

RESOLUTION ALLEY

In Search of the Fair and Impartial Neutral

By Theodore K. Cheng

Resolution Alley is a column about the use of alternative dispute resolution in the entertainment, arts, sports, and other related industries.

The last *Resolution Alley* column told the story of how George Takei intervened to help prevent the public auction of valuable artifacts from World War II Japanese-American internees.¹ It engendered a number of wonderful and warm reactions regarding Takei's role in securing a home for those artifacts at the Japanese American National Museum (JANM) in Los Angeles. Most relevant for this column, some of those comments addressed the issue of whether Takei was truly acting in the capacity of a fair and impartial mediator. For example, one reader noted that Takei's actions were more akin to being an "outstanding advocate and negotiator." Another reader viewed Takei as "being meaningfully invested in the dispute himself" and, thus, was "a thoughtful and empowered representative of one of the constituent groups who was able to negotiate an effective resolution."

These insightful comments raise a salient point about how ADR processes are designed and implemented, namely, that the mediator (or arbitrator, as the case may be) is presumed to be neutral in outlook, and having no personal, financial, or other stake in the outcome. The American Heritage® Dictionary of the English Language defines being "neutral" as "[n]ot aligned with, supporting, or favoring either side, in a war, dispute, or contest"; as a noun, it defines it as "[o]ne who take no side in a controversy."² Under these definitions, was Takei truly "neutral"? That is, was he acting in the classic role of a neutral in an ADR proceeding, or was he, at least in part, an interested party who ended up being able to successfully broker a deal?

It is possible to view Takei's conduct here as a little ambiguous. He appeared to have no personal stake in the outcome, in the sense that the press reports do not mention that any of his or his family's artifacts were on the auction block. At the same time, because he and his family had spent time in the internment camps, he must have been influenced by his own life experiences.³ Moreover, he served on the board of the JANM, which ultimately took possession of the artifacts. Thus, perhaps he had more of a personal interest in the dispute itself than the archetypal mediator. Could Takei's actions be analogized to how George Mitchell successfully brokered the Northern Ireland peace process, a dispute in which the U.S. was arguably invested? That accomplishment has often been referred to as a "mediation."⁴ Or perhaps Takei was engaged in "facilitation," a separate kind of dispute resolution process, in which a third party helps others work together more successfully, identify and minimize problems, and increase effectiveness, usually

before a concrete conflict arises, but also to help parties prepare to negotiate or mediate.⁵ For the purposes of the lessons imparted by that story, Takei was cast as a "neutral," reflecting the *Sacramento Bee's* characterization of him as an "intermediary," as well as CNN's description of what he did as a "mediation."⁶

With respect to arbitration, as discussed in a recent article by Robert E. Wallace, Jr. in *Law360*, the ability of the commissioners of Major League Baseball (MLB), the National Basketball Association (NBA), the National Football League (NFL), and the National Hockey League (NHL) to serve as arbitrators over disciplinary matters relating to the players also raises questions regarding the concept of neutrality and the rendering of fair and impartial decisions in professional sports.⁷ As the author relates, all of the leagues employ outside, third-party arbitrators to handle disputes. These arbitrators are typically attorneys who are jointly agreed upon by the players' associations and their respective leagues. However, under the collective bargaining agreements governing the players, each commissioner generally retains broad discretion to designate him or herself as the arbitrator to hear, for example, the players' disciplinary and personal conduct matters. As the commissioners are hired and employed by the team owners, they could arguably be predisposed to rule in the interests of the owners and against the interests of the players (or other employees who have contractually agreed to let their Commissioner be the arbiter of certain disputes). The author goes on to relate that "[t]he NFL system has come under the most severe criticism because of the perception that [Commissioner Roger] Goodell acts as judge and jury on personal conduct matters, and, until recently, on drug cases. They also charge that he is responsible for hearing any appeal from the discipline he issues."⁸

