Alternatives
TO THE HIGH COST OF LITIGATION
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Arbitration Rules

Preliminary Injunctions in International Proceedings: How 'Irreparable' Should the Harm Be?

BY MOHANNAD A. EL MURTADI SULEIMAN

In court proceedings, it is common for parties to apply for preliminary injunctions as an interim measure to avoid any harm that could impact their underlying claims while the court decides them. The same is true in arbitrations, whether commercial or investment.

But while there are precise requirements for granting injunctive relief in national proceedings, most arbitral institutions do not set requirements for granting temporary injunctive relief in arbitrations. This may be explained by the fact that different legal systems apply different requirements for preliminary injunctions, and arbitral institutions that want to attract parties from various jurisdictions and legal backgrounds prefer to appear flexible regarding such injunctions.

Yet some arbitration rules do provide limited guidance regarding the standards that tribunals should adopt in deciding preliminary injunctions, and those tend to relax the standard around the nature of the harm the applicant could suffer without the measures.

This article examines this practice and calls for more stringent requirements regarding the risk of harm alleged by the applicant.

The Standard

Is "irreparable harm" needed for preliminary injunctions in arbitration?

The author is counsel in the New York office of Curtis, Mallet-Prevost, Colt & Mosle and a member of the firm's International Arbitration Group. He is a member of the Libyan, New York, District of Columbia, and the U.S. Supreme Court Bars and a fellow of the Chartered Institute of Arbitrators. His article discussing interim measures in international arbitration in more detail is expected to be published soon by Columbia University in American Review of International Arbitration. See https://aria.law.columbia.edu. The views expressed in this article are the author's and do not necessarily reflect those of Curtis or its clients.

Unlike in domestic litigation, where there are precise conditions for preliminary injunctions, most arbitration rules give tribunals a wide latitude regarding the requirements for such injunctions. Nevertheless, a few rules and guidelines regarding interim measures contain some details regarding the conditions for such measures. Those tend to avoid requiring irreparable harm as a condition for an interim measure.

For instance, the Arbitration Rules of the United Nations Commission on International Trade Law allow tribunals to grant preliminary injunctions where the harm alleged by the applicant cannot "*adequately*" be repaired by an award of damages. UNCITRAL Rules (2010), Art. 26(3)(a) (available at https://bit.ly/40OSBd3); UNCITRAL Rules (2021), Art. 26(3)(a) (available at https://bit.ly/49aSgBR).

Under those rules, if the applicant can show that an award of damages could not completely repair the alleged harm, a tribunal may grant the requested injunctive relief. The same is true under the UNCITRAL Model Law on International Commercial Arbitration (referred to as the UNCITRAL Model Law below), Art. 17 (available at https://bit.ly/3OgkEuu).

The fact that the UNCITRAL Arbitration Rules do not condition interim measures on irreparable harm is also reflected in the types of interim measures contemplated under the 1976 version of those rules, which include measures

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CPR News

Next Month's 2025 Annual Meeting Features ICJ Judge Keynote and More

Registration is open and limited sponsorship slots remain for the 2025 CPR Annual Meeting, on Wednesday-Friday, Feb. 5-7, in Miami.

"Calming the Waves: Managing Conflict with ADR," the meeting's title and theme, will offer 11 panels over two-and-a-half days, as well as a welcome cocktail reception, all meals, coffee/snack breaks, multiple networking opportunities, the Annual CPR Awards Dinner, and more.

The meeting will feature a keynote speech by Judge Rosemary Barkett, who sits on the Iran-U.S. Claims Tribunal in the Hague, Netherlands. She is also a judge ad hoc on the International Court of Justice. She previously served on the Eleventh U.S. Court of Appeals and was the first woman Florida Supreme Court Chief Justice.

The annual meeting will be held at the Miami Marriott Biscayne Bay, which is offering registrants discounted room rates. Full details on registering, including early bird discount expiring Jan. 3, and room reservations are available at CPR's 2025 Annual Meeting website at https://bit.ly/3Ca8bWc.

CPR expects to provide continuing legal education credits for New York and Florida. The CPR Institute has been certified by the New York State Continuing Legal Education Board as a CLE Accredited Provider in New York. For New York admitted attorneys, this course is non-transitional and for experienced attorneys only.

In past years, the CPR Annual Meeting has been approved for 10-12 New York CLE credits in the categories of Professional Practice; Cybersecurity Ethics; Diversity, Inclusion and Elimination of Bias. At press time, categories and approvals for the 2025 CPR Annual Meeting were under consideration.

Full CLE details and hardship provisions are available at the meeting link above, under FAQs.

In addition to Judge Barkett's keynote address, the seminars are slated to address ethics, international and domestic arbitration, mediation, dispute prevention, and other topics for resolving commercial disputes effectively and efficiently. The panels will include:

- Dispute Prevention: Moving from Theory to Practice, with Joan Stearns Johnsen, of the University of Florida Levin College of Law, and Cynthia Randall of Microsoft Corp., who co-chairs the CPR Council and is the most recent recipient of CPR's Partner of the Year award.
- Crisis Management ADR: Mediating the Existential Conflict, with Eric D. Green, a member of the CPR Panel of Distinguished Neutrals and head of Resolutions LLC; Herman B. "Dutch" Leonard of the Harvard Kennedy School and Harvard Business School; William Dodero of Bayer-United States; Jana Litsey, former general counsel of Huntington Bancshares; James Smith, Deputy General Counsel, Intellectual Property, Litigation and Environmental, Ecolab; Fouad Kurdi, Resolutions LLC, and Josh Green, M.D., who is governor of Hawaii.
- The Changing Face of International Arbitration in Latin America: Practical Considerations, Opportunities and Challenges with

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Alternatives
CPR

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Theory Meets Practice

How Can You Turn Adversarial Attorneys Into Quasi-Mediators?

BY JOHN LANDE

When you are mediating, don't you just hate it when attorneys act as if they are arguing in court?

Many mediators find this extremely disturbing. The good news is that there are some things you can do to make adversarial attorneys behave more cooperatively–indeed, as "quasi-mediators" described below.

I recently conducted an educational program, "How Can You Turn Adversarial Attorneys into Quasi-Mediators?" which functioned as a focus group. The program was sponsored by the St. Louis chapter of the Association of Attorney-Mediators (AAM), a national nonprofit professional organization based in Dallas. Nine members participated on Zoom, answering a series of questions in writing and conversation. I received responses from six or seven mediators to various questions. Data from this small non-random sample can't be generalized but it is suggestive.

The mediators who participated in the program are highly experienced. They all graduated from law school at least 25 years ago and some graduated more than 45 years ago.

For two-thirds of the mediators, mediation comprises most of their practice. Two-thirds handle commercial, labor, and employment cases, and half handle tort cases. Members include a retired judge and a general counsel. Some do family law, small family business and real estate cases, transactional patent cases, and arbitration and neutral fact-finding. Two thirds had previously represented clients in mediation, though none do so now.

They all reported mediating with attorneys who behaved in a "problematically adversarial way." But when I asked, "In the mediations you have participated in during 2024 in any role, in what proportion of the mediations did one or more attorneys behave in a problematically adversarial way?" they all said that this occurred in less than 34% of their mediations, as shown in Table 1 on the following page.

I asked the same question about the proportion of attorneys who behaved in a "helpful way to advance the process." Half of the mediators said that attorneys were helpful in *less than one third* of their cases, and half of the mediators said that attorneys were helpful in *more than two thirds* of their cases, as shown in Table 1. The different experiences presumably reflect differences in the mediators' practice systems as described below.

The author, a longtime *Alternatives* contributor, contributes this regular column, "Theory Meets Practice." He is Isidor Loeb Professor Emeritus at the University of Missouri School of Law's Center for the Study of Dispute Resolution in Columbia, Mo. Last year, he received the American Bar Association Section on Dispute Resolution's Award for Outstanding Scholarly Work. See https://bit.ly/3Tq5YuK. His biography page can be found at https://lande.missouri.edu. Thanks to Jen Shack and Laurel Stevenson for comments on an earlier draft.

Attorneys as Quasi-Mediators

Many attorneys probably act as quasi-mediators, though the term is used only rarely in practice and the academic literature.

Quasi-mediators are affiliated with one side in a conflict but act to promote agreements that would be in the interests of their side and that are mutually acceptable. They generally do so in every case, not only mediations. They use mediation techniques, but they aren't neutral or subject to rules governing mediators.

Attorneys acting as quasi-mediators help their clients realistically understand the other side's perspectives. The attorneys also promote their clients' interests by enlisting the mediators' help and encouraging the other side to adjust its positions.

Attorneys who sometimes act as quasi-mediators tailor their techniques to their clients' preferences and the other side's approach. If the other side is acting badly and taking unreasonable positions, these attorneys vigorously advocate their clients' interests. But whenever appropriate, they look for opportunities to reach reasonable agreements, and they use mediation techniques to move the process in that direction.

