Challenges of The "Party" Arbitration in the Commercial Setting

By Hon. John P. DiBlasi

In any commercial case, the goal of the arbitration is a swift and expeditious resolution of the litigation with a savings of time and money. At a minimum, while not always as swift as we would like, one would hope that it will afford a faster and more efficient process than that provided by the court system.

Typically, there are three forms the arbitration may take. The parties may agree to a single arbitrator which generally provides for the most expeditious process as you are dealing with the schedule of a single neutral as opposed to multiple hearing officers. However, some attorneys would prefer not to put their proverbial eggs in one basket when it comes to the decision making process. The other two forms are tri-panel arbitrations, with the difference being the manner in which the arbitrators are selected. The tri-panel arbitration, again due to the number of neutrals involved, is less expeditious, but with respect to the decision making process, many attorneys feel that it is far better to have several cooks stirring the pot before a just dinner is served.

I have talked about these different forms of arbitration with many attorneys involved in commercial litigation around the country and have, in fact, served as a neutral many times in each type of arbitration. Based on my discussions, there does not appear to be a prevailing view as to which is better, nor do I have a preference. One comment that I have heard that may have some merit is the concern that a single arbitrator may be more inclined to attempt to reach a compromise in making a decision. However, a tri-panel arbitration, as appropriate, may be inclined to grant more drastic relief. While I have not experienced this myself, it is something to consider.

One form of the tri-panel is where all three arbitrators are agreed upon jointly by both parties. The other form of the tri-panel, and in my opinion the most vexing, is the tri-panel "party" arbitration which the author has also participated in. Simply put, each side selects its own neutral and then the two party arbitrators are charged with the responsibility of picking the final panel member, sometimes referred to as the umpire, who is presumed to be neutral.

At the outset, it would be wise for any party contemplating the prospect of a "party" arbitration to review The Code of Ethics for Arbitrators in Commercial Disputes. It would be recommended for any party engaging in a "party" arbitration to review Canon III B (2), (3), & (4); Canon IX A., B., C; and most importantly Canon X. While subject to many of the rules that apply to non-party neutrals, the party arbitrator may have a predisposition in favor of the appointing party and may consult with the appointing party, inter alia, with regard to the selection of the third neutral or umpire.

The "party" arbitration may be required pursuant to a specific term in the commercial agreement between the parties. For the purposes of this article, we will assume that there was no such provision in the contract and the parties have agreed to this process after the fact. In the absence of such a provision, the parties are free to craft the procedures that will be followed. A

critical consideration is agreeing at the outset to the time limits within which the parties will operate.

First, once this forum is agreed to, how long will each party have to designate a party arbitrator? Once the neutrals are chosen, how long will each neutral have to designate their proposals for the umpire? What happens if the parties cannot agree? Will a striking process be employed to strike proposed umpires? For example, each side may be required to propose three. Thereafter, each side must strike two of the potential arbitrators. Finally, how will one of the two umpires be eliminated? Will a third party be selected to make the decision? Will the selection be decided by coin toss? Or as in one case that I know, the parties agreed to use the Dow Jones performance on a particular date as the manner in which the umpire will be selected. There is also the option of having the two party arbitrators agree to appoint the umpire without consulting the appointing parties. There are some arbitration administrators that incorporate this type of provision into their rules. However, the same problems may very well arise if the party arbitrators cannot agree on an umpire. Further, the appointing parties may not be willing to waive the right to consult regarding the umpire's appointment.

Finally, will the parties agree to a default provision in the event one party fails to cooperate with the process? The party arbitrator appointed by the non-compliant party under the Code of Ethics, must not do anything to delay the process. The default provision would give the non-defaulting party the right to proceed with the appointment of the other neutral and the umpire. The fascinating part about this process is the point at which the party arbitrators cannot agree to the appointment of the third arbitrator. If the umpire is selected from a list provided by your adversary, they may have at least communicated with the prospective umpire to determine their availability. At this juncture, the umpire who is designated by a neutral now knows who selected them. Based upon the foregoing, there should be some agreement that there will be no communication between the third neutral and either party regarding their selection.

From my own experience, the coordination of the schedules of multiple arbitrators in any tri-party arbitration is difficult. From the view of this panel member, there are very real benefits having a third party administer an already complicated process.

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