Arbitrating a Dispute with a Pro Se Party: The Challenges the Arbitrator Faces

By Jeffrey T. Zaino

Pro se is Latin meaning "for self" or "in one's own behalf." Persons appear pro se in any legal proceeding when they appear without counsel, represent themselves, and do not have an attorney speaking or writing for them. Unlike a judge who may not have the option of refusing to hear a pro se case, arbitrators do, and it is telling that some find the prospect of handling these types of cases so challenging that they will sometimes refuse to handle such cases. This article discusses some of the challenges that a pro se party case creates and gives arbitrators strategies for handling these types of disputes.[1]

Not being able to afford an attorney is the most common reason why parties appear pro se. Even when they can, however, we do sometimes see cases where the party either does not trust an attorney to represent them or feels capable representing themselves better. Whatever the reason, all parties to an arbitration case have the right of self-representation. If they do choose to proceed on a pro se basis, however, they will dramatically alter the process in several ways.

Unique Issues to Pro Se Cases

Several issues arise in pro se cases, but the primary one is that the pro se party is likely to be entering arbitration for the first (and in some cases the only) time. As a result, the pro se parties may be apprehensive, fearful, and in some cases overwhelmed. They may ask basic questions about procedure and express uncertainty about the process. Pro se parties may not only lack knowledge of the rules and procedures, but adversarial skills common to attorneys. They also tend to bring more emotion to the arbitration process. The lack of experience in organizing facts and arguments, dealing with procedural matters, and referring to applicable legal precedent can impact the arbitration process. How should these issues be addressed?

Impact on Arbitrator

When dealing with a pro se party, the arbitrator will likely provide more leeway for the presentation of issues and evidence than if the party were represented by counsel. The arbitrator may also be dealing with emotions over issues that are not relevant to the dispute and be required to assist the pro se party's understanding of the process. It is necessary, therefore, to provide the pro se party with confidence that he or she is being heard and understood.

The arbitrator has an ethical obligation to be fair and impartial to all parties. The *Code of Ethics for Arbitrators in Commercial Disputes* prescribes a number of ethical duties that are applicable to all arbitrators and cases. With a pro se case, the arbitrator should ensure that he or she pays close attention to the requirements regarding fairness, impartiality, and information sharing, as those issues can be even more magnified than in cases where both parties are represented.

Arbitrators also have a duty to prevent abuses of the arbitration process. Self-representation does not entitle the pro se party or the other party to abuse the process and ignore applicable rules and procedures. Canon I.F. of the *Code of Ethics* obligates the arbitrator to prevent abuses of the arbitration process:

> An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision. An arbitrator should make all reasonable efforts to prevent delay tactics, harassment of the parties or other participants, or other abuse or disruption of the arbitration process.

Strategies for Managing the Case

When managing a pro se case, there are three basic strategies that arbitrators should consider employing:

1. **Declare impartiality throughout.** Regardless of the efforts of an arbitrator to be impartial in these types of cases, at some point one or both parties will likely question the arbitrator's impartiality. Particularly when it comes to pro se parties, these types of concerns are not always expressed verbally. As a result, arbitrators in these disputes should never assume that silence is a sign of satisfaction in this regard. The non-pro se party may believe that the arbitrator is overcompensating for the pro se party. The pro se party may feel overwhelmed and *have the perception* that the represented party has an unfair advantage. In most non-pro se cases the arbitrator declares his or her impartiality at the outset of the proceeding. With a pro se case, the arbitrator should declare impartiality throughout and communicate it verbally in clear and unambiguous terms. This can also be achieved through indirect ways such as comments at the appropriate time to both parties. When the arbitrator makes suggestions aimed at improving the pro se's advocacy for the good of the process, the comments should be addressed to both parties to assure the parties of impartiality. For example, the arbitrator might say, *"In order to help make the hearing go smoothly, I want*

each of you to organize your exhibits and number them in order in which you intend to use them."

2. **Educate the parties.** The arbitrator should carefully explain the rules, procedures, and expectations. The arbitrator should walk through the process covering the statement of claim, order of proceedings, evidence, witnesses, closing the hearing, post-hearing and award, and post-award activity. The parties should then be given an opportunity to ask questions and the arbitrator should not proceed until confident that both parties, in particular the pro se party, fully appreciate and understand the process. It is also important that the arbitrator clearly explain the arbitrator's role and where the authority comes from. By providing plenty of education in simple, clear and concise terms, future breaches of the rules/process should not be interpreted as a product of ignorance.

3. **Establish firm limits of assistance**. The arbitrator must advise both parties of the ethical limitations of assistance to the pro se party and stay firm to those limits. If a limit is reached, the arbitrator should be prepared to explain the rationale for drawing the line where he or she did. The arbitrator should not provide legal interpretations, research, legal opinions, or clerical support (e.g., filling out forms or drafting/preparing documents for the pro se).

As concerned as an arbitrator may be about the prospect of overseeing these types of cases, it is important to note that there are steps that can be taken to manage them properly and in the best interests not only of the process, but both parties. Armed with both an understanding of the major concerns of pro se parties and the knowledge of what types of strategies can be employed in these situations, the arbitrator will often find that these types of cases can be rewarding.

Endnote

1. Summary based in part on *Arbitration Fundamentals and Best Practices for New AAA Arbitrators*, American Arbitration Association, 2007, pages 109-120.

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