Being a quasi-mediator is the default mode for some attorneys in all their cases. The sidebar lists dos and don'ts for attorneys acting as quasi-mediators.

Another term for quasi-mediators is "good lawyers." John Lande, "Good Pretrial Lawyering: Planning to Get to Yes Sooner, Cheaper, and Better, 16 *Cardozo J. of Conflict Resolution* 63 (2014) (available at https://bit.ly/4g4z9gA).

Mediators' Experiences With Quasi-Mediators

In the AAM program, I asked mediators to describe cooperative behaviors by attorneys in their mediations. (I used the term "cooperative" because mediators are familiar with it, unlike "quasi-mediator.") Mediators said that these attorneys work hard to develop a realistic view of their cases. They consider the other side's perspective. They speak honestly about the strengths of the other side's case and are willing to privately discuss the risks in their clients' cases. They act as counselors to their clients, not only as advocates.

The AAM mediators said that some of these attorneys behave cooperatively because of their personalities. Typically, they believe that it is in their clients' interests to settle their cases, often because clients have expressed interest in doing so. And they

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may have a cooperative relationship with the other attorney.

Mediators' Experiences with Adversarial Attorneys

AAM mediators said that some attorneys have a hard time shifting from the adversarial approach they use in court. They behave this way because it's their default behavior–they treat everyone as an adversary. They are accustomed to fighting and they are not well equipped to seek resolution. They take unreasonable advocacy positions and encourage their clients to do so as well, failing to advise their clients about problems in their cases.

Several mediators said that sometimes the problem is that the attorneys dislike each other, and their animosity prevents cases from settling. Some attorneys make accusations that the other side is lying or acting in bad faith. Sometimes they have a hard time assessing the weaknesses in their cases or may simply be unprepared.

Sometimes attorneys act uncooperatively to demonstrate to their clients that they are vigorously advocating for them. When defendants have insurance, sometimes this inhibits cooperation.

Fostering Cooperation

There are mediation techniques to stimulate attorneys to be more cooperative:

Private Conversations with Attorneys. The AAM mediators generally said that they try to stimulate attorneys to be more cooperative by building a relationship with them, talking with them privately before and/or during mediation sessions. Some attorneys don't have much experience representing clients in mediation, so mediators sometimes coach them about how to represent their clients well in mediation.

One mediator said that she is pretty direct in her private conversations with attorneys. She would ask them to tell her what's going on because she knows that they want to settle the case but they are just "spinning their wheels." Another mediator tells attorneys that their anger may be counterproductive.

Some mediators said that it can be tricky to talk with attorneys privately because their clients may feel excluded from what seem like "secret" conversations. One mediator said that in his initial comments during mediation sessions, he alerts parties that he may talk with attorneys privately. He tells them that it's easier to discuss some issues with just the attorneys. He explains to clients that he's trying to speed up the process, which clients always appreciate. So that "takes some of the sting out of being excluded."

He said that the word "quicker" seems to have universal appeal. He tells clients that their attorneys will explain what they discussed privately and that he would be happy to answer any questions. When he has a good rapport with the clients, they generally understand. This can be challenging when corporate representatives are in-house counsel who may resent being excluded because they are attorneys.

Another mediator said that she leaves attorney-client teams to talk privately at times, and she asks the attorneys to get her when they are ready to talk with her. When the attorneys get her, she closes the door in her room and talks with them privately.

Mediators also said that sometimes it is helpful to talk with both attorneys without their clients.

Discussing Weaknesses of Legal Cases. Several mediators find it helpful to discuss the weaknesses of the parties' legal cases. In caucus, after validating strengths in the attorneys' cases, they may ask what the attorneys see as their risks. What could happen to make the case "go sideways"? How might a group of jurors see things differently? Mediators may begin this approach before mediation sessions and continue these conversations as they learn more during mediation sessions.

Focusing on Clients' Interests. Some mediators said that they focus on clients' interests, not just their positions. They encourage attorneys to focus on their role as counselor and not just as an advocate. Mediators may ask whether "chest pounding" is really benefitting their clients.

Unsuccessful Techniques. I asked mediators what techniques they tried to

Table 1. Behavior of Attorneys in Mediations

Proportion of Mediations	Attorney Was Adversarial	Attorney Was Helpful
0%	0%	17%
1-33%	100%	33%
34-66%	0%	0%
67-99%	0%	50%
100%	0%	0%

Table 2. Mediation Practice Systems

Stages	Attorneys	Parties	Mediators
Case Evaluation and Client Counseling	Learn facts and evaluate case	Arrive stressed, worried, confused, angry, etc.	
	Advise clients about dispute resolution options	Attorney conducts "client school" to reassure, educate, coach clients, etc.	
	Decide to mediate and retain mediator		
Preparation for Mediation Session	Coordinate with mediator's preparation for mediation session	Prepare for mediation session with attorney	Coordinate preparation for mediation session
Mediation Session	Represent client	Decision time	Mediate
Follow-up	Follow up if needed	???	Follow up if needed

make attorneys more cooperative that were unsuccessful. Their responses included ignoring problematic behavior, becoming irritated, pointing out the weaknesses in the attorneys' cases, and "all of the above" strategies.

Designing Systems To Promote Quasi-Mediation

Mediators can use Real Practice System Theory to encourage attorneys to act as quasi-mediators.

This theory holds that all practitioners have unique practice systems based on their personal histories, values, goals, motivations, knowledge, skills, and procedures as well as the parties and the cases in their practice. They develop categories of cases, parties, and behavior patterns in their cases.

They use unconscious routine procedures as well as conscious strategies. In mediation, these systems include practitioners' thoughts and actions before, during, and after mediation sessions. Practitioners' systems grow out of their experiences and evolve over time. Good practitioners regularly reflect on their experiences and improve their techniques. John Lande, "Real Practice Systems Project," *Indisputably.org* (Dec. 20, 2022) (available at https://bit.ly/3V2LudS).

Table 2 at the bottom of the preceding page provides a graphic illustration of mediation practice systems generally. Some elements may not occur in some cases, and practitioners perform the functions at different levels of effectiveness.

The pattern of AAM mediators' experiences described in Table 1 suggests that their mediation practice systems affect the frequency of attorneys' cooperation in their cases. Some mediators find that attorneys are cooperative more often than other mediators do. There are many possible explanations for these differences including the mediators' personal histories, values, goals, motivations, knowledge, skills, and procedures as well as the parties and the cases in their practices.

Based on responses during the AAM program, the following techniques may increase attorneys' level of cooperation and/or reduce adversarial reactions. The mediators' experiences highlight the importance of mediators' role as coordinating the preparation for mediation sessions, as shown in the shaded area of Table 2.

Mediators should take initiative to prepare for mediation sessions. When mediators do a good job of orchestrating mediation sessions, attorneys are more likely to be cooperative. Preparation for mediation sessions generally can produce substantial benefits in mediation processes and outcomes. See John Lande, "The Critical Importance of Pre-Session Preparation in Mediation" (Dec. 19, 2022) University of Missouri School of Law Legal Studies Research Paper No. 2022-15 (available at https://bit.ly/3V4Taf5).

Improving Involvement

The practitioners: This article examines the role of attorneys in representing mediation clients.

The perspective: How the mediators see these often-adversarial participants.

The goal: Enlist their service in settling the case more effectively by making them 'quasi-mediators'—it's about fostering cooperation in the mediation room better.

Mediators should consider using the following specific techniques during preparatory calls.

A basic goal of pre-session conversations should be to develop relationships with attorneys. When mediators and attorneys have a good relationship, they can communicate more candidly during mediation sessions about problems in the case.

Mediators should assess the relationships between the attorneys. When the attorneys have a cooperative relationship, the process is likely to go more smoothly than when they are antagonistic. John Lande, Getting Good Results for Clients by Building Good Working Relationships with "Opposing Counsel," 33 *University of La Verne L. Rev.* 107 (2011) (available at https://bit.ly/4eSvNMK). When attorneys don't get along with each other, mediators can encourage them to give top priority to their clients' interests instead of the attorneys' feelings about each other.

> Using Real Practice System Theory to promote cooperation by adversarial attorneys in mediation.

Mediators generally should ask what factual or legal issues need to be addressed before the mediation sessions so that the attorneys can have the best possible assessments of possible court outcomes during mediation sessions. Mediators also should ask about parties' interests, which are intrinsically important to clients and can help divert discussion from differences in each side's claims about expected court outcomes.

At the outset of mediation sessions, mediators should tell parties that the mediators sometimes need to talk privately with attorneys to help expedite the process.

This is not an exhaustive list of techniques to prompt attorneys to be cooperative. John Lande, "The Real Practice System Project: A Menu of Mediation Checklists," 42 *Alternatives* 53 (April 2024), includes numerous other helpful ideas. The first sidebar, on the next page, lists topics that can be especially helpful for mediators to discuss with attorneys.

