

Neutral Selection

-- Some Guidance from a Neutral

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Choosing a Neutral

- ❖ The most crucial element of any ADR process.
- ❖ The most important decision a party will make.

Primary advantage of ADR: parties have complete autonomy in who they select as the neutral.

But, an ADR process is only as good as the neutral conducting it.

“The quality of an arbitration is directly governed by the quality of the arbitrators.”

Arthur Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 190 (3rd ed.1999), and Julian D. M. Lew, Loukas A. Mistelis and Stefan M. Kroll, *Comparative International Commercial Arbitration* 223 (2003)

However, there is no “one size fits all” approach for neutral selection.

[Rothman 2004 re: arbitrator selection]

Two basic tasks

a) How do you learn of neutrals?

-- basically, how do you – the final decision-makers (either in-house counsel or a client executive with authority over legal matters) who will hire neutrals, get to know who we are?

b) Once you have a list of neutrals, then what do you do with it?

--How do you pick the most suitable person(s) for the job?

Learning of Neutrals

Basically the neutral's problem -- classic marketing

-- HOW DO WE GET WORD OUT TO OUR TARGET AUDIENCE?

A) Institutions (e.g. AAA/ICDR, JAMS, WIPO, CPR, LCIA)

- ❖ Appointing authorities maintain lists of qualified neutrals, often quite difficult to become listed as institutions maintain very high standards for entry and are also dictated by market demand
 - Institutions use selection procedures, often committees/personnel (in-house, outside or both)

B) Neutrals

- ❖ Traditional reputational approach: typically built up on a case-by-case basis as counsel appear before or have experience with particular neutrals
 - Word of mouth discussions amongst professionals
 - Personal referrals among counsel; large law firms often maintain lists of preferred neutrals; judges may recommend neutrals
- ❖ Neutrals also publish, attend conferences, teach; reporting in mass and legal media; etc.
- ❖ Professional organizations and Institutions often list their neutrals on their websites (access may be restricted to members)
- ❖ Law firm/neutral websites
- ❖ Web sites devoted to marketing neutrals -- legitimate sites are very selective, as to neutral's experience and reputation, in who they list (e.g. NADN – Nat'l Assoc of Distinguished Neutrals, IMI); but there are fraudulent marketing web sites that are merely “pay to list” sites which are absolutely useless
- ❖ Advertisements by neutrals and/or their firms in legal newspapers

Selecting a Neutral

Goal: Identify several candidates and rank them. Select them in rank order. If possible, select more than one to yield alternates.

Match the neutrals to the specifics of the dispute.

- ❖ **Disputes are widely different; neutrals are widely different in terms of experience, expertise, background, temperament, med/arb philosophy, etc.**
- ❖ **There is no “one neutral fits all”.**

The approach: Carefully think about, formulate and then follow an appropriate process of selecting a neutral that takes into account the primary characteristics of the dispute. Avoid selecting anyone without adequate forethought. If the results are not what you want, modify the process accordingly and iterate it.

Neutral Qualifications

- ❖ Decide if you want a neutral to have any substantive/legal expertise in the field of the dispute
 - if you are advocating a position contrary to common wisdom in the area or prefer to have someone with no preconceived notions whatsoever based on prior experience, you might want someone who has no knowledge of the field/ technology in question
 - allows both parties an opportunity to teach the neutral
 - alternatively, if your position comports with common wisdom and you want that person to credibly cut through misconceptions put forth by the other side, then expert in the field may make sense
- ❖ ADR clause may specify necessary qualifications (e.g., experience, expertise, training, education, nationality, language); but qualifications may be too narrowly drawn
 - if qualifications are too narrowly drawn, then, in practice, no neutral will qualify or will be very hard to find
 - ADR clauses are usually prepared by transaction attorneys/contract negotiators who have no ADR/litigation experience; they often choose standard corporate boilerplate clauses with little/no forethought about what would result in a specific matter, hence adverse unintended results can occur; attention should be paid to drafting proper clause during contract negotiation
- ❖ If qualifications (expertise, background) were not stated in ADR clause but substantive experience is necessary, then what qualifications do you require
- ❖ For cases filed with an institution, ask the case manager to screen potential candidate neutrals (through keyword searches on Institution's neutral database based on customer needs, sometimes followed with additional screening through specialized queries posed directly by the case manager to those neutrals) [AAA-Enhanced Neutral Selection Process]

