Drafting the Arbitration Provision in Commercial Contracts, Part 1
Back to Basics: Important Considerations Not to be Overlooked

By: Hon. John P. DiBlasi, J.S.C. (Rtd.) &
Jacqueline I. Silvey, Esq., NAM General Counsel

John Wooden, one of the most successful coaches in basketball history, always focused his teams on the basics. The first lesson he taught them was how to properly tie their shoes. Truly, a lack of understanding the basics often "trips" you up!

More and more cases are being submitted to arbitration as a result of pre-dispute contractual clauses. In other words, at the time of entering into the contract, it is wise to make sure the contract contains a clause that provides for arbitration in the event of a future dispute. These clauses are found in all types of agreements and in a myriad of contract forms involving construction, consumer financing, employment, insurance, rendering of professional services, sale of goods, and others. Sometimes, the clause is very basic and simply provides for arbitration in the event of a dispute. However, a better practice (which is becoming more typical) is for the clause to be detailed and to specify a variety of terms. One example is a provision as to whether the arbitration will be conducted by a single arbitrator or by a tri-panel, or if it will be an arbitration where each party chooses a "party arbitrator" who then selects a third neutral arbitrator. Other issues addressed may include, inter alia, the selection of the ADR provider to administer the process; a roster of arbitrators; applicable law to govern the proceeding such as the Federal Arbitration Act (FAA) and/or the laws of a particular state; specific rules to be followed during the arbitration process such as those pertaining to discovery; and the location where the arbitration hearing is to be held.

Probably the most basic provision is the designation of the ADR provider who will administer the arbitration process. The provider can, among other things, provide the rules of procedure to govern the proceeding, the facilities for same, handle scheduling, provide formal notice at various stages of the proceeding, and provide a roster of potential neutrals who may serve as the arbitrator(s). While some choose to have the parties self-administer the process, it would seem that the preferred method is to have an experienced ADR provider in place to coordinate and ensure administratively that the process moves expeditiously and seamlessly. But, assuming a provider is designated, what happens if the provider specified is unable or unwilling to administer the case? The first step would be to approach the other party and try to agree on a new provider. However, difficulties often arise in this regard because, while the claimant is anxious to resolve the dispute and obtain their affirmative relief, the respondent is often not as motivated and a delay of the process is in their interest.

Assuming the arbitration clause is governed by the Federal Arbitration Act, it would seem that judicial intervention by motion may be sought under the provisions thereof to resolve this issue. But isn't the point of the provision to simplify matters and stay out of court? Another possible alternative to force the issue is to approach a new ADR provider, explain the circumstances and request that the new provider administer the process. Hopefully, at this point the other side will become cooperative, as the onus may possibly be shifted to them to seek judicial intervention challenging this procedure. However, it is hard to imagine an argument that could be made to the court where there is an arbitration provision that one party is seeking to comply with and the other to delay. The logical net result will be the appointment of a new administrator. If the defendant/respondent does not raise an objection

to the new provider and proceeds with the arbitration process, an argument can be made that he/she waived the objection and thus, consented to the jurisdiction of the new ADR provider.

If you follow Coach Wooden's tact of learning how to 'tie your shoelaces' properly, you may avoid a trip and fall which will potentially land you in the courtroom—defeating the entire purpose of the arbitration process to provide a more expeditious means of resolving contractual disputes.

Hon. John P. DiBlasi is a retired Justice of the Supreme Court, Westchester County, Commercial Division. He is a member of NAM's (National Arbitration and Mediation) Hearing Officer Panel and is available to arbitrate and mediate cases throughout the United States. For the third straight year, Judge DiBlasi was voted the #1 mediator in the United States in the 2016 National Law Journal Annual Reader Rankings Survey. He was also named a National Law Journal 2016 Alternative Dispute Resolution Champion, as part of a select group of only 48 nationwide. Judge DiBlasi was voted one of the Top 10 mediators in the 2016 New York Law Journal Annual Reader Rankings Survey for the seventh year in a row. Additionally, he has been designated a Super Lawyer for the fourth consecutive year (2016, 2015, 2014 & 2013) and he holds an AV Preeminent Peer Rating from Martindale-Hubbell in both Alternative Dispute Resolution and Litigation – a distinction given only to those who possess the highest ethical standards and professional ability.

Jacqueline I. Silvey, Esq. is General Counsel at NAM (National Arbitration and Mediation). She is involved in various operations of the company, including oversight and implementation of commercial and employment dispute resolution initiatives. Ms. Silvey is former in-house counsel to one of the largest property and casualty insurers in the United States.

For any questions or comments, please contact Ms. Silvey via email at jsilvey@namadr.com or direct dial telephone at 516-941-3228.