Training Attorneys To Be Quasi-Mediators

Unfortunately, much legal education and practice encourages attorneys to operate using what Prof. Leonard Riskin called "lawyers' standard philosophical maps." Leonard L. Riskin, "Mediation and Lawyers," 43 Ohio State L. J. 29, 43-48 (1982) (available at https://bit.ly/3Vacw2e). These maps show only zero-sum disputes that are resolved by use of legal rules. Although some attorneys have expanded their maps to recognize ways to create value and to consider various norms for resolving disputes, too many attorneys still navigate using the

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same old map that Riskin described more than four decades ago.

Law schools should do a better job throughout the curriculum to teach students to be quasi-mediators. Mediation courses are especially appropriate places to teach students this perspective and the necessary skills.

More than 90% of mediation instruction, however, focuses on the neutrals' role, and instructors generally devote little attention to attorneys' role in mediation. This is unfortunate considering that new law school graduates are likely to represent clients in mediation much more often than they will try cases or mediate. John Lande, "Law Schools Should Substantially Increase Instruction in Mediation Representation" University of Missouri School of Law Legal Studies Research Paper No. 2024-32 (Oct. 1, 2024) (available at https://bit.ly/3CVktCt); John Lande, "Theory and Practice of Mediation Representation " University of Missouri School of Law Legal Studies Research Paper No. 2024-31 (Sept, 24, 2024) (available at https://bit.ly/4gcUmFc).

> Mediators can encourage attorneys to give top priority to their clients' interests instead of the attorneys' feelings about each other.

A major goal of mediation courses should be to teach students how to be good quasi-mediators when representing clients in mediation. John Lande, "Creating Educational Value by Teaching Law Students to be Quasi-Mediators," University of Missouri School of Law Legal Studies Research Paper No. 2024-35 (Nov. 6, 2024) (available at https://bit.ly/3V8LKat).

* * *

It's extremely frustrating when attorneys use counterproductive tactics in mediation. Although that's unavoidable at times, there are things that mediators can regularly do to prevent and deal with such behavior.

More on Fostering Cooperation

Mediators can promote cooperation by asking attorneys about the following issues during conversations before mediation sessions:

- Causes of underlying conflict.
- Client's interests, goals, and priorities.
- Possible options for settlement in addition to lump-sum payments.
- Special needs of any participant.
- Personalities and dynamics of participants.
- Expectations about how participants might act in mediation session.
- "Hot buttons" that might cause counterproductive reactions.
- Non-negotiable issues.
- Negotiable issues.
- Potential barriers to agreement.
- Actions needed before the mediation session to make mediation productive.
- How the mediator can be helpful during mediation session.

Mediators can help attorneys make realistic estimates of possible court outcomes by asking about:

- Potential factual discoveries that would be *helpful*.
- Potential factual discoveries that would be *harmful*.
- Assumptions they are *very* confident about.
- Assumptions they are *not very* confident about.
- What would change *their* assumptions about the possible court outcome.
- What might change the *other party's* assumptions about the possible court outcome.
- How they would persuade a skeptical judge or jury about arguable issues.
- Their clients' risk tolerance for unfavorable outcomes.

— John Lande

Dos and Don'ts for Attorneys Acting as Quasi-Mediators

Do

- Listen carefully and respectfully to everyone.
- Treat each client's case individually, not as a routine case like others.
- Act as a counselor to your clients as well as an advocate.
- Learn and respect your clients' interests, goals, and priorities, including intangible interests.
- Consider possible options for settlement in addition to lump-sum payments.
- Develop a good working relationship with counterpart attorneys.
- Consider the other side's perspective.
- Develop a realistic perspective of your case.
- Candidly discuss the strengths and weaknesses of your case with your client.
- Develop options and take positions to advance your clients' interests that lead to agreements acceptable to the other side whenever appropriate.
- If you mediate, talk privately with mediators before mediation sessions.

Don't

- Develop a default approach of treating everyone as an adversary.
- Give your clients unrealistically optimistic evaluations of their cases.
- Take an adversarial approach to impress your clients.
- Take unreasonable positions or encourage your clients to do so.
- Act based on negative feelings about a counterpart attorney or party.
- Make unwarranted accusations against the other side.

— John Lande

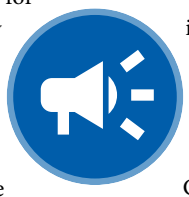
Back to School on Dispute Management

Confronting Conflict: Recognizing When the Alarm Bell Rings

BY KATE VITASEK

Contract disputes don't just happen out of the blue. But can you predict when constructive conflict may make a turn for the worse? And if you could, what would those alarm bells look like?

The good news is that this has been studied extensively by Austrian-born Dr. Friedrich Glasl. He is well known for his research and insights into how organizations can understand the evolution of conflict.



His findings? There is a predictable pattern. And when you can recognize the pattern, you can likely take preventive measures rather than fall into a common trap of getting sucked into a dispute death spiral.

Glasl—an international authority of conflict escalation—combined a unique background of political science, psychology, economics and management theory to create a model for analyzing conflict.

Glasl divided conflict escalation into nine stages spanning three phases: a win-win phase; a win-lose phase; and a lose-lose phase. Within the first phase, each party can still construct a resolution that is advantageous to both sides. But, as the conflict intensifies, and the parties begin to view one another with distrust and hostility, the possibility for mutually advantageous outcomes dims.

Finally, in the third stage the parties shift to a lose-lose mindset which results in unremitting strife, waste and cost. The full version of Glasl's conflict escalation model has only been published in German and now is in its 10th edition. Friedrich Glasl, Konfliktmanagement: Ein Handbuch für Führungskräfte, Beraterinnen und Berater (Freies Geistesleben, 10th edition, 2011). Chris Wheeler provides a good summary in English. Chris Wheeler, Conflict Escalation by Complainants, 12 *Perspektive Mediation* 118-124 (2015) (available at https://bit.ly/3ODfwkg) (lose-lose mindset).

Glasl's model illustrates how easy it is for individuals and organizations to fall into a negative cycle of tit-for-tat behavior when working through conflict.

The best way to understand how Glasl's model works is to share an example. For this article, I'll be profiling how Glasl's model works in practice through the lens of a relationship between Suburbia Town USA (Suburbia) and its Firefighters. As part of this article, I will also provide tips on how Suburbia and the Firefighters could have used dispute prevention mechanisms for more efficient and effective management of potential problems and disputes. While the names of the case study have been changed, the story itself is very real.

Once Upon a Time...

The town of Suburbia developed as a quaint suburb in the shadows of a much larger city. Suburbia had grown over the years from a sleepy suburb to an affluent and hip alternative to the nearby city.

By the mid-1970's the city's volunteer fire department was no longer keeping up with Suburbia and the city decided to shift from a volunteer department to a fully funded city department. As part of the transition, the Firefighters unionized. As Suburbia continued to grow so too did its fire department. Today, Suburbia boasts a professional fire service crew with more than 120 staff working at six fire stations.

Suburbia and the Firefighters would go through a consistent cycle of renewing their contract every three years–something that neither party looked forward to. Folks on both sides referred to the relationship as good.

When Big Chief took over as Suburbia's fire chief in 1997, he committed to building solid working relationships between Suburbia and the Firefighters. Under Big Chief's leadership, the relationship between Suburbia and the Firefighters went from good to great, with Firefighters referring to Suburbia as "a great place to live and work."

Big Chief leaned on three dispute prevention techniques which contributed to the strengthening of the relationship.

1. *Partnering:* Big Chief organized leadership retreats which were facilitated by a "Partnering" expert. Partnering has been used with a great deal of success in the construction industry to help contracting parties align on goals and learn how to collaborate. For more information on partnering, see the U.S. General Services Administration's website at https://bit.ly/3D0Jegr. Together, leaders from the city and the Firefighters would periodically review the plans for Suburbia and collaborate on how to staff and manage fire services for the city.
2. *Relational Negotiations.* The contracting cycle was historically a drain on the relationship. Big Chief has read about the concept of interest-based negotiations as a more effective way to negotiate because it allows the parties to share the interests that underlie their grievances and try to jointly negotiate a solution that satisfies all parties. For more information on interest-based negotiations, see Harvard Law School's Program on Negotiation website at https://bit.ly/3ZBlwQQ. Suburbia paid for both its own personnel and the Firefighters to

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Dispute Management

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learn the fundamentals of interest-based negotiations. While neither party looked forward to contract negotiations, Suburbia and the Firefighters found using interest-based negotiations to be a much more collaborative way to negotiate their contracts and any grievances.

3. *Relational Governance.* Big Chief sought to further increase the relationship health between Suburbia and the Firefighters by implementing relationship governance, such as regular check-in meetings with leaders of the Firefighter's union and a tiered issue management process for working through issues while they were small.

A Change of Mindset

Things started to change for Suburbia in 2009.

First, the financial crisis meant tightening budgets. In addition, Big Chief retired; the new fire chief came from out of state and did not have relationships with either Suburbia's leaders or the Firefighters. And in 2010, Suburbia hired a new City Manager who seemed to be more concerned with the business and politics of Suburbia than with building and maintaining relationships with the Firefighters.

