

Selecting a party-appointed arbitrator in the US

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Produced by Latham & Watkins LLP for [LexisPSL Arbitration](#).

11/03/2014

Arbitration analysis: Selecting an arbitrator is one of the most important strategic considerations in an arbitration. While an arbitrator's neutrality and impartiality is widely assumed to be the norm (especially internationally), tribunals in the United States have historically allowed commercial arbitrators to exhibit differing degrees of partiality. Here, David J. McLean of Latham & Watkins' New York office discusses the background to party-appointments in the US and discusses the practice in modern international arbitration.

Questions about the permitted partiality of party-appointed arbitrators in the United States have been much debated and the answers have evolved over the years. Having a partisan arbitrator may seem like an advantage, but as the norm has moved towards favouring neutral arbitrators, parties need to strategise carefully when selecting partisan arbitrators so as not to overplay their position.

To provide an understanding of the current status of this important issue in domestic arbitration and to examine considerations surrounding the selection of party-appointed arbitrators in the United States, this analysis discusses the historical context and the subsequent development of the modern role of party-appointed arbitrators in domestic arbitration. Also discussed are the factors that practitioners should consider when selecting a party-appointed arbitrator and how those factors vary depending on whether the party-appointed arbitrator is to be neutral or partisan.

Understanding the historical context

To understand how the partisan nature of party-appointed arbitrators in the United States developed, one should remember that many of the rules and customs attendant to American-style arbitration grew out of the American labour movement of the early 1900's. Going back to the 1930s, a typical labour contract provided for arbitration as the only form of dispute resolution. Not until the civil rights legislation of the 1960s could workers resort to the courts for redress of employment claims and even then, contractual claims were not typically resolved through court proceedings.

To this day, collective bargain agreements in the United States provide for an arbitration process in which management appoints one arbitrator, the union appoints another and the two select the third. Not surprisingly, the union-appointed arbitrator is sympathetic to the worker's claims while the management-appointed arbitrator can be expected to favour the company. As commercial arbitration in the United States became more widespread, the prevailing approach to arbitrator selection resulted in party-appointed arbitrators who were expected to advocate for the party that appointed them (see *Tate v Saratoga Savings & Loan Association* 216 Cal. App. 3d 843 (1989) (not available in Lexis@Library)).

In effect, party-appointed arbitrators were partisan representatives of the appointing sides and each was expected to compete for the vote of the third, neutral arbitrator (see *Sunkist Soft Drinks v Sunkist Growers* 10 F.3d 753 (11th Cir. 1993), cert. denied, 513 U.S. 869 (1994) (not available in Lexis@Library)). Far from acting as neutrals, the party-appointed arbitrators advocated for their respective side and such advocacy influenced the tribunal's deliberations. The boundaries of acceptable partisan conduct were ill-defined and without clear rules or customs, uncertainty arose as to whether both partisans were playing the same game. Even with consensus among the parties about the boundaries of permitted conduct in a particular situation, the concept of partisan arbitrators allowed for a considerable range of conduct. In some instances, party-appointed arbitrators were expected to aid counsel for 'their side' in formulating strategy, considering arguments to advance, witnesses to call and other tactical considerations. Essentially, these partisan arbitrators acted like an extension of the appointing party's counsel. Sometimes, the lines of communication between counsel and its chosen arbitrator would remain open until the tribunal's deliberations began. In other instances, albeit rarer, such communications continued even as the tribunal deliberated (although this later conduct is now proscribed by the Canons of Arbitrator Ethics). In this world, the lines between advocate and party-appointed arbitrator often blurred.

Over time, many began to question the fairness and propriety of this approach. As criticism mounted, both from within the United States and abroad, the norm for United States commercial arbitration shifted to a presumption of arbitrator neutrality. The commercial rules of many arbitral institutions were revised in the last decade or so to pro-

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vide that, absent a specific agreement between the parties, all three arbitrators comprising the panel must be neutral. For example, the American Arbitration Association (AAA) amended their own rule to this effect for domestic arbitration in 2003. The rules of the AAA's international arm, the International Center for Dispute Resolution (ICDR), also require all arbitrators to be neutral, as do the domestic and international rules of the International Institute for Conflict Prevention and Resolution.

