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New York Law Journal

# Arbitration Umpire Selection: What Makes Sense

**By Barry Ostrager**

August 5, 2024

Arbitration, of course, exists by contractual design. For this reason, considerable thought should be given to the terms of any contractual provision that provides for the resolution of disputes by arbitration. The parties are free to design an arbitration provision that forecloses certain issues that could arise once there is a dispute that needs to be resolved by arbitration. All too often parties insert arbitration clauses that give rise to problems that could be avoided if more thought were given to the drafting of an arbitration clause.

Arbitration is intended to be an expeditious, cost-effective, and streamlined way of resolving disputes. The virtue of arbitration is that the parties to a contract can avoid the delays and expense that come with resolving a dispute in a courtroom. Court dockets contain hundreds of cases with a single trial judge, who is contending on a daily basis with multiple motions, hearings, orders to show cause, and trials, all of which renders it nearly impossible to achieve resolution of a dispute in court in less than two years. And don't forget about the expenses associated with discovery rules and necessary court filings.

Courtesy photo

**Justice Barry Ostrager (Ret.) of Federal Arbitration.**

It is common for cases in court to languish for far longer periods of time than two years. Indeed, in the New York State Supreme Court interlocutory appeals on discovery orders and motions to dismiss can easily protract the life of a civil dispute to five years. In addition, appeals from any trial court judgment can further extend the ultimate resolution of a

civil case. By contrast, absent protracted disputes about umpire selection in arbitrations, disputes can be resolved in far less time than they can be resolved in court and far less expensively. And, while arbitration awards can be challenged in Court, absent extraordinary circumstances, arbitration awards are routinely confirmed by the courts.

Returning to basics, parties have the ability to tailor arbitration provisions to preclude disputes that could foreseeably arise from the nature of the subject matter of the contractual relationship between contracting parties. Rather than automatically choosing an arbitration platform to administer the arbitration, the parties can thoughtfully circumscribe the parameters of the arbitration process. For example, the parties could agree in advance that any arbitration would be conducted by a sole arbitrator of their choosing—typically a respected expert in the field of the contract or a retired jurist that the parties respect. Or the parties can specify that the arbitrators must have an agreed upon amount of experience in a discipline related to the subject matter of the contract or consist entirely of conflict-free retired judges. Any arbitration platform will, of course, attempt to propose qualified arbitrators with appropriate backgrounds to resolve a dispute.

If the parties leave the composition of an arbitration panel to an arbitration platform to administer, the parties are each free to select a party arbitrator from a list of qualified arbitrators provided by the arbitration panel or to choose an arbitrator who will be governed by the rules of the arbitration platform. Presumably, for a three-arbitrator panel the parties to an arbitration can be confident that any party arbitrator that a party selects will advance the arguments that support the position of the party who chooses a party arbitrator. But for an arbitration to truly work as intended, the parties must have confidence that the umpire, who may be the deciding vote in the outcome of the arbitration, is truly neutral and will chair the arbitration with a view toward rendering a merits-based outcome. Of course, it is only natural for each party to wish to secure an "edge" in the umpire selection process, so, sadly, umpire selection can be among the most time-consuming parts of the arbitration process. Typically, each side proposes a number of umpires and the umpires each side proposes are viewed with suspicion by the other side. So, if each side proposes a list of a half a dozen umpires and each side strikes five of the other sides' choices, the parties can be left with two choices, neither of which is entirely satisfactory to both parties. When this occurs, the umpire is sometimes chosen by a coin flip. This approach can undermine the confidence a party has in the arbitration as the party who loses the coin flip may come to believe that the arbitration was decided by the outcome of the coin flip. And in some industry-specific arbitration platforms the suspicion that the outcome of the coin flip will determine the outcome of the arbitration is quite valid. If the parties do not agree on a coin flip (and there are arbitration platforms that insist on a coin

flip), most arbitration platforms will select the umpire. But leaving the umpire decision to an arbitration platform may also disappoint one of the parties.

The thesis of this article is that neither a coin flip nor the selection of the umpire by an arbitration platform is an entirely satisfactory way to choose an umpire. So, the optimum solution is for the parties to take whatever time is necessary to come to a mutual agreement on an umpire. This ensures that the parties have selected an arbitration panel that is mutually satisfactory to both parties.

I am aware of cases in which the parties have spent months haggling over the selection of an umpire. Nevertheless, by reaching a consensual agreement on an umpire the parties will have maximum confidence in the fairness of an arbitration. But, if the parties front-load the drafting of an arbitration clause with a mutually agreed upon mechanism for selecting the arbitration panel, including the umpire, each party will achieve the benefits of arbitration and the benefit of their bargain.

I recognize that the path I have outlined is not a well-trodden path, but particularly for high stakes arbitrations, the aforementioned thoughts warrant consideration.

Arbitrations have proliferated because the various arbitration platforms met the challenge of formulating rules and procedures that expedite the resolution of disputes while reducing the transactional costs associated with achieving a reasoned disposition of commercial disputes.

**Justice Barry Ostrager** *(Ret.) is a panelist with FedArb. He served as a New York State Supreme Court justice in the Commercial Division and retired on December 31, 2023, after nearly 10 years of judicial service. Prior to his appointment to the bench, Ostrager was a litigation partner at Simpson Thacher & Bartlett and served as the long-time head in the litigation department.*