For example, the Suburbia City Manager stopped the practice of leadership retreats due to "budget cuts." In addition, the typically amicable contract renewal process took a more adversarial tone. To make matters worse, the good working relationship between Suburbia and the Firefighters became fractured when the Firefighters issued a vote of no confidence in the fire chief, who ultimately resigned.

By 2014, Firefighters and city leaders referred to the relationship as "unstable" and "complex." The relationship began to take a turn for the worse as the parties began to work through a problem that later resulted in a formal dispute. What was once a good relationship fell into Glasl's predictable pattern of conflict escalation.

Let's go back to school and learn how Glasl's model can be applied to the relationship between Suburbia and the Firefighters.

First Level (Win–Win)

The first level of Glasl's model is where parties seek a win-win solution. This was the intent of Suburbia and the Firefighters, as the parties had used interest-based negotiations over the years to reach amicable solutions.

In April 2014, the Firefighters raised an issue with Suburbia about a potential problem by putting the item on the agenda for discussion during the parties' monthly management-labor staff meeting.

Between April 2014 and October 2014, the sides continued to discuss the problem at the monthly meetings. At this point, the parties entered Stage 2 of Glasl's model, debate. According to Glasl, when parties first enter a debate, they often do not perceive they are entering into conflict because they feel they are still actively trying to work through a solution.

After six months of discussions, team members from Suburbia and the Firefighters felt this problem should be escalated. The contract between Suburbia and the Firefighters was coming up for renewal and the parties agreed to address the problem through a formal bargaining process as part of the broader contract renewal. Both sides were optimistic because the parties had a positive history of using interest-based bargaining and had always worked through to a successful negotiation.

In November 2014, Suburbia's and the Firefighter's negotiation teams took on the task of negotiating a solution to the problem in the broader contract renewal. Unlike previous negotiations, however, the parties began to anchor on their positions.

To make matters worse, the City Manager used a negotiation team that abandoned interest-based negotiation and decided that he would not actively participate in the negotiations.

To the Firefighters, Suburbia was playing a classic "good cop, bad cop" game indicative of classical (and not interest-based) negotiations. During this time, trust levels between Suburbia and the Firefighters eroded. It was also during this time the parties transitioned into what Glasl defines as a win-lose stage.

Second Level (Win–Lose)

Glasl's model indicates that as time passes without an amicable solution, parties shift from a win-win mindset to a win-lose mindset. Each party takes actions to try to "win." During this time, parties seek sympathizers for their cause, which typically amplifies tension. Differences of opinion widen, conflict exacerbates, and relationships get damaged. Glasl's predictable pattern indeed happened between Suburbia and the Firefighters.

With slow-to-no progress, Suburbia's City Manager brought in a labor union expert as a consultant to facilitate discussions with the Firefighter's Union in July 2015. The Firefighters responded by hiring an expert adviser to help them develop a negotiation strategy. The idea to bring in outsiders was well-intentioned; however, instead of bringing the parties closer together, it further widened the trust gap between Suburbia and the Firefighters.

In October 2015, the City Manager dismissed the expert on their side because of no progress. By November 2015, the Firefighter's expert adviser suggested mediation, citing the parties distance.

Suburbia's leaders and the Firefighters dreaded mediation but felt there was no way to avoid it. Both parties further amplified their positional thinking, with each party hiring outside legal counsel to represent them in the mediation--to help them "win." The Firefighters could not afford to keep both their expert adviser and their lawyer on retainer, so they decided to retain the lawyer and dismiss the expert in January 2016.

The Escalator

An inevitable path: Conflict escalates if not properly addressed. Remediation becomes harder.

The science: It comes in nine stages spread over three phases. Don't let it get to the third stage.

The dispute prevention: Our columnist shows the relationship between minimizing conflict and the win-win mindset.

The formal mediation process began in February 2016. After nine long months, the mediator suggested both parties move to binding arbitration due to "irreconcilable differences." By this time, the Firefighters and Suburbia officials were exhausted from the distraction. In addition, the Firefighters had been working under an expired contract for almost two years and had gone without a cost of living increase due to the expired contract. Needless to say, morale was low, and emotions were running high.

In January 2017, nearly four years after the problem escalated, the parties begrudgingly settled. At this point, they felt they had "caved in" and entered Glasl's Lose-Lose stage.

Third Level (Lose-Lose)

The third level of Glasl's conflict escalation model is when the parties become so disillusioned and angry that they revert to tactics to severely damage their opponent. Lose-lose conflict is often depicted as the parties being "at war" and wanting to "win at all costs."

While at times this "war" may take the form of overt actions, at other times, retaliation may come as more subtle tactics, such as "shading." Oliver Hart and John Moore, Contracts as Reference Points, 123 Q.J.E. 1, 3-4 (2008). Note that shading is retaliatory behavior in which a party stops cooperating, ceases to be proactive, or makes aggressive countermoves because of disappointment. Shading happens when a party doesn't get the expected outcome from the deal and feels the other party is to blame for failing to act reasonably to preserve value or mitigate losses.

Some Firefighters felt that since they had "lost" in the contract settlement, they could game the system and "win" in another area. For example, Suburbia reported a record number of sick days, and there was an increase in firefighters filing for disability benefits prior to their retirement.

In addition, to "keep Suburbia fair," the Firefighters kept their lawyer on retainer to help manage grievances. Thus, what used to be potential problems the parties could easily work through have become formal grievances, some going through mediation and others only settled by arbitration.

Over the years, Glasl's predictable pattern of increased adversarial actions continued. Recall that every three years, Suburbia and the Firefighters are back at the negotiation table for a contract renewal cycle. Adversarial actions amplify with each contract renewal cycle.

For example, in 2021, the Firefighters replaced the union leadership with individuals more comfortable playing hardball with Suburbia leaders. The parties' internal struggles went public when the Firefighters shared their plight with local news channels to garner public support, claiming "staffing levels are at crisis levels" and "public safety is at risk."

> It's easy for individuals and organizations to fall into a negative cycle of tit-for-tat behavior when working through conflict.

Once again, painful and protected negotiations took over two years and were only settled right before an arbitrator got involved. Sadly, neither party was trying to find a better way.

Lessons Learned

The Suburbia and Firefighters case study provides several lessons relevant to dispute prevention.

First, it illustrates how easy it is for parties in a contractual relationship to fall into the predictable pattern of escalating and adversarial actions Glasl outlined. Most organizations–like Suburbia and the Firefighters–start with good intentions. But without using dispute prevention mechanisms, one or both parties often turn to a protectionist mindset when they feel frustrated or perceive they have been treated unfairly.

The second lesson is that conflict can be costly and time-consuming. Once easily resolved problems became formal grievances which go through mediation and arbitration. Suburbia Firefighters incur hard costs associated with expert advisers (on each side) and outside counsel (on each side).

Besides the hard costs, Suburbia and the Firefighters spend countless hours in contract negotiations and dispute resolution instead of performing their jobs. Suburbia taxpayers ultimately suffer because Suburbia bears hard costs associated with paying overtime to backfill the off-duty Firefighters during contract negotiating days.

The third lesson? As parties move through Glasl's model, actions become more adversarial, which erodes trust. Once healthy relationships turn toxic, taking a toll on team members.

Sadly, neither Suburbia nor the Firefighters recognized that when they stopped using dispute prevention mechanisms that Big Chief had put into practice that it would be the beginning of a descent down Glasl's slippery slope of the dispute death spiral. Even sadder, none of the outside advisers, lawyers, mediators or arbitrators recommended that Suburbia or the Firefighters escape Glasl's predictable pattern of conflict escalation by using dispute prevention. Instead, all of these professionals personally profited from the increase in disputes.

Unfortunately, Suburbia and the Firefighters are not alone in not using or stopping to use tools in their toolbox that can help them prevent disputes. Like Suburbia, too often, parties view the mechanisms they engage in as "costs" rather than "investments" in the relationship.

* * *

From an academic perspective, Glasl's model provides a theory of conflict escalation that emphasizes the situational pressures people often face when involved in a conflict. But the real power isn't the academics or research behind the model—rather, it is helping people become consciously aware of how easy it is to fall into a negative cycle of tit-for-tat behavior.

The next time you find yourself in conflict, consider which stage you are in Glasl's model. If you find yourself escalating, stop and have a pragmatic discussion with your business partner about how you can perhaps rethink your actions to prevent a dispute death spiral.

Author's Acknowledgments

The example of Suburbia and the Firefighters first appeared in my book *Getting to We: Negotiating Agreements for Highly Collaborative Business Relationships.* I'd like to call out CPR's Ellen Waldman for suggesting I connect the dots with Glasl's model.

— Kate Vitasek

ADR History

Dispute Processes Within Religious Communities, But Where the Disputes Are Not about Religion

BY ADAM SAMUEL

Dispute resolution within religious communities summons up an image of all male rabbis or imams ruling on civil disputes, applying religious laws or doctrines developed more than a millennium ago.

