

**NON-NEUTRAL PARTIES ADD LAYER OF EXPENSE**  
**by Martin C. Weisman**

In many types of commercial contracts, clauses exist which mandate arbitration. Sometimes those clauses call for the appointment of a single arbitrator but many of them call for a panel of three arbitrators. In many of those instances, one party would appoint one arbitrator, and, the opposing party appoints a second arbitrator. The parties then select a neutral third arbitrator or the two party-appointed arbitrators would select the third arbitrator. Party-appointed arbitrators may be neutral or non-neutral. Non-neutral party-appointed arbitrators are not only selected and designated by one of the parties, but, they are permitted to have direct communication with that party throughout the course of the arbitration. The non-neutral party appointees then become advocates for the position of the party who appointed them, and, are not subject to disqualification or objection because of impartiality or lack of independence.

A neutral party-appointed arbitrator is suppose to have no preconceived bias in favor of the appointing party's position. Neutral party-appointed arbitrators are not to have any direct contact with the party who appointed them during the course of the arbitration proceedings. A party-appointed neutral arbitrator, unlike the non-neutral arbitrator, would be subject to the requirements of independence and impartiality.

Normally, the party who appoints an arbitrator is responsible for that party-appointed arbitrator's fees and one-half of the third or presiding neutral arbitrator's fees. In the course of an arbitration where you have non-neutral party-appointed arbitrators, those arbitrators will often engage in aggressive examination of witnesses following counsel's examinations and cross-examinations. These arbitrators will play an active role as if they were an additional advocate. Because of the contact that the non-neutral party-appointed arbitrators have with their respective

appointing parties, the neutral presiding arbitrator becomes isolated and reluctant to speak to his co-arbitrators and discuss matters pertaining to the case as it progresses. This is because the neutral arbitrator's comments might be relayed back to their respective parties, and, perhaps, alter the independence and impartiality of the proceeding. In the final conclusion, notwithstanding that party-appointed non-neutral arbitrators are required to act in good faith during the course of the proceeding, the neutral presiding arbitrator is ultimately the decider of the case. The two non-neutral party appointees generally cancel each other out, and therefore merely add a layer of expense to the proceeding. Non-neutral party-appointed arbitrators can be the cause of inefficiencies and delays and, from the perspective of a neutral presiding arbitrator, create significant problems in the manner in which the case proceeds. The parties would be better served by appointing a single neutral arbitrator. If a panel of three arbitrators is preferred, then all three should be neutral and not party-appointed. Most ADR providers have procedures and methods for appointing qualified arbitrators to meet the requirements of the parties.

A different issue arises when there are party-appointed neutral arbitrators who then appoint a neutral presiding arbitrator. In that case, the neutral party-appointed arbitrators, although subject to the rules of independence and impartiality, find themselves in the unusual position of dealing with an inherent bias in favor of the party who appointed them. This may be because of a desire to gain additional appointments in the future or as a result of a belief, whether it be conscious or subconscious, of being beholden to the party who appointed them. This is particularly true if the appointing party is solely responsible to their appointees fees. While many of the ADR providers try to separate themselves, mandate, or plead neutrality in sitting as an arbitrator, in practice this may not work. An examination of all matters where there were neutral party-appointed arbitrators in which I participated as either a party-appointed neutral

arbitrator, the neutral presiding arbitrator, or an advocate, it became clear that these party-appointed arbitrators struggle with the issue of their bias and neutrality. Many of those cases resulted in a two to one decision, although these decisions may not necessarily be reflected in a published dissenting opinion. In short, the decision still rested upon the shoulder of the neutral presiding arbitrator. Wouldn't the parties have been financially better off by just appointing a single neutral arbitrator with topic specific experience and expertise make the decision? If the case warrants a three arbitrator panel, then all three arbitrators should be selected by the parties jointly or through a matching process that many of the ADR providers employ, and the parties should pay their aliquot share of each arbitrator's fee.

In the case of those who are drafting commercial arbitration provisions, it would be wise to include in those provisions qualifications and methods for selecting the arbitrator. In commercial contracts, one can identify years of experience, type of experience, and the method of selecting the arbitrators. If one wants to resort to party-appointed neutral arbitrators, the provisions in the contract should clearly state that they must be independent, impartial, and not beholden to the position of the party who appointed them. This includes payment of their fees.

The conclusion gleaned from an examination of the costs and effectiveness of the practice of party-appointed arbitrators is clear. This neutral arbitrator concluded "don't do it".

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