

## Respective Roles of the Chair and Other Arbitrators

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### Issues

- Arbitrator authority: What types of matters may be decided unilaterally by the chair? What types of matters need to be decided by all the arbitrators? What communications are appropriate among the arbitrators?

### Three Different Situations in which These Questions Arise

- No party-appointed arbitrators: Where there are three neutral non-party-appointed arbitrators;
- Two party-appointed neutral arbitrators: Where there is a neutral chair and two party-appointed neutral arbitrators; and
- Two party-appointed non-neutral arbitrators: Where there is a neutral chair and two party-appointed non-neutral (Canon X) arbitrators.

### Rules and Canons

- Rule 40 of the AAA's Commercial Arbitration Rules: "When the panel consists of more than one arbitrator, unless required by law or by the arbitration agreement, a majority of the arbitrators must make all decisions."
- Canon IV.G of The Code of Ethics for Arbitrators in Commercial Disputes: "Co-arbitrators should afford each other full opportunity to participate in all aspects of the proceedings."
- Official Comment to Canon IV.G: "Paragraph G of Canon IV is not intended to preclude one arbitrator from acting in limited circumstances (e.g., ruling on discovery issues) where authorized by the agreement of the parties, applicable rules or law, nor does it preclude a majority of the arbitrators from proceeding with any aspect of the arbitration if an arbitrator is unable or unwilling to participate and such action is authorized by the agreement of the parties or applicable rules or law. It also does not preclude ex parte requests for interim relief."
- Canon X.C(5): "Unless otherwise agreed by the arbitrators and the parties, a Canon X arbitrator may not communicate orally with the neutral arbitrator concerning any matter or issue arising or expected to arise in the arbitration in the absence of the other Canon X arbitrator. If a Canon X arbitrator communicates in writing with the neutral arbitrator, he or she shall simultaneously provide a copy of the written communication to the other Canon X arbitrator".

### Situation Where there Are Three Neutral Non-Party-Appointed Arbitrators

- Decision-making: In this situation, the three arbitrators together make all substantive decisions. The chair runs the preliminary hearing and other conferences and the hearing, deciding routine evidentiary and procedural matters, but consults generally with the wing arbitrators in advance and along the way, and the three arbitrators consult on any matters as to which any of them would like consultation.
- Process: The communications between the three arbitrators are generally collegial and consultative. No arbitrator should be excluded, although there is no impropriety and

indeed nothing unusual in any two of the arbitrators discussing the matter between themselves without the presence of the third, although, even with three neutral arbitrators, this should generally be kept to a minimum—and certainly nothing may be decided without including all three arbitrators in the discussions. The parties and arbitrators may agree to a “discovery master” to hear and decide discovery and routine procedural matters, subject to convening the entire panel at the request of any party or arbitrator.

**Situation Where There Are Two Party-Appointed Neutral Arbitrators and the Chair**

- **General rule:** This situation is generally handled the same way as where there are three non-party-appointed neutral arbitrators.
- **Exception:** A possible exception is the situation where one or both of the party-appointed neutral arbitrators seem to be partisan, in which case, on a judgmental basis, the chair may choose to treat the situation more like the one where there are two party-appointed non-neutral arbitrators.

**Situation Where There Are Two Party-Appointed Non-Neutral Arbitrators**

- **General rule:** The rule, as set forth above, is that the chair will treat the non-neutral arbitrators essentially as she treats counsel, refraining from discussing the case with such non-neutral arbitrators unless both are present.
- **Decision-Making:** All substantive decisions will be made jointly. As in the other two situations, the chair runs the preliminary hearing and other conferences and the hearing, deciding routine evidentiary and procedural matters, but consults generally with the party-appointed arbitrators in advance and along the way, and the three arbitrators consult on any matters as to which any of them would like consultation.