Now, typically, when three arbitrators are to be selected, the parties have some input in the selection process. For example, under the AAA default rule, the parties receive a list of candidates and are asked to strike and rank the candidates. Under other regimes, each party appoints one arbitrator and the two will pick the third, subject to certain deadlock breaking provisions set forth in the rules of the various arbitral institutions or the agreement of the parties. Although two of the arbitrators may be selected directly or with input from the disputing parties, in the United States today, all arbitrators are presumed neutral, unless the parties have agreed otherwise.

Despite the modern presumption of neutrality in the United States, parties can still select the partisan approach, with each side picking an arbitrator beholden to the appointing party (if the applicable arbitral rules or the parties' agreement so provides). This approach stands in stark contrast to international arbitration where, even in the United States, all arbitrators must be independent and impartial. Such partisan arbitrators are sometimes referred to as 'Canon X' arbitrators, because Canon X of the American Bar Association's Code of Ethics for Arbitrators in Commercial Disputes (2003) specifically exempts such party-appointed arbitrators from certain expectations of neutrality where the parties so agree.

Considerations for selecting a partisan party-appointed arbitrator

Considerations for selecting a party-appointed arbitrator depend on whether he or she is to be partisan or neutral. We begin with the less common instance where the parties have agreed to appoint partisan arbitrators.

The selection of a partisan party-appointed arbitrator in the domestic arbitration setting in the United States will have implications throughout the dispute resolution process. The influence of the partisan arbitrator is not limited to advocacy during final deliberations. Disputes about discovery, such as the number of depositions allowed, the length of a deposition, the scope of discoverable evidence and whether or not to grant a protective order will likely be influenced by the views of the partisan arbitrators. Similarly, decisions affecting the proceedings, such as whether to grant interim relief, motions to dismiss or motions for summary adjudication and other procedural matters are likely to be influenced by a partisan arbitrator who argues effectively in favour of one party's interests. While typically not outcome-determinative, these procedural decisions can affect the overall direction of the dispute.

In these circumstances, a party must consider the degree of partisanship that is permissible and most favourable. Although an effective partisan arbitrator is expected to advance the cause of the party who appointed him or her, a party-appointed arbitrator who is patently biased may be less effective in influencing the vote of the third arbitrator. Sometimes, the chair will react by deeply discounting a vocal advocate on the panel, especially if the other side has appointed a less obviously partisan arbitrator. For this reason, maintaining some appearance of neutrality may actually increase the effectiveness of the party-appointed arbitrator on the chair whose vote, practically speaking, will decide the case. Balancing these factors can be difficult, making partisan arbitration selection challenging, even under the best circumstances.

Although there has been no shortage of criticism of 'partisan' party-appointed or Canon X arbitrators and the rules of most arbitral institutions in the United States now require all arbitrators be neutral unless the parties agree otherwise, some argue that the partisan approach is not inherently unfair or ill-advised. Commercial arbitration is a creation of contract, and so, the argument goes, parties should be allowed to fashion their agreement as they see fit (within certain limits, perhaps).

The biggest risk associated with appointing partisans arises when parties do not have a clear and shared understanding of the parameters that apply to the conduct of the party-appointed arbitrator. One party may limit its own or its arbitrator's conduct in certain ways to which the other side does not adhere. For example, one party may constrain the extent of communication with its appointed arbitrator, while the other party continues to discuss strategy, or even the merits, with its appointed arbitrator, thus gaining undue influence on, or at least valuable insight into, the tribunal's assessment of important issues. This risk of an uneven playing field creates the potential for unfairness and underlies much of the criticism associated with the use of partisan arbitrators over the years.

For these reasons, and others, the modern presumption in favour of neutrality for party-appointed arbitrators in domestic arbitrations has gained solid ground in the United States, much as it has always had in the realm of international arbitration.