The most recent example concerned Goodell's service as an arbitrator over Tom Brady's suspension relating to the "Deflategate" controversy, which involved alleged tampering with footballs by the New England Patriots during the AFC Championship Game this past January. An independent investigation had concluded that "it is more probable than not that Brady was at least generally aware of the inappropriate activities of [certain New England Patriots personnel who participated in rules violations] involving the release of air from Patriots game balls."⁹ Thereafter, in May 2015, NFL Executive Vice President Troy Vincent sent a letter to Brady, stating:

The Commissioner has authorized me to inform you of the discipline that, pursu-

ant to his authority under Article 46 of the CBA [Collective Bargaining Agreement], has been imposed on you for your role in the use of under-inflated footballs by the Patriots in this year's AFC Championship Game.... [P]ursuant to the authority of the Commissioner under Article 46 of the Collective Bargaining Agreement and [the] NFL Player Contract, you are suspended without pay for the your club's first four games of the 2015 regular season.¹⁰

A mere three days later, Brady, through the NFL Players Association, appealed the suspension. Goodell then designated himself as the arbitrator to hear Brady's appeal pursuant to CBA Article 46 § 2(a), which provides that "the Commissioner may serve as hearing officer in any appeal under Section 1(a) of this Article at his discretion."¹¹ Thereafter, he rendered several decisions, including ruling on a motion for recusal and several discovery motions, and ultimately held a hearing, after which he upheld the four-game suspension in a written award on July 28, 2015.¹² Ruling on the parties' cross-motions to confirm and vacate the award, on September 3, 2015, a Manhattan federal court vacated the award, thereby vacating the suspension.¹³

Judicial scrutiny over arbitration awards is severely limited,¹⁴ and the court's reasoning for its decision rested on what it perceived as three specific legal deficiencies: (a) inadequate notice to Brady of both his potential discipline and his alleged misconduct; (b) denial of the opportunity for Brady to examine one of the two lead investigators; and (c) denial of equal access to the investigative files. Brady had also argued (as he had similarly maintained on his unsuccessful recusal motion) that Goodell was "evidently partial"—one of the statutory grounds for vacatur of an arbitration award under the Federal Arbitration Act (FAA). Specifically, he contended, among other things, that Goodell had improperly delegated to Vincent his exclusive authority to discipline players for conduct detrimental to the NFL, and that, before serving as the arbitrator, Goodell had publicly lauded the reliability of the investigative report, which according to Brady had locked Goodell into supporting that report and rendering him incapable of reaching a contrary conclusion in the arbitration, as doing so would undermine Goodell's own competency as the commissioner. However, the court chose not to address these arguments in view of its determination to vacate the award on other grounds.¹⁵

In the absence of a review of the underlying collective bargaining agreement at issue, and without at least some empirical data on the outcomes of NFL player arbitration proceedings when the commissioner sits as the arbitrator, it is difficult to reach any definitive conclusions.¹⁶ However, two things seem clear:

First, maintaining the neutrality of the third-parties who conduct the proceedings should be a goal in design-

ing and implementing any ADR process, because it is one of the core foundations for having an outside individual fairly and impartially assist in resolving disputes. Such an arbitrator or mediator is an integral and presumed component of the classic understandings of those particular processes.¹⁷ In a mediation, the mediator is a disinterested third party who facilitates communication amongst the parties to assist them in arriving at a mutually consensual resolution. Even though no decision maker makes a determination on the merits of the dispute, in order to be effective, the mediator needs to be fair and impartial so that he or she can give as unbiased a perspective as possible on the dispute to help the parties satisfy their best interests while uncovering areas of mutual gain. The mediator's neutrality also helps encourage honest, candid, and confidential communications between the mediator and the parties. In short, the mediator is the "honest broker" who is "neutral" in the dictionary sense of the word. In an arbitration, the neutrality of the arbitrator should be even more paramount because, like judges in the court systems, he or she is being asked to determine the merits of the dispute, usually in a final and binding manner. Indeed, the arbitrator needs to demonstrate his or her ability to be fair and impartial, otherwise, under the FAA (and other state arbitration statutes), the award can be vacated for, among other things, a showing of evident partiality.