Gradually, though, the study of archive materials, mainly found in the books of the Spanish and Portuguese Jewish Congregation in London, are revealing a very different picture: lay resolution by communal leaders of disputes between congregants on the basis of what they thought was fair and reasonable or just sensible, not Jewish law.

Yes, the Mahamad—a council of elders—were men but we are talking about the period between 1656 and 1868 when female judges were unknown in the United Kingdom. These people were not necessarily deeply religiously observant or learned. At least by the standards of the day, they could not be described as extremists in any sense.

Often they were successful businessmen seeking to serve the general welfare of their community. This communal dispute resolution was flexible, worldly-wise and may have messages for communal leaders and other resolvers of conflict in modern times. Perhaps, what they were doing continues to occur in the privacy of people's homes and communities.

'Gentlemen of the Mahamad'

My late uncle Edgar Samuel first alerted me to what are known as the Livros dos Pleitos (or just "Livros"), the reports within the synagogue archives of the Mahamad's dispute resolution activities, when presenting his 2005 paper to the Jewish Historical Society ("The Mahamad as an Arbitration Court," 41 *Jewish Historical Studies* 9 (2007) (available at https://bit.ly/47bUIHR). Notwithstanding his title, the examples my uncle gave from the Livros smacked more of mediation or imposed settlements.

Wendy Filer introduced the arbitration historian, the late Derek Roebuck, to Edgar Samuel's article. Derek referred to it in his last book, "English Arbitration and Mediation in the Long Eighteenth Century" (History of Arbitration and Mediation) (co-authored with Francis Calvert Boorman and Rhiannon Markless). Roebuck's argument was that despite the English court's apparent hostility to enforcing what would now be regarded as mainstream arbitration clauses, arbitration was used in almost every aspect of English daily life.

Wendy, who was a practicing solicitor, has now produced a magnificent doctorate on the subject of dispute resolution in London's Spanish and Portuguese Jewish community, "A Space for Jewish Justice: The Mahamad's Court of the Spanish and Portuguese Jews' Congregation of London, 1721-1868" (April 2022) (available at https://bit.ly/4fRecpV). This article draws heavily on her work.

The part devoted to lay subjects (such as commercial law and debt collecting) shows the communal leadership helping to develop many of the strategies one finds being used today in all walks of life to deal with conflict, both minor and on a grander scale. Some of the challenges seem rather too familiar for comfort: the management of poverty and hunger, housing conditions, and the mixture of the roles performed by the "Tribunal" between administrator, judge and even being party to or partisan in the dispute.

The Gentlemen's Jurisdiction

There were two overlapping conflicting principles of Jewish law which lay at the heart of the Mahamad's work.

The first bans Jews from suing each other in the state courts. The second requires the community always to follow the law of the land.

As worldly-wise people, the Gentlemen of the Mahamad understood the need occasionally to break the first rule. They knew that the sanctions available to it for noncompliance remained limited to small fines—enforced donations to charity—and removal of communal membership and burial rights.

More important the Mahamad both ran the community, organized its work for the relief of its poor and resolved disputes or played a role in their resolution. As with most communities, it had rules that it called "Ascamot," which still exist.

Jews were expelled from England in 1291 and did not return officially until 1656 when a small community of Sephardi Jews were allowed to return by Oliver Cromwell. The people who came were effectively refugees from the Spanish and Portuguese Inquisition who had settled in Amsterdam and what one would now call Italy. Wendy Filer argues that they brought their dispute resolution ideas from Venice and Amsterdam.

The first version of the Ascamot of 1664 is derived heavily from the 1639 Amsterdam version. It required any member to summon before the Mahamad any other member with whom it had a business dispute, using the services of the Samas (shamash in Hebrew and the beadle in English, although many were of rather greater distinction than that implies). The Mahamad then had to persuade the parties to agree to arbitration.

Where the parties failed to appoint arbitrators within eight days, or the arbitration was

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deadlocked or the award not met, the parties could litigate in the municipal courts. There was always an urgency exception originally covering bills of exchange and the detention of goods allowing a claimant go directly there.

The Mahamad's role expanded in 1677 to one of using "all possible diligences" to settle disputes. In the event of failure, they needed to persuade the parties to select Jewish arbitrators. By 1693, the community realized that its disputes might be less elevated. "Doubts and disagreements" in general replaced the reference to business disputes in the Ascamot.

By 1733, a single member of what is still a committee could not perform this role alone. Three-person tribunals seem to have been the norm. The 1784 version required the Mahamad to try to reconcile the parties with "complaints or disputes" "whether for offences or for debts" to a solution reflecting "reason and justice," or tell the parties to refer their dispute to assessors. This covered "debts or disagreements in accounts" as well. The rule suggests, as the Livros confirms, that the Mahamad engaged in evaluative mediation, urging reasonable solutions on problems, rather than just facilitating settlements.

Apart from urgent cases where no permission was required, the Mahamad could authorize members to use the courts typically in the event of non-cooperation by the other parties involved or to defend themselves. This ultimately extended to cases where both mediation and arbitration had failed to reach a solution either because of a lack of party or tribunal agreement, or perhaps because of enforcement issues. These remained common in English law throughout this period.

The right of access to the courts could be a bracing sanction exposing the debtor to the risk of debtors' prison. Otherwise, breaches of the Mahamad's procedure could be sanctioned by a fine payable to the community's charity box.

Early on, the desire to avoid scandal or "odium," as it became in the 1784 Ascamot, seems to have been the real motivation behind the creation of this unusual tribunal. It reflected the expected nervousness of a new community being re-admitted into a country against significant opposition. Odiousness disappeared from the 1850 Ascamot, suggesting perhaps a degree of comfort or awareness that cases in state courts had not actually damaged the community's reputation. By 1868, the role of the Mahamad in dispute resolution had apparently ended.

Does the high number of parties who currently indicate in surveys that confidentiality is the main reason why they like arbitration reflect to a degree a fear of "odiousness"?!?

The Mahamad In Practice

Wendy Filer's examination of the Livros shows the Mahamad using "different strategies."

It occasionally appears to have been an almost classical mediator. On other occasions, it imposes the solution.

In a third category, a recommendation sounds like a neutral evaluation. Often enough, people are just being given more time to pay or a reduction in the debt to make it affordable.

Sometimes, the tribunal steps into the arena by threatening to allow the claimant to file suit if its offer is not accepted or where there was a large difference between the parties. In one messy family row, payment of the relevant sums was actually made to a Mahamad member.

When a defendant failed to attend, the "Tribunal" might speak informally to him or her. Sometimes negotiations occurred in the chamber and at other times privately. Non-Jews could use the Mahamad in claims against members, using its inside knowledge of the individuals and influence over them to achieve results.

As Wendy indicates, the Livros only records one formal arbitration in which three men of the Mahamad and the Gabbay (a lay leader of the community) constituted the tribunal. It involved diamond trading. There were others where a Mahamad member served as an arbitrator, or the Mahamad ordered a debtor to sign a bond payable in the event of a refusal to honor the arbitrator's decision. In one case, the settlement that was recorded was that the parties would arbitrate their dispute in front of the tribunal secretary.

The role of the Mahamad as communal leaders when faced with poverty placed it in a strangely ambiguous place. On one occasion, a tribunal member just paid the debt. On others, the solution involved the Mahamad diverting to the creditor funds due to be paid from the community's charity funds to the delinquent debtor (an unusual type of garnishee order). Stopping these types of payments operated as a sanction for non-attendance.

Sometimes, the Mahamad was faced with claims brought by the voluntary loan society of the community, financed by member gifts against recipient synagogue members who had not kept up their loan payments. This placed the tribunal uncomfortably close to being a judge in its own cause. In its role as owners of almshousing for the poor, the Mahamad recognized this problem and had to resort to the municipal courts in order to evict tenants. It could not be landlord and judge at the same time.

Wendy shows that the Mahamad's attempts to create an exclusive jurisdiction for its members were only a partial success. People did end up in court, sometimes with the express permission of the Mahamad and occasionally without it.

As she shows, the 19th century witnessed the decline of this form of dispute resolution. The devolution of the charity function of the community to a committee of the Board of the Elder—the equivalent of the Senate to the Mahamad's House of Representatives—may also have shown the difficulties that the community was having in reconciling its governance and judicial functions.

The community was assimilating, marrying people from outside it, both Jews and non-Jews. The departure of Isaac D'Israeli, the Prime Minister Benjamin Disraeli's father, from the community in 1817 over a fine imposed on him

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All in the Family

The ADR processes: The community, historically, looked to its religious elders to decide disputes—all disputes.

The paradox: The tribunal would need civil courts because members often were involved in, for example, providing the house whose tenant was the subject of an eviction proceeding.

The modern lesson: In fact, religious-based ADR for secular matters has never gone away. It's just mostly out of sight.

