which made it "readily evident" that the arbitral panel was aware of, and improperly applied, the law in making an award.

In *Schafer v. Multiband Corp.*, 2014 FED App. 0003N; 2014 U.S. App. LEXIS 288; 2014 WL 30713 (6th Cir. Jan. 6, 2014; h1.usa.gov/1mieYg5), an unpublished opinion, the Sixth Circuit reversed and remanded a Michigan district court judgment that had vacated an arbitral award for manifest disregard of the law. The court sidestepped the ongoing debate on whether manifest disregard survives the Supreme Court's 2008 decision in *Hall Street* as a basis for vacatur, adopting a narrow interpretation of manifest disregard and relying on the policy of finality in arbitration.

The dispute concerned indemnification agreements between a holding company and two directors, Bernard Schafer and Henry Block, who were trustees of both company and subsidiary employee stock ownership plans. Upon sale of the holding company, the buyer, Multiband Corporation, assumed the indemnification agreements, but later refused to indemnify the trustees for a settlement with the Department of Labor (DOL) over claims of breach of fiduciary duty. The trustees initiated arbitration; Multiband argued that under the 1974 Employment Retirement Income Act (ERISA), 29 U.S. § 1110, the indemnification agreements were void as against public policy, and the arbitrator agreed. ERISA indeed prohibits relieving a fiduciary from responsibility or liability, but contains an exception—which despite Sixth Circuit precedent and a DOL bulletin the arbitrator found inapplicable—that allows for the purchase of insurance to cover a fiduciary's potential liability or loss.

The U.S. District Court for the Eastern

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District of Michigan granted Schafer and Block's petition to vacate the arbitral award, finding that the arbitrator's decision manifestly disregarded the law and was "more than 'a mere error in interpretation or application of the law'" [*citation omitted*].

The Sixth Circuit disagreed. As a preliminary matter, the court determined that none of the four grounds for vacatur under the Federal Arbitration Act (FAA) applied. Further, while noting that the circuit had, since *Hall Street*, continued "to acknowledge 'manifest disregard' as a ground for vacatur—albeit not in a published holding," the court found it unnecessary in this case to decide whether manifest disregard "legitimately forms a basis for vacatur in the first place . . ." because there had been no manifest disregard of the law in arriving at the arbitral award.

The court did agree that the award appeared legally incorrect: legal precedent, including Sixth Circuit case law, supported the validity of the indemnification agreements. Indeed, the court noted, "we would reverse the decision if it had been made by a district court." But "[m]anifest disregard of the law is not just manifest error of the law." The scope of manifest disregard is "very narrow," and, the court added, a basis of clear legal error for vacatur would undermine the goals of the FAA, which include finality, efficient and speedy dispute resolution, and avoidance of appeals expenses. Ultimately, the court found "little evidence" of disregard. It found that the arbitrator had relied on a broad reading of ERISA, a formal reading of the statutory exception, and "on precedents that [the court could] distinguish," but this was insufficient for vacatur. Moreover, the court noted that because arbitral awards are not appealable to the court for legal error, an arbitrator is not necessarily bound by circuit precedent. The arbitrator's "colorable" reading of ERISA was enough to confirm the award.

While this decision reflects the high bar typically associated with the application of the manifest disregard ground for vacatur of an arbitration award, it skirts the issue of whether manifest disregard remains a relevant legal doctrine.

— Cynthia Galvez, CPR Legal Intern

Editor's Note: Law Offices of Kathleen M. Scanlon, PLLC, whose principal also serves as Special Counsel to CPR, represented pro hac vice the plaintiff in *Sotheby's Intl Rlty, Inc v. Relocation Group LLC et al.*

CPR News

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- **July 2** – Noah Hanft will speak at the annual meeting of the Association for Corporate Mediation in Amsterdam; corporate-mediation.nl.

CPR'S SECOND ANNUAL BRAZIL BUSINESS MEDIATION CONGRESS: RESOLVING CONFLICTS IN A MORE TRANSPARENT WORLD

On April 25, 2014, CPR in association with the Câmara de Arbitragem Empresarial (CAMARB) held Brazil's second Business Mediation Congress in Minas Gerais. Sponsored by numerous law firms and companies as diverse as Hill International, GE, GSK, Fluor, Danaher and Raizen, the event featured speakers from the corporate, law firm, academic and mediator communities. The Fundação Dom Cabral hosted the Congress and provided logistical support. The goal of the Congress was to continue to raise awareness in Brazil as to the availability and suitability of mediation as a method for resolving business disputes. Topics included an overview of how mediation is being used by organizations in Brazil, presentations on dispute boards in construction contracts and online dispute resolution, as well as an interactive session on ethical issues arising in mediation. Prof. Kazuo Watanabe gave the keynote address. Over 120 participants took part. Corporate counsel from several companies, including Arcelor-Mittal, HP and Banco Itau described their internal policies and use of mediation mechanisms for resolving disputes. Judge Andre Gomma de Azevedo and Mariana Veras of INPI described government initiatives spearheaded by the Judiciary and INPI in the IP field, while Diego Faleck described the use of mediation to help resolve recent mass disasters. A lively Panel moderated by Professor Leandro Renno discussed the use of other forms of ADR such as DRBs and deal mediation. Speakers from the Colombian Trade Ministry, Walmart E-commerce, and Google introduced the participants to ongoing projects with respect to online dispute resolution. Participants also attended an ethics workshop where several hypotheticals were debated by a diverse panel and the audience. Attendees participated enthusiastically in the Congress and a lively debate ensued as to whether mediation would supplant arbitration as a dispute resolution mechanism. The Congress closed with a panel on the use of the CPR 21st Century Corporate ADR Pledge internationally. CPR is currently planning for another training of mediators in the fall to take place in Rio de Janeiro, and plans are underway for next year's Congress in Sao Paulo.