See also [Moore 2013; Seppala 2008]

Perform Due Diligence, Compare Results

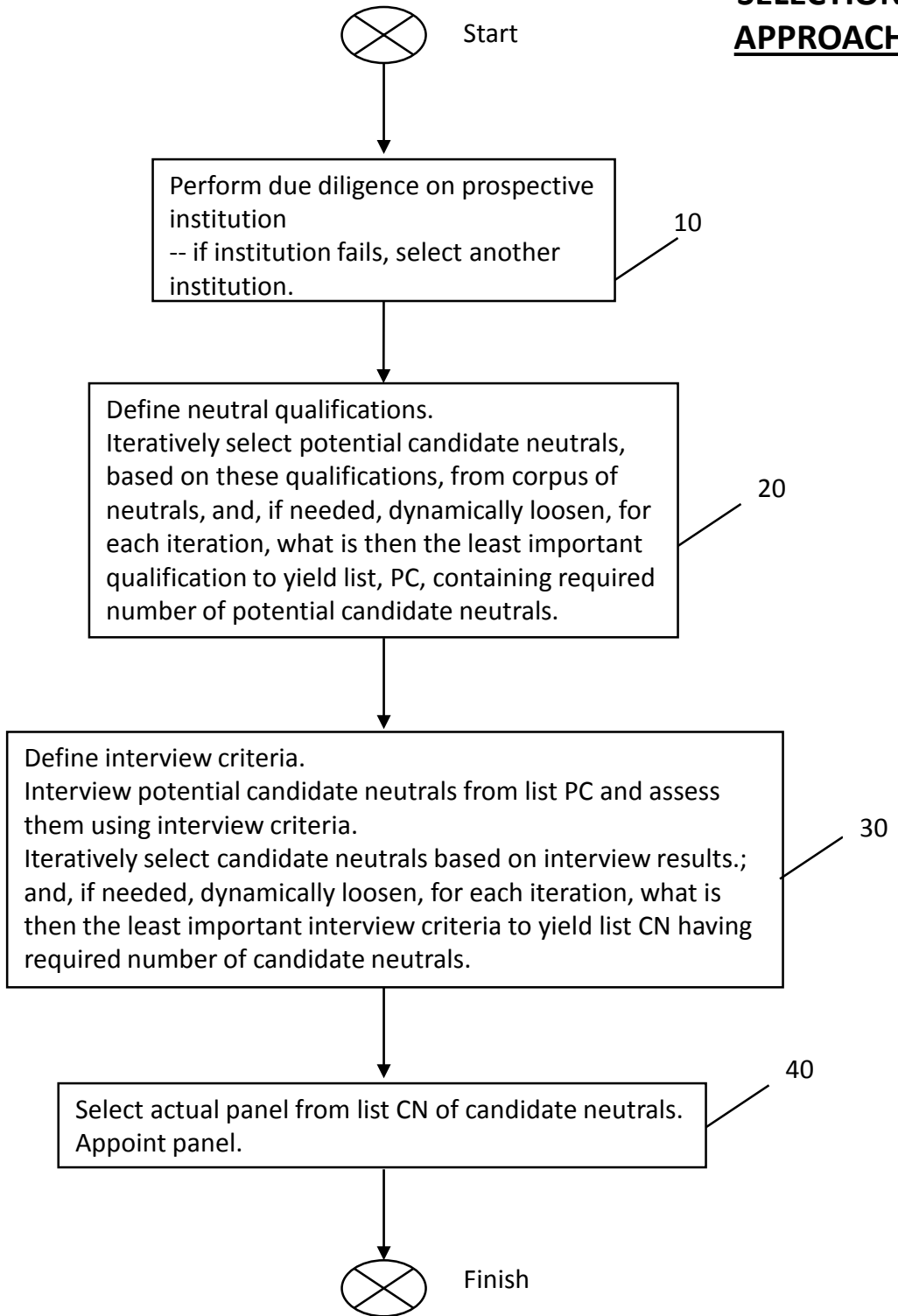
- ❖ Perform due diligence on candidates (web searches, caution: some info on web can be false; firm/neutral web sites; directories, e.g., M-H, Juris, IMI (mediators only), NADN)
 - If you don't have info on whether the neutral has the qualifications, request that info from the referring source, or ask the referring source to contact the neutral to get the info
 - No numeric ratings exist of neutrals (lack of reliable ratings and whether/how to provide them are currently the subject of much controversial debate in the ADR field)
 - Directories and the like are often self-serving regarding statements in CVs/Bios
 - Find out if neutrals have any prior writings of interest, previously taken any position on issues in dispute
 - Ask colleagues at other firms for their thoughts on candidates
 - Ask neutrals for conflicts: substantive, relationship, time (availability), financial interests in outcome; affinities with parties, witnesses, counsel or other arbitrators on tribunal or the institution itself
 - There is a marked tendency among arbitrators, especially those who are busy, to take on too many cases creating extended schedule conflicts when arranging lengthy hearings, thus, in turn, causing unnecessary delays
 - ICC now asks for an arbitrator's current caseload on a Statement of Acceptance form to ensure that an arbitrator has adequate time to handle the matter before confirming his/her appointment. Whether this technique really works or not is another question.