ADR History

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for refusing to join the Mahamad (see A. L. Shane, "Isaac D'Israeli and his quarrel with the Synagogue--a re-assessment," 29 *Jewish Historical Studies* 165 (1982-1986) (available at https://bit.ly/3CPq50R)), may be symptomatic of both this assimilation and perhaps a difficulty in finding people to fill the demanding role. Wendy also suggests that the increasing numerical dominance of the competing Ashkenazi community (made up principally of immigrants from Germany, Poland, and Russia) and its lack of interest in lay communal decision-making could have played a part.

Arbitration Facilities

That lack of interest in the growing Ashkenazi community was not absolute. Recently, while looking for traces of my family in the records of the Exeter Jewish Community of the early 19th century, I ran across an unusual form of secular communal arbitration. In 1823, the community resolved to adopt a new set of Rules. Paragraph 21 read:

> Should any persons having any disputes in money or other matters, on both Parties agreeing and entering with arbitration bond or a [illegible] and on their apply to the Gabbay for such purpose, he the Gabbay is obliged to call a [illegible] day meeting to try such dispute and their decision to be final.

The Gabbay, as noted above, was the community's lay leader.

Clause 28 of a later version reads:

> In case of litigation betwixt parties on their agreeing to assigning an Arbitration and the said Bond be placed in the hands of the Gabbay for the purpose or in lieu of an Arbitration Bond, a proper [illegible]shall be given, the Gabbay shall convene a meeting of the community to hear such dispute and their decision shall be final.

There is no evidence of these provisions ever being used. The idea of the community meeting if that is what it was does not sound very practical. It does, though, show an active interest in arbitration at a time when there was no legislative support for the subject outside of the formalities of the Arbitration Act 1698. Under that, the agreement had to be made an order of court for it and the award to be enforced. The reference to the bond concerns the security that would be seized in the event of a failure to arbitrate or honor the award in a case not governed by that legislation.

These Ashkenazi rules are significantly different from Ascamot of the Spanish and Portuguese Congregation—Sephardi community rules. The community is essentially offering an arbitration service to those wishing to use it. There is no sense of compulsion. There is, though, one similar feature: the absence of any reference to Jewish law being applied or clergy being involved in the process. This is secular decision-making.

The Move Toward Religion

Wendy Filer notes that as the lay dispute resolution activities of the Mahamad were coming to a close, the extremely observant were submitting their disputes with each other to the Bet Din of the Community. There, the judges were rabbis applying Jewish Law.

This still happens even where the subject matter is purely commercial. *Soleimany v. Soleimany,* [1998] EWCA Civ. 285 (available at https://bit.ly/3Zgzjec), involved an attempt to evade Iranian exporting and exchange control regulation by a father selling carpets to his son. Lord Justice Waller refused to enforce the award of the Ashkenazi Beth Din (chosen despite the likely Sephardi affiliation of the family), saying:

> That award refers on its face to an illegal object to the enterprise which the English court views as contrary to public policy. It is that award which the English court should not enforce.

There are plenty of other cases in different parts of the world to show that this type of arbitration still goes on before rabbis and no doubt other religious leaders. Such tribunals are not renowned for their diversity. While in the Jewish community, one has to be qualified as a "Dayan," a judge in a religious court, this does not necessarily guarantee a mastery of basic civil procedure or arbitration law. *Ulman v. Live Group Pty. Ltd.*, [2018] NSWCA 338 (2018) (available at https://bit.ly/4gakyjV).

Modern Communal Decision-making

Largely unseen, though, lay decision-making within a community context still goes on.

Evidence for this is both anecdotal and occasionally concrete. A famous example of the latter made its way to the English Supreme Court in 2011, *Jivraj v. Hashwani* ([2011] UKSC 40 (available at www.supremecourt.uk/cases/uksc-2010-0170). This involved an arbitration clause in a joint venture which provided for English law to be applied but the arbitrators to be members of the Ismaili Moslem faith. When a dispute arose, one of the parties appointed a Jewish retired Commercial Court judge. He was removed ultimately by the Supreme Court for not having the right qualifications. The Court of Appeal had reached the opposite result on the basis of European Union anti-racism legislation and the absence of a choice of Islamic law.

The International Chamber of Commerce Court and the LCIA both presented amicus briefs to the U.K. Supreme Court which explained that since "race" and "nationality" are equated in the Equality Act, a ban on racial discrimination would stop them appointing arbitrators based on their nationality. In the discussions leading up to the recent Arbitration Bill currently being debated in Parliament, there was an attempt made to build an anti-discrimination provision into the act. This, though, would have required a careful de-coupling of the "race" = "nationality" provisions of the Equality Act and may explain why ultimately it was dropped from the final draft.

There is, though, nothing to stop informal communal dispute resolution where in fact everyone comes from the same ethnic or religious group. A client of mine, a non-observant Iranian Jew, asked me what I did for the rest of my "day job." When I mentioned "arbitration," he responded that he was involved in an arbitration but "not your sort."

He had done a successful business deal with a childhood friend from Iran and the friend had not paid him his agreed share of the profits. The sole tribunal member whose award sought to put that right was a renowned ex-stockbroker from the Iranian Jewish world whose synagogue attendance was of the once-a-year variety. After I wrote an appropriate letter referring to the English Arbitration Act1996, the necessary payment was duly made.

This, though, was not my first encounter with secular dispute resolution within a religious community. That was *Karapschinsky v. Rothbaum*, 177 Mo. App. 91, 163 S. W. 290 (1914), a Kansas City, Mo., decision from 111 years ago on whether to confirm an award following proceedings on a Sunday in a synagogue. Although the parties were told the result at end of the day, the court found that the award had only formally been rendered the following day. It thus escaped the statutory prohibition against doing judicial acts on a Sunday.

In 1960, Wesley Sturges argued that this showed the private nature of arbitration (see Sturges' article, "Arbitration–What Is it?" 35 *NYULR* 1031 at 1041-1045 (1960) (available at https://bit.ly/4icl5DK). Actually, re-reading it reminded me that it did no such thing. It merely illustrated the absurdity of the Sunday ban on legal proceedings in this and possibly any other context.

ADR Brief

Keeping ADR In-House? NFL Switches Arbitrators In High-Profile Discrimination Case

BY STEPHANIE ARGUETA

In U.S. football, success often hinges on a well-crafted playbook—a trusted guide that coaches use to help their teams score big touchdowns. A good playbook anticipates anything and everything, including disputes that may arise on the field.

But what about off the field? What's in the National Football League's playbook when internal conflicts come up?

The answer might surprise you: the NFL's go-to strategy has its chief executive officer, Commissioner Roger Goodell, acting as both player and referee in their arbitration disputes. This approach, however, is currently under fire in a high-profile case, *Flores v. National Football League,* before the Second U.S. Circuit Court of Appeals, where legal experts are raising serious concerns about fairness and procedural integrity.

The case has been a mix of arbitration and litigation, and hasn't progressed significantly in years while still moving through the federal court system. A top national arbitrator was inserted by the NFL in place of Goodell, but the matter is waiting for the Second Circuit to schedule a hearing date. At press time, the arbitration appeared to be held up and the ADR part of the case on pause pending the appellate court's calendar determination.

The controversial matter has sent shockwaves through the league, prompting widespread debate about how the NFL handles its internal conflicts. This article looks at the case and the reaction.

The author, a student at Brooklyn Law School in New York, was a Fall 2024 intern at *Alternatives*' publisher, the CPR Institute.

Background

Former Miami Dolphins head coach Brian Flores, along with Steve Wilks and Ray Horton, filed a class action lawsuit against the NFL in 2022, alleging racial discrimination in the league's hiring practices for head coaches, general managers, and coordinators. The Flores charges were national news. See, e.g., Mike Florio, "Skirmish erupts in Brian Flores case over appointment of arbitrator," *NBC News* (Sept. 25, 2024) (available at https://bit.ly/3DcXNNR).

Flores, now headed for the playoffs as the Minnesota Vikings' defensive coordinator, claimed that the NFL's "Rooney Rule," which mandates interviews with minority candidates for leadership positions, has been ineffective and that systemic racial bias pervades hiring practices. He specifically cited his experience with the New York Giants, alleging that his head coach job interview was a mere formality, as the team had already decided to hire a white candidate. Flores also claimed that his employer at the time, the Miami Dolphins, incentivized him financially to deliberately lose games—the motive was to improve the team's standing in the league's draft of college players—underscoring unethical and discriminatory treatment.

Wilks and Horton added their experiences to the case, reflecting a broader issue of racial disparities in hiring across the NFL.

In March 2023, the court partially granted and partially denied a motion to compel arbitration. Claims against the New York Giants, Denver Broncos, Houston Texans, and related NFL claims were excluded from arbitration, while those involving the Miami Dolphins, Arizona Cardinals, and Tennessee Titans were sent to ADR.

