Providing for Neutrals with Industry, Legal, and Business Expertise

by Theodore K. Cheng

Imagine that you are the human resources manager at a record label and you have just received a copy of a federal court complaint filed by a recently terminated employee who is now claiming that her firing was discriminatory. The court has also automatically referred the case to mediation. Although there are any number of potential mediators with expertise in the employment field, you wonder whether someone with knowledge of the music industry might better understand the context of the employment situation.

Or maybe you negotiate agreements for the purchase of artwork for your museum's own collection. Allegations have surfaced that your most recent acquisition from a private gallery may be a counterfeit. Your agreements with galleries always contain a standard, generic arbitration clause, but you now wonder whether having an arbitrator with knowledge, training, or expertise in art history might better understand both the background of the dispute, as well as appreciate the technical information that might be adduced at the evidentiary hearing.

Or perhaps your company licenses the logo of a professional basketball team and makes and sells various articles of clothing and other merchandising on which that logo appears. Recently, the team's in-house director of intellectual property and licensing contacted you and is upset about the quality of the apparel being made by your overseas manufacturer, which she contends is damaging the brand. She is threatening to terminate the licensing agreement, pointing to some arguable language in the agreement as a basis for doing so. You wonder whether you might suggest that the parties try mediating the dispute using someone with knowledge of sports merchandising and licensing in the apparel industry.

In each of the above scenarios, the characteristics of the person being selected as the arbitrator or mediator could make a difference in how (and sometimes whether) the dispute is resolved, how quickly a resolution is achieved, and how cost-effective the process will likely be. Because alternative dispute resolution mechanisms like arbitration and mediation are voluntary and consensual in nature, they are processes detailed in dispute resolution clauses that are (outside of the mandatory, adhesion context) customizable by the parties, in that the parties have broad flexibility to design a dispute resolution mechanism that best fits the dispute in question. One of the aspects of this customization is the ability of the parties to select neutrals who are "experts" familiar with the subject matter of the dispute, the industry or background business norms in which the dispute arises, or the legal framework governing the dispute itself. Exercising this flexibility is something often overlooked by many parties.

Arbitration is seen as having a number of significant advantages over litigation. One of these advantages is that the parties have the ability to choose their own decision maker. That decision maker can be someone who is an acknowledged expert in the subject matter of the dispute, such that an arbitration should (at least in theory) be conducted more quickly and efficiently than having it heard and decided by a randomly assigned and, most likely, generalist judge, who has no special expertise, knowledge or insight into the dispute, the relevant industry, or the business context.

A mediator who is an acknowledged expert in the industry or the business norms underlying the dispute could assist in helping the parties to furnish or uncover creative and innovative solutions. A mediator who is an acknowledged expert in the subject matter of the dispute could also add a helpful, perhaps more evaluative, perspective for the parties, oftentimes offering a different kind of reality testing – not a reality testing of the legal contentions, but the practicalities of implementing certain proposals.

Delineating the qualifications and/or credentials of the arbitrator or mediator can also lead to increased savings in both time and cost because the parties do not need to expend additional time and energy educating the neutral as much about the underlying industry, business norms, or legal framework applicable to the dispute. The parties can begin thinking about this option when they first draft and enter into a dispute resolution provision. Here is an example of an arbitration clause that requires a certain level of subject matter experience:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules before a single arbitrator. The arbitrator shall have at least 10 years of experience in intellectual property licensing matters. Judgment on any award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

Or, for employment matters in a particular industry, the clause might read something like this:

If a dispute arises out of or relates to this employment contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Employment Mediation Procedures before resorting to arbitration. The mediator shall be currently employed at either a record company or a music publisher, neither of which is affiliated with the parties to the contract. Any arbitration shall be administered by the American Arbitration Association under its Employment Arbitration Rules and Mediation Procedures before a single arbitrator, who shall also similarly be currently employed at either a record company or a music publisher, neither of which is affiliated with the parties to the contract. Judgment upon any award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

Depending upon the circumstances, some degree of expertise can matter. Why not provide for it upfront in the dispute resolution clause?

For the situation where a court has automatically

referred or mandated the dispute to be resolved, in the first instance, through one or more alternative dispute resolution mechanisms, many courts maintain rosters of individuals with varying degrees of industry, business, and legal backgrounds. Parties can choose someone from those rosters with the appropriate background for that dispute. And if the practice is for the court to assign a neutral, the rules usually permit parties to opt out of that selection and choose a replacement – someone who would be a better fit.

One cautionary note is to exercise some restraint in drafting such specificity into the clause. Being too specific can inadvertently limit the pool of arbitrators or mediators from which the parties can make their selection. For example, a clause that mandates that "the mediator shall possess a Ph.D. degree in the field of experimental plasma physics and/or quantum particle acceleration" would obviously result in few available candidates because, even if the pool of such Ph.D. degree recipients is large, the likelihood that they also possess the requisite mediation skills (or can even conduct anything approaching a mediation process) is undoubtedly low. Depending also upon the geographic area where the dispute is located, it may be difficult to find a sufficient number of neutrals within the local area who satisfy a very detailed set of qualifications. Thus, over-specifying the qualifications and/or credentials of the arbitrator or mediator may inadvertently lead to situations where very few suitable neutrals can be identified (or, in some cases, none), thereby thwarting the original intent of the parties in trying to design a more cost-effective and efficient process.

If the parties had not exercised this flexibility to insert the qualifications and/or credentials of the neutral into the dispute resolution clause before the dispute arises, all is not lost. Although the parties may disagree on the merits and preferred outcome of the dispute, it is conceivable that they will each recognize the benefits of agreeing, after the dispute has arisen, to select a neutral who has certain industry, business, or legal expertise. In matters administered by a provider such as the AAA, the CPR Institute, or Resolute Systems, the parties may be afforded an opportunity, after the case is filed, to articulate any preferences they may have for the neutral, particularly in situations where the dispute resolution clause is generic or silent as to the neutral's qualifications and/or credentials. Such an opportunity is another time when the flexibility and customization of alternative dispute resolution mechanisms can be leveraged to ensure that the neutral might have a better understanding of the industry, business norms, and/or legal framework in which the dispute has arisen and appreciate any technical information that might be adduced at the evidentiary hearing.

The ability to provide for, and ultimately select, the neutral with the right background and experience for the dispute in question is one of the hallmarks of a voluntary, consensual alternative dispute resolution process. It distinguishes arbitration and mediation, for example, from the traditional litigation model for resolving disputes and is well worth considering, not only at the moment when dispute resolution clauses are being drafted and entered into, but also when disputes actually arise.

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Theo Cheng is an independent, full-time arbitrator and mediator, focusing on commercial, intellectual property, technology, entertainment, and labor/employment disputes. He has been appointed to the rosters of the American Arbitration Association, the CPR Institute, Resolute Systems, and the Silicon Valley Arbitration & Mediation Center's List of the World's Leading Technology Neutrals. He was recently inducted into the National Academy of Distinguished Neutrals. Mr. Cheng also has over 20 years of experience as an intellectual property and commercial litigator. More information is available at www.theocheng.com, and he can be reached at tcheng@theocheng.com. *An earlier version of this article appeared in the NYSBA Entertainment, Arts and Sports Law Journal, Vol. 29, No. 3 (Fall/Winter 2018).*