Considerations for selecting a neutral party-appointed arbitrator

Even in the context of rules that require selection of 'impartial' and 'independent' arbitrators, parties will often attempt to appoint an arbitrator who is predisposed in their favour. Impartiality refers to one who is not biased nor prejudiced in relation to the parties, but that is not the same as requiring a total absence of pre-existing philosophies influenced by one's life experiences.

Arbitrator independence tends to focus on the financial, professional or personal relationships of the arbitrator and the parties or their counsel and ought to be easy to achieve. When appointing a neutral, party-appointed arbitrator, parties often attempt to maximize their chance of winning while remaining cognizant of the arbitrator's neutrality. As one commentator expressed, in selecting a party-appointed arbitrator, the candidate with the 'maximum predisposition towards' the client, but 'with the minimum appearance of bias' is often favored (M Hunter, *Ethics of the International Arbitrator*, 53 Arb 219 at [223] (1987)).

Even when an arbitrator must be neutral and impartial, parties nevertheless seek candidates who are predisposed towards their position, whether based on philosophy, prior rulings or predilection. Without a doubt, all else being equal, to select an arbitrator likely to view one's case favourably should increase the chances of a favourable award. For example, depending on the case, one may seek to appoint 'pro-business' or 'pro-consumer' arbitrators. Similar dichotomies include 'pro-employee' and 'pro-employer' jurists in an employment dispute or 'strict constructionist' and 'liberal constructionist' in a contract dispute. Likewise, potential arbitrators, like judges, sometimes can be distinguished by the degree to which they are likely to focus on equitable considerations as opposed to implementing the business deal as written on the four corners of the contract. Parties might find clues into such predispositions in previous academic writings or prior decisions. Even though the modern arbitrator is neutral and not an advocate for the appointing party, the neutral's legal perspective, political views and other such factors could colour his or her decision. Under somewhat analogous circumstances, litigants often speak of being assigned to a judge whom they believe will look favourably on their side, such as when a judge has previously expressed views on relevant legal theories consistent with one's position in litigation. These considerations are often germane as one approaches arbitrator selection.

Most arbitral rules in the United States, like their international counterparts, now require the neutrality of the arbitrators (although under some regimes, the parties can agree to appoint partisan arbitrators, as discussed). Correspondingly, there are rules that impose a duty on arbitrators to investigate possible conflicts of interest and disclose facts likely to affect an arbitrator's judgment. Upon receiving such disclosures, parties can object to the appointment of an arbitrator who appears biased, at which point the arbitral institution typically determines whether the arbitrator should be disqualified (see Rule R-18, AAA Commercial Arbitration Rules and Mediation Procedures (2013)). Rules also limit the extent of ex parte communication between the arbitrators and the parties (see Rule R-19, AAA Commercial Arbitration Rules and Mediation Procedures (2013)). Additionally, some rules require the arbitrator to sign a statement of independence.

Choosing the right arbitrator

Because an arbitrator's approach to procedural and substantive issues likely will impact significantly the outcome of the dispute, appointing the right arbitrator is an essential step towards representing a party in arbitration.

Although the presumption is now in favour of arbitrator neutrality even in the United States, parties in domestic arbitration in the United States are generally free to agree to appoint Canon X or partisan arbitrators. Especially because partisan arbitrators are an anathema in the international context, such that many parties may be unfamiliar with the concept or the role party-appointed arbitrators can play in the domestic context, practitioners should be mindful of the differences in these two approaches.

Practitioners should know the parameters and limitations of selecting (and communicating with) a party-appointed partisan arbitrator. Similarly, where all three arbitrators are to be neutral, the selection process remains just as important. Practitioners should take into consideration the varying dispositions of potential arbitrators in making their selection. Failure to account for these dynamics could significantly disadvantage one's position in the dispute resolution process.

This article was originally published on [Lexis®PSL Arbitration](#) on 11/03/14.