Second, and relatedly, arbitrators and other neutrals should act at all times in a manner that promotes confidence in the integrity of the proceedings. Impartiality of the neutrals who conduct these proceedings can easily be compromised simply by the appearance of impropriety. Recognizing this danger, the Code of Ethics for Arbitrators in Commercial Disputes and the Model Standards of Conduct for Mediators, for example, contain admonitions on this very subject.¹⁸ Notwithstanding these conduct rules, the perception of neutrality will always be an issue, especially in arbitrations where "there is a winner or loser and the arbitrator can be replaced if one of the parties does not like his [or her] decision."¹⁹

Of course, much more can be said about neutrality in ADR, both in professional sports leagues and in other contexts, and how neutrals, like all human beings, can be affected by a host of different factors—conscious or unconscious—that can influence or alter their perspectives on being "neutral." Perhaps all that can be expected is that they be honest with themselves about whether they have made full and accurate disclosures to the parties regarding their interests, if any, in the individuals and the disputes before them and are truly in a position to conduct themselves in a fair and impartial manner.

As for Takei, he may not have been acting strictly as a mediator under the classic view of that dispute resolution mechanism. However, there is no question that he played a quintessential role in achieving a satisfying resolution for all concerned, and any actual or perceived conflict of interest or bias appears to have not been an issue. As

some readers noted, he “was the ideal individual to be involved in this matter to deliver such a positive result,” and that “[g]iven his status and eloquence and activism I imagine that Takei was more effective because he was not neutral but was a strong voice for a community that was otherwise being ignored.” Labels and categories aside, a job well done is a job well done.

However, the same probably cannot be said for Goodell. A system that is designed in such a manner as to permit the person who meted out the original discipline to then serve as the arbiter on an appeal of that decision naturally calls into question the neutrality of that individual.²⁰ Moreover, although presumably the product of an arm’s-length negotiation memorialized in a collective bargaining agreement, the system perpetuates the appearance of impropriety by allowing the individual to serve as the arbiter “at his discretion.” These foregoing aspects of the NFL arbitration system cast doubt on the fair and impartial nature of the decisions that are issued, especially when the Commissioner sits as the arbitrator. As for Goodell, he has consistently rejected all calls and demands to step aside as the arbitrator in personal conduct matters.²¹ That decision will be the source of constant criticism and debate on the issue of neutrality.

Endnotes

1. See Theodore K. Cheng, “Auction, Artifacts, and George Takei: How ADR Helped Preserve a Part of Japanese-American History,” N.Y. State Bar Assoc. Entm’t & Sports L., Vol. 26, No. 2 (Summer 2015), at 56.
2. See The American Heritage® Dictionary of the English Language (5th ed. 2015), available at <https://www.ahdictionary.com/word/search.html?q=neutral>.
3. Indeed, a new musical entitled “Allegiance” opened on Broadway this October inspired by Takei’s own experience in the internment camps. See generally <http://allegiancemusical.com/>.
4. See, e.g., Geoffrey Corry, “George Mitchell: Role Model for Mediation,” Mediate.com Blog, available at <http://www.mediate.com/articles/corry.cfm>.
5. See, e.g., Janice M. Fleischer & Zena D. Zumeta, “Preventing Conflict through Facilitation,” Mediate.com Blog (December 1999), available at <http://www.mediate.com/articles/zenandfle.cfm>.
6. See *supra* n.1 at 57 & nn.7-8.
7. Robert E. Wallace, Jr., “Neutral Arbitrators in Sports: What Makes it Fair?,” *Law360* (July 23, 2015), available at <http://www.law360.com/articles/680682/neutral-arbitrators-in-sports-what-makes-it-fair>.
8. *Id.*
9. *Nat’l Football League Mgmt Council v. Nat’l Football League Players Ass’n*, Nos. 15 Civ. 5916 (RMB) (JCF), 15 Civ. 5982 (RMB) (JCF), slip op. at 5 (S.D.N.Y. Sept. 3, 2015), available at <http://www.nytimes.com/interactive/2015/09/03/sports/football/document-judge-dismisses-tom-bradys-four-game-suspension.html>. (An amended decision was issued later that same day, which appears to have only corrected some typographical errors.).
10. *Id.* at 9-10.
11. *Id.* at 10-11.
12. See *id.* at 11-18.
13. See *id.* at 18-40. Mere hours after the decision was entered, the National Football League Management Council filed a notice of appeal to the Second Circuit.

