



SELECTING PARTY ARBITRATORS

By Richard Chernick, Esq.

The use of party arbitrators is on the rise in the United States. It is now common in U.S.-based commercial arbitrations with tripartite panels that the parties each select unilaterally one party arbitrator, who then together select the third. Party arbitrators can be neutral or non-neutral but must follow standard ethical guidelines for disclosure and conduct.

Why a Party Arbitrator?

The value of being able to appoint one arbitrator unilaterally is unmistakable. It allows each side to appoint someone with expertise in the subject matter of the dispute or special knowledge of the industry or the technology involved, or special expertise in an area of the law or even with the arbitration process if that is important. Industries that continue to use non-neutral arbitrators routinely, such as insurance or maritime, will generally appoint arbitrators based on their industry or subject matter experience and their comfort with the process.

Neutral or Non-Neutral?

The first issue parties must decide is whether they intend the party arbitrators to be neutral or non-neutral. Generally, most arbitration rules state that unless there is clearly expressed intent in the arbitration clause, the party arbitrators are to be non-neutral they are presumed to be neutral. When a party arbitrator is first contacted, it is expected that counsel will discuss with the candidate his or her status; counsel will often consult with the client on this subject and sometimes with the other side. If there is a consensus, the issue can

be determined at that point; if there is disagreement, the practice is for both sides to proceed as if the party arbitrators are neutral until the panel or the arbitral institution is able to resolve the issue.

Communications with party arbitrators at this stage of the proceedings are conducted *ex parte*, as allowed by the Code of Ethics, Canon IX. Parties are free to discuss with the candidate his or her experience, suitability to serve, availability, possible disclosures, fee structure and general knowledge of the subject matter, industry, technology and area of law involved. They may also discuss the selection of the chair and the names and qualifications of possible candidates for chair. They may not discuss the substance of the issues in dispute or the candidate's views about any disputed issue of fact or law.

Disclosure

Party arbitrators, whatever their status, are required to make disclosures to the parties once the appointment has been made. A party may seek to disqualify a neutral party arbitrator based on these disclosures but may not disqualify a non-neutral party arbitrator. The disclosures a non-neutral party arbitrator makes are informational only, primarily for the benefit of the chair and the other participants.

The Unique Role of Non-Neutral Party Arbitrators

Generally, non-neutral party arbitrators are not subject to disqualification, but there are some limits on who is eligible to serve. They often have specific industry

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knowledge or familiarity with the subject matter of the dispute (factual or legal). They often also have some relationship with the party or counsel. A potential financial interest in the dispute would cause most courts to question a non-neutral arbitrator's ability to ensure a fair hearing. Non-neutral arbitrators who are potential witnesses or partners of counsel or have a present business relationship with a party have also been challenged.

In addition to the functions performed by neutral party arbitrators, non-neutral party arbitrators are often expected to communicate *ex parte* with their parties prior to the hearing on such issues as how to effectively frame the issues, legal theories, presentation of witnesses and other evidence and appropriate expert testimony. Any agreement as to *ex parte* communications beyond the first preliminary conference should be documented in the first scheduling order.

Ethical Conduct of the Non-Neutral Party Arbitrator

Non-neutral arbitrators have the same obligation as the neutral arbitrator to provide the parties with a fundamentally fair hearing. Thus, although non-neutral arbitrators may be predisposed to the party that appointed them, they must act fairly to both sides.

For example, the non-neutral arbitrator should not interfere with the arbitration process or in the presentation of a party's case and should refrain from conducting cross-examination of the other side's witnesses, as distinguished from asking questions that were not answered in a witness' testimony. Non-neutral arbitrators should also never disclose to a party or counsel the substance of any deliberations of the panel in an *ex parte* meeting.

Conclusion

The benefits to parties of unilaterally choosing an arbitrator are undeniable. Though there are issues with respect to ethics and procedure to manage, the value of party arbitrators generally makes the process worthwhile. ■

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