The plaintiffs later sought an interlocutory appeal on whether arbitration agreements were unconscionable due to bias and whether such agreements could undermine statutory discrimination claims. The court denied this request. The suit challenged the NFL to address longstanding systemic racial disparities in hiring and treatment within the league.

When the case was brought to the U.S. District Court for the Southern District of New York, it addressed claims of racial discrimination and retaliation brought by Brian Flores and others against the NFL and several teams. The court had previously compelled arbitration for certain claims while denying arbitration for others, as noted above.

The plaintiffs sought to appeal interlocutory rulings on whether arbitration agreements appointing potentially biased arbitrators are unconscionable or invalid under the effective vindication doctrine—that is, the plaintiffs couldn't fairly exercise their rights in arbitration.

The court denied the motion, as noted above, with the reasoning that the issues involved mixed legal and factual analysis rather than pure legal questions, lacked substantial grounds for differing opinions, and would not materially advance the litigation. *Flores v. The Nat'l Football League*, 22-CV-0871 (VEC) (S.D.N.Y. Jan. 4, 2024). The decision reflects the federal policy favoring arbitration and the disfavor of interlocutory appeals.

The Current Case

The case gained widespread attention from legal experts and arbitration professionals, so far culminating in, among other things, an amicus brief that was filed in the Second Circuit appeal in July 2024.

This brief scrutinized the NFL's arbitration practices, asserting that it violated procedural fairness by allowing Goodell, a party with vested interests, to oversee disputes. The authors—the filing was made on behalf of 12 law school professors—argued that such practices went against the Federal Arbitration Act and due process standards that require the presence of neutral

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ADR Brief

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and independent arbitrators.

The brief also cited broader legislative trends, such as the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, to emphasize the growing pushback against biased arbitration systems. It warned that a ruling in favor of the NFL could set a dangerous precedent, enabling other corporations to implement similar one-sided clauses and undermining fairness for employees and other parties.

Before the amicus brief's submission, several developments have shaped the case. In August 2023, the NFL filed a reply brief (available on *Bloomberg Law* with a subscription at https://bit.ly/3B6kAKS), asserting that the district court erred in refusing to compel arbitration across the board.

The NFL argued that Flores' employment agreements with the Patriots and Steelers, incorporating the NFL Constitution, were valid and enforceable despite concerns about hypothetical amendments or missing approval conditions. According to the NFL, Flores failed to prove the agreements were unconscionable or inhibited his ability to assert his rights.

In response, in September 2023, Flores' legal team filed a counter brief, defending the district court's decision. (Available on *Bloomberg Law* with a subscription at https://bit.ly/3Vqi4FX). They reiterated that the arbitration agreement was unconscionable, particularly because it appointed Goodell as the arbitrator, who they maintained is inherently biased due to his obvious league ties. They also pointed out the lack of critical procedural safeguards and emphasized the district court's findings that rendered the agreements unenforceable.

And after the professors' amicus brief in the Second Circuit, the case took an unexpected turn on Sept. 24, 2023, when the NFL unilaterally appointed New York-based Patterson Belknap Webb & Tyler partner Peter C. Harvey as arbitrator. (Filing available on *Bloomberg Law* with a subscription at https://bit.ly/4gkyyaW).

Flores' legal team immediately pushed back, arguing that this move created a false sense of impartiality while keeping the arbitration process within the NFL's control. They also raised concerns about undisclosed conflicts of interest involving Harvey and Bill Polian, a consulting expert in the case. Flores' team noted that Goodell had improperly classified the discrimination claims as "football-oriented" to justify retaining arbitration within the NFL.

As of now, there doesn't appear to be activity on the arbitration track. NFL arbitrator-appointee Peter Harvey—a former New Jersey Attorney General who has participated in previous NFL matters including the appeal of a suspension of Cleveland Browns quarterback Deshaun Watson, and whose biography includes employment-related work for the league—didn't respond to a request for comment.

At the same time, a Second Circuit court clerk employee said that the appellate argument had not yet been set as of press time, but also confirmed to *Alternatives* that the briefing had been completed.

This legal battle has drawn national interest because of the NFL's prominence and the racially charged allegations, but it also appears to be gaining momentum as a focal point for discussions on arbitration reform, shining a light on the tension between employer-controlled arbitration systems and the legal standards of fairness and neutrality.

Arbitration Rules

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to conserve "goods forming the subject-matter in dispute." UNCITRAL Rules (1976), Art. 26(1) (available at https://bit.ly/4fSIQP0).

Since harm to such goods is, in most cases, remediable, the availability of these interim measures reflects that the UNCITRAL Arbitration Rules do not require irreparable harm as an element for preliminary injunctions.

The same is true for the Arbitration Rules of the London Court of International Arbitration, which provide for interim measures to preserve, among other things, monies, goods, and property "under the control of any party and relating to the subject-matter of the arbitration." LCIA Rules (2020), Article 25.1(ii) (available at https://bit.ly/4fA0N5m). No doubt, a loss of "monies" is remediable with a monetary award.

The CPR Rules for Administered Arbitration of International Disputes and its Global Rules for Accelerated Commercial Arbitration also appear to allow interim and conservatory measures in the absence of irreparable harm. They both provide that a tribunal may issue an interim measure "as it deems necessary," including measures for the "conservation of goods." CPR Rules for Administered Arbitration of International Disputes, Art. 13.1 (available at https://bit.ly/3Vttau6); CPR Global Rules for Accelerated Commercial Arbitration, Art. 9.1 (available at https://bit.ly/3XVLxYy). [*Alternatives*' publisher, CPR, also is publisher of these rules, which are available through its case management services, CPR Dispute Resolution Services LLC (https://drs.cpradr.org).]

The Chartered Institute of Arbitrators' guidelines on Applications for Interim Measures (available at https://bit.ly/4f68ajO) also allow interim measures in the absence of irreparable harm. Under those guidelines, arbitrators are called to examine whether there is a risk of harm that is "not adequately reparable by an award of damages if the measure is denied."

In addition, some arbitral tribunals have granted preliminary injunctions in the absence of irreparable harm by the applicant. For instance, in ICC Case No. 10596, a tribunal accepted an interim measures application even though the harm alleged by the applicant was remediable. ICC Case No. 10596 of 2000, Interlocutory Award, 30 ICCA Y.B. COM. ARB. 66, 72–73 (2005).Other tribunals have construed "irreparable" harm as substantial (not necessarily irremediable) harm.

In *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Claimant's Request for Provisional Measures, ¶ 109 (Jan. 21, 2015) (available at https://bit.ly/3VwDGR1). For example, the tribunal ruled that the term "irreparable" harm means "a material risk of serious or grave damage to the requesting party" and not "literally 'irreparable' harm."

Inconsistencies with National Rules

By not conditioning preliminary injunctions on irreparable harm, arbitral rules, guidelines, and tribunals have deviated from the requirements

for such injunctions under national legal systems.

For instance, in the Second U.S. Circuit Court of Appeals, based in New York, a court would not grant an application for a preliminary injunction unless the applicant can show that it stands to suffer irreparable harm without the requested injunction.

In the Second Circuit, the applicant must also establish a likelihood of success on the merits or "sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardship tipping decidedly toward the party requesting the preliminary relief." See *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2nd Cir. 1953); *Checker Motors Corp. v. Chrysler Corp.*, 405 F.2d 319, 323 (2nd Cir. 1969); *Jackson Dairy Inc. v. H.P. Hood Sons, Inc.*, 596 F.2d 70, 72 (2nd Cir. 1979), and *Citigroup Global Markets Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30 (2nd Cir. 2010).

But why do tribunals and arbitration rules not require irreparable harm for preliminary injunctions?

While it is difficult to track down the reasons behind arbitrators' and providers' abstention from requiring irreparable harm as an element for preliminary injunctions in international arbitrations, some have explained this practice by the complications award creditors could face when enforcing their monetary awards. They explain that this requirement is incompatible with international arbitrations where awards, although final, are not immediately enforceable.

And thus, while national courts may condition preliminary injunctions on irreparable harm, the same should not apply to arbitrations. In arbitrations, there are no guarantees that award creditors can enforce their monetary awards quickly. Therefore, substantial or serious (though remediable) harm should be avoided by a preliminary injunction rather than remedied with a monetary award. See David Caron, "Interim Measures of Protection: Theory and Practice in Light of the Iran United States Claims Tribunal," 46 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 465, 491-494 (1986).

While enforcement of arbitral awards may have been more challenging in the past, however, it has become easier with the substantial increase in the number of states that have signed the New York Convention. In addition, at least 93 states have adopted arbitration legislations based on the UNCITRAL Model Law, which calls for enforcing foreign arbitral awards. Thus, while not requiring irreparable harm could have been understandable in the past, there should be no justification for not conditioning preliminary injunctions on irreparable harm today.

Irreparable Harm: Required

In fact, some International Centre for Settlement of Investment Disputes (ICSID) tribunals have already required irreparable harm before granting preliminary injunctions.