- ❖ If considering an ADR institution that is not well-known or with which you have no experience, undertake due diligence on the institution as to quality and selection of its neutrals, how neutrals are compensated, any relationships that may cause inherent biases or conflicts of interest with disputants of one side or another, industry reputation, governing ethics rules, organizational longevity, members, how organization is supported (filing fees, member contributions, etc), etc. [Mazadoorian 09-1996]

- ❖ Make “initial cut” -- eliminate clearly unqualified candidates on qualifications, conflicts and availability
- ❖ What type of demeanor/temperament/perspective do you want: experienced practicing attorney, ex-judge (commands more authority but exhibits dictatorial conduct, and has far less subject matter or industry expertise); arbitrator who remains closely “involved” throughout proceeding and exercises proper “muscular” control throughout so proceeding doesn’t explode (go ballistic) or follow a tangential path, and can reset it back on proper track when and if necessary; sensitive to cost v autonomy issues; someone able to make hard decisions and not just “GAGA” (go along, get along) person
- ❖ Possible psychological screening to identify incompatibilities [Michaelson 2010]
 - Usually only done on substantial matters (large amount at stake, multiple hearing sessions, etc)
- ❖ Lesser importance today: neutral v. party-appointed arbitrators (current default is that all arbitrators are neutral; some industry specific panels, e.g. maritime or re-insurance, still use party-appt arbitrators (e.g., AAA Canon 10 arbitrators))
- ❖ Interview candidates (telephonic or in person)
 - Ex parte: general nature of case, suitability to hear case, availability, conflicts, language proficiency (if applicable), references, discussions concerning party’s preference for chair if panel selected
 - Better to deal with these aspects through case manager and avoid any ex parte contact
 - Inter partes: Only a very limited inquiry is permissible (Stds of Ethics exist) and not touching merits of case [CIArb Guidelines 2006; Dundas 2009; Bishop 1998], e.g., anything that is allowed ex parte, also what is panelist’s preferred practice on awards if given discretion (fully reasoned, abbreviated reasoning, bald; provide draft award to parties for review, etc.), what is panelist’s view of attaining cost-effectiveness and efficiency, and similar
- ❖ Don’t merely acquiesce in adversary’s selection of neutral – particularly if sole panelist (or mediator)
 - Be pro-active, make your preferences known and stand steadfastly for them if need be [Kichaven 2007]
- ❖ Where institution is involved and a sole neutral is being appointed, “strike” procedure often used
- ❖ For mediation, try to identify underlying driving causes of dispute (e.g. relational, psychological, substantive) and appropriate skill set to deal with those causes and choose mediator with those skills [Young 2012]
- ❖ Compare remaining candidate neutrals, rank order them in terms of preference, and select top ranked persons [Donahey 2011, and for various 3-person panel/sole arbitrator selection procedures]
- ❖ Trust your instincts
- ❖ If you don’t get useful results, modify the requirements and/or steps, and repeat the process as needed