14. For example, under the Federal Arbitration Act (FAA), a court may generally vacate an award only under the four grounds set forth in 9 U.S.C. § 10. See also Theodore K. Cheng, “Developments on Judicial Review Under the FAA After *Hall Street*,” ABA Alternative Dispute Resolution, Vol. 19, No. 2 (July 30, 2015) (discussing whether *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008), left open the question of whether parties could increase the level of judicial review or, alternatively, limit the scope of judicial review or even waive or eliminate it altogether), available at <http://apps.americanbar.org/litigation/committees/adr/articles/summer2015-0715-developments-judicial-review-under-faa-hall-st.html>.
15. See *Nat’l Football League Mgmt Council*, *supra* n.9, at 38-39.
16. Lawyers representing team employees also recently challenged Goodell’s power to decide disputes involving the interest of a team and a non-player. See generally *Hewitt v. Kerr*, No. SC 93846, slip. op. (Mo. Supr. April 28, 2015) (*en banc*) (holding, in a plurality opinion, that Goodell, as the sole arbitrator with unfettered discretion and as an employee of the team owners, was not sufficiently neutral to protect Hewitt’s right to have a fair hearing and directing the trial court to issue a new order compelling arbitration with a neutral arbitrator, not Goodell), available at <http://www.courts.mo.gov/file.jsp?id=86195>. See *supra* n.7 for discussion of the decision.
17. See, e.g., Theodore K. Cheng, “Using Alternative Dispute Resolution to Address Your Entertainment Disputes,” NYSBA EASL Journal, Vol. 26, No. 1 (Spring 2015), at 17-18.
18. See Canon I.C., Code of Ethics for Arbitrators in Commercial Disputes (2004) (“After accepting appointment and while serving as an arbitrator, a person should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality.”), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/commercial_disputes.authcheckdam.pdf; Standard II.B., Model Standards of Conduct for Mediators (2005) (“A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.”), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf. See also Canon 2, Code of Conduct for United States Judges (“A Judge Should Avoid Impropriety and the Appearance of Impropriety in all Activities”) (2014), available at <http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges>.
19. See *supra* n.7.
20. Even outside, third-party “neutrals” are under some influence or pressure because “an arbitrator who is hired by both sides but can be fired by either side,” see *id.*, or at least not hired again (presumably by the losing or less favorably treated party) for a future matter.
21. See, e.g., Darin Gantt, “Roger Goodell officially tells NFLPA he will not recuse himself,” NBCSports.com (June 2, 2015), available at <http://profootballtalk.nbcsports.com/2015/06/02/roger-goodell-officially-tells-nflpa-he-will-not-recuse-himself/>.

Theodore K. Cheng is a partner at the international law firm of Fox Horan & Camerini LLP where he practices in commercial litigation, intellectual property, and alternative dispute resolution. He is an arbitrator and mediator with the American Arbitration Association (AAA) and Resolute Systems, as well as on the neutral rosters of various federal and state courts. Mr. Cheng also serves on the AAA’s Board of Directors. More information is available at www.linkedin.com/in/theocheng. He can be reached at tcheng@foxlex.com.

Like what you’re reading? To regularly receive issues of the *Entertainment, Arts and Sports Law Journal*, join NYSBA’s Entertainment, Arts and Sports Law Section (attorneys and law students only).