For example, in *Plama Consortium Ltd.* v. *Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order regarding Provisional Measures, ¶ 46 (Sept. 6, 2005) (available at https://bit.ly/4hZSvWd), the tribunal rejected Plama's provisional measures application, holding that "harm is not irreparable if it can be compensated for by damages." The tribunal also ruled as follows:

> What Claimant is seeking in this arbitration are monetary damages for breaches of Respondent's obligation under the Energy Charter Treaty. Whatever the outcome of the bankruptcy proceedings or the ASR or CPC proceedings in Bulgaria is, Claimant's right to pursue its claims for damages in this arbitration and the Arbitral Tribunal's ability to decide these claims will not be affected.

Similarly, in *Occidental Petroleum Corp. v. Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, ¶ 92 (Aug. 17, 2007) (available at https://bit.ly/4fSMUPx), the tribunal rejected Occidental's provisional measures application, partly because of the lack of any irreparable harm in the absence of the requested measures. There, the tribunal ruled that any prejudice Occidental could suffer "can readily be compensated by a monetary award."

In *Phoenix Action Ltd.* v. *Czech Republic*, the tribunal also demanded irreparable harm, holding that "a provisional measure is necessary where the actions of a party 'are capable of causing or of threatening irreparable prejudice to the rights invoked.'" *Phoenix Action Ltd* v. *Czech Rep.*, ICSID Case No. ARB/06/5, Decision on Provisional Measures, ¶ 33 (April 6, 2007), (available at https://bit.ly/40Wx8Pu).

Even before the ICSID Convention's 1965 adoption, international courts and tribunals had conditioned interim measures on irreparable harm. For instance, in the 1927 *Sino-Belgian Treaty* case, the Permanent Court of International Justice (the precursor to the International Court of Justice, or ICJ), ruled that provisional measures require that the alleged harm "could not be made good simply by the payment of an indemnity or by compensation or restitution in some other material form." Denunciation of the Treaty of Nov. 2, 1865, between China and Belgium (*Belgium v. China*), Interim Measures Order, 1927 P.C.I.J. (ser. A) No. 8, at 7 (Jan. 8) (available at https://bit.ly/3V0zatZ).

The ICJ adopted the same approach in some of its provisional measures' orders. For example, in *Pulps Mills on the River Uruguay* (between Argentina and Uruguay), the ICJ ruled that provisional measures could only be granted where "there is an urgent necessity to prevent irreparable prejudice to such rights" before the ICJ reached a final decision. Pulps Mills on the River Uruguay (*Argentina v. Uruguay*), Provisional Measures Order, 2007 I.C.J. 3, ¶ 32 (Jan. 23) (available at https://bit.ly/4fVys9y).

Similarly, in 1993, the Iran-U.S. Claims Tribunal rejected Iran's application for provisional measures against the U.S. government after concluding that Iran could not suffer irreparable harm without the measures. In that case, the Iran-U.S. Claims Tribunal held that it can "compensate Iran for any damages that the Tribunal finds Iran has sustained by awarding an adequate monetary relief." *Iran* v. *U.S.*, 19 ICCA Y.B. Com. Arb. 390, ¶ 21 (1993) (available at https://bit.ly/49eYUc9).

* * *

While creditors may have faced challenges enforcing monetary awards in the past that justified preliminary injunctions without irreparable harm, the increased prevalence of arbitration and its wide acceptance calls for conditioning such injunctions on irreparable harm. After all, if a claimant would not suffer harm that an award of damages cannot repair, the claimant should not be entitled to obtain an interim injunction before the tribunal decides its claim.

If the tribunal accepts the claim, it could compensate the claimant for any loss suffered pending the tribunal's decision. And if the claim is rejected, the tribunal would not have imposed an unnecessary injunction that risks prejudicing the defendant's rights. Doing so would be more consistent with the requirements for preliminary injunctions in national courts, and how some ICSID tribunals have already approached such injunctions and how the ICJ and the Iran-U.S. Claims Tribunal have historically addressed interim measures' applications.

CPR News

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Alexandre de Gramont, Womble Bond Dickinson; Carlos E. Martinez Betanzos, of Mexico's Basham; independent arbitrator Elisabeth Eljuri, and Eduardo Silva-Romero of Wordstone.

- Refocusing on the "Alternative" in ADR: Innovative Paths to Resolving Business Disputes, with Kiera S. Gans of DLA Piper.
- The Roberts Court's Treatment of the Federal Arbitration Act, with John M. Barkett, Shook Hardy & Bacon; Haley L. Wasserman, Williams & Connolly; Prince-Alex Iwu, Diaz Reus, and Eric Boos, ADT Inc.
- Practicing Dispute Prevention: Proven Dispute Prevention Mechanisms for Avoiding B2B Disputes and Fostering Better Business Relationships, with former CPR President and CEO Allen Waxman, now of DLA Piper, and Ellen Waldman, CPR Institute Advocacy & Educational Outreach.
- Bifurcation – Achieving Balance for the Efficient and Fair Resolution of Disputes, with Lauren Friedman, King & Spalding, and Teresa Garcia-Reyes, Baker Hughes.
- Mitigating Risks and Navigating Potential Disputes in Latin America, with Estefanía San Juan, White & Case.
- Dispute Resolution in the Tech Sector, with Harout J. Samra, DLA Piper; Conna Weiner, JAMS and member of the CPR Panel of Distinguished Neutrals, and Eduardo Perazza, Machado Meyer.

In addition, CPR's perennial Corporate Counsel Roundtable will return, with John J. Buckley Jr., Williams & Connolly; Mary Beth Cantrell, Amgen Inc., Kate Gonzalez, Airbus Americas, and Alberto Ravell, of ConocoPhillips Co.

And: an ethics session will be featured. The panel of "Immunity and Independence: Outer Limits on Arbitrator Ethics: Where is the Line?" includes Carlos F. Concepcion, a member of CPR's Panel of Distinguished Neutrals; Sashe D. Dimitroff, of Baker Hostetler; Greg Fullelove, of Osborne Clarke, and Effie Silva, of Fresh DelMonte.

More session details, including updates on added panelists unavailable at press time, can be found at the 2025 CPR Annual Meeting website linked above.

* * *

Sponsors receive many benefits, including free registrations, and are available at a variety of levels. Contact Helena Tavares Erickson at herickson@cpradr.org.

The sponsors at press time include DLA Piper, King & Spalding, Microsoft, Williams & Connolly, ConocoPhillips, and White & Case. Additional support is provided by Holland & Knight; CEIA Capitulo de la Florida; Resolutions LLC; Wordstone, and academic sponsors the University of Florida Levin College of Law, and Yeshiva University's Benjamin N. Cardozo School of Law.

The current updated sponsor list can be found on the meeting website linked above and directly at https://bit.ly/4fcnRXz.

The 2025 CPR Annual Meeting Steering Committee is led by Co-Chairs Effie D. Silva, General Counsel of Fresh Delmonte Produce Inc., based in Coral Gables, Fla., and Philip Greenberg, Deputy General Counsel of Veru Inc., a Miami biopharmaceutical company.

Jan. 15: CPR's Annual Houston Energy, Oil & Gas Regional Meeting

The CPR Energy, Oil & Gas Industry Alliance is convening the energy sector in Houston on Wednesday, Jan. 15, for the Eighth Annual CPR Houston Regional Meeting at Baker Hostetler.

Registration information is available on CPR's website at www.cpradr.org/energy-oil-and-gas-alliance.

This annual industry-insider event brings together leaders in energy law, both in-house and law firm counsel, for a substantive ADR-focused panel discussion and networking.

The 2025 panel will discuss third-party litigation funding in the energy sector, preceded and followed by networking receptions.

Save the Date: March Launch for CPR's Seattle Chapter

The launch event for CPR's new Seattle chapter will focus on early dispute prevention and the role of outside counsel in assisting their clients in heading off conflicts.

CPR is extending the invitation to the Seattle conflict resolution community to join on March 4 for the opening of the first CPR Institute chapter in Seattle, which will serve the Pacific Northwest.

Registration is open now at www.cpradr.org/events/general-counsel-early-dispute-resolution.

This group will convene in-house and outside counsel, and others interested in resolving business and employment disputes efficiently and effectively, or preventing them altogether, to share best practices and new developments in alternative dispute resolution and early dispute prevention, particularly those unique to the region.

The kickoff program will feature a substantive fireside chat on general counsels' view of early dispute prevention and resolution mechanisms, as well as the roles outside counsel can and/or should play in the current environment.

The speakers include CPR Institute Board Chair Laura Robertson, who is Vice President and Deputy General Counsel at ConocoPhillips Co.; Cynthia Randall, Vice President and Deputy General Counsel—Litigation, Microsoft Inc., and co-chair of CPR's Council (for more on Randall's CPR Institute work, see CPR 2025 Annual Meeting item above); and Michael Paisner, who is a partner in Perkins Coie.

CPR's sponsors for the event include HKA and host K&L Gates.