FIG. 1

**NEUTRAL
SELECTION
APPROACH**



**POTENTIAL
CANDIDATE
NEUTRAL
SELECTION**
20

FIG. 2

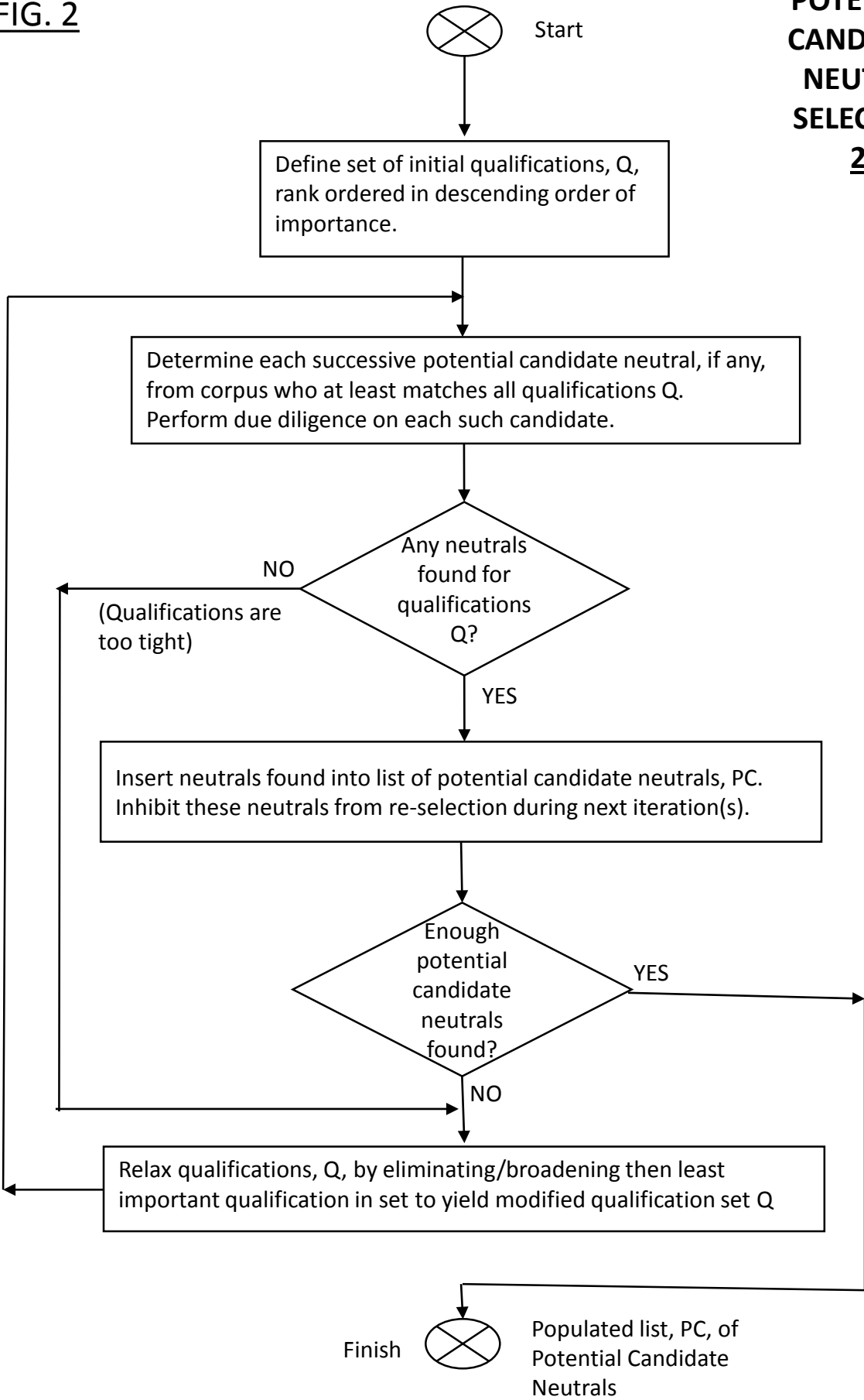
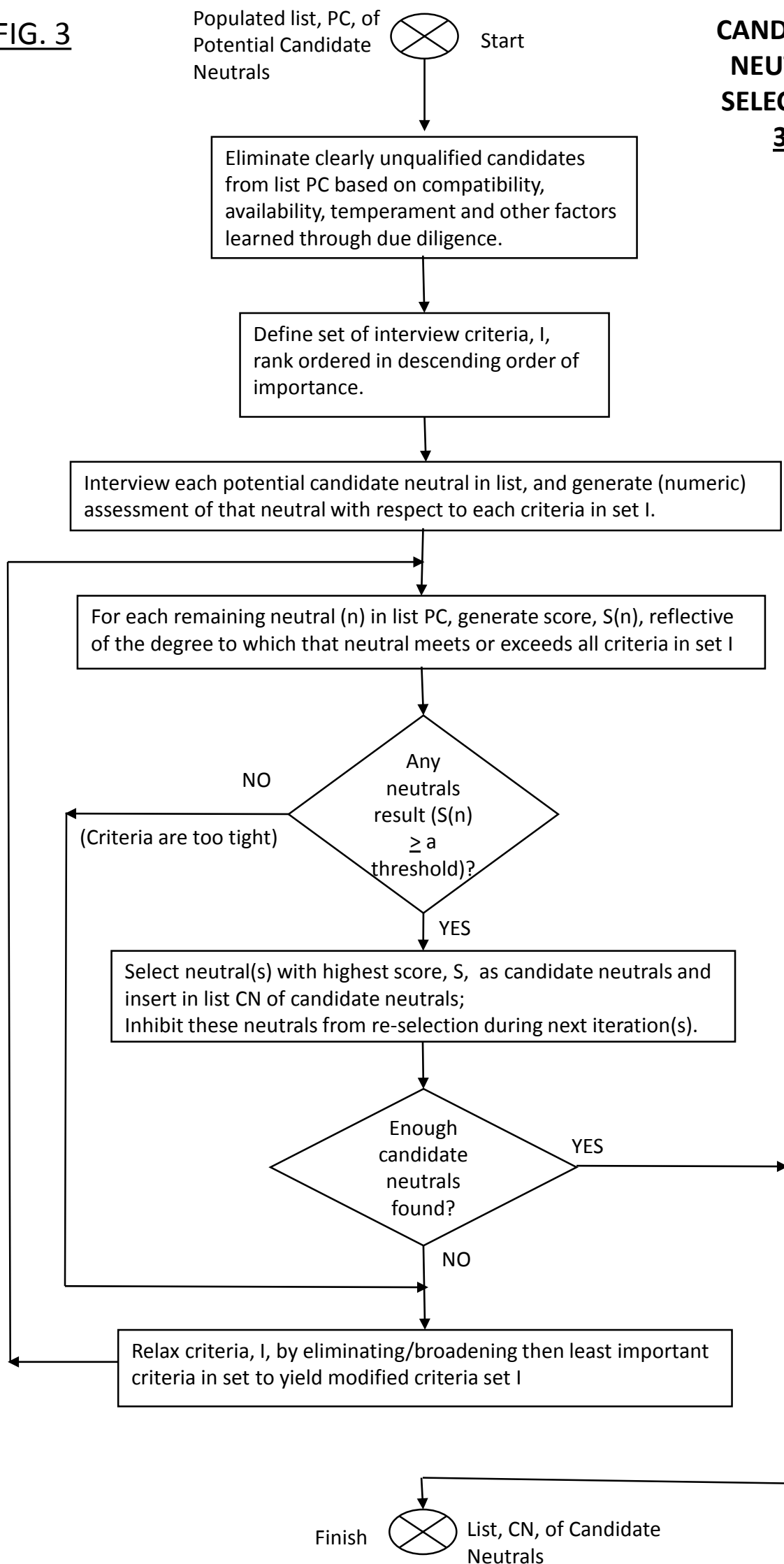


FIG. 3

**CANDIDATE
NEUTRAL
SELECTION**
30



Illustrative CPR Pharma patent arb – panel selection process

1. Within 25 days after receipt of a party's request to appoint an arbitration panel -- CPR provides list of 25 members of its panel of distinguished neutrals who are not conflicted and are available to serve.
2. Within 10 days after receipt of list – each party selects 15 out of 25 candidates and rank orders them. 15 candidates, from both lists, with highest combined ranking are finalists.
3. Within 2 months after receipt of 15 finalists – parties shall jointly conduct interviews of the finalists.
4. Within 10 days after completing interviews, each party shall rank the finalists. Three candidates with highest combined rank from both parties will constitute the arbitration panel. (Panel will select its own chair).

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