

Shedding Light on the AAA's Streamlined Three-arbitrator Panel Option

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On May 1, 2017, the American Arbitration Association (AAA) announced a new procedure under the AAA's Arbitration Rules¹ aimed at lowering the administrative cost of arbitrations involving three-arbitrator panels.²

The new procedure, referred to as the "Streamlined Three-Arbitrator Panel Option," allows parties to reduce arbitrators' fees by allowing a single arbitrator to manage the arbitration through the preliminary procedural and discovery stages, while calling on the complete three-arbitrator panel for the evidentiary hearing and final award. According to the AAA, "a three-arbitrator panel can actually cost five times as much as a single arbitrator" and "[b]y maximizing the use of single arbitrator, parties can capitalize on the cost savings, while still preserving their right to have the case ultimately decided by a panel of three arbitrators."³

This article sheds light on the new procedure and explains how parties can better assess whether the Three-Arbitrator Panel Option is a good fit for their dispute. Indeed, the Three-Arbitrator Panel Option is not explicitly incorporated into the AAA's Arbitration Rules, and, therefore, parties may not necessarily consider the Three-Arbitrator Panel Option when initially proceeding to arbitration.

The Three-Arbitrator Panel Option is a novel attempt by the AAA to limit the costs of arbitration and make arbitration a more attractive method of dispute resolution. However, before parties opt into the Three-Arbitrator Panel Option, there are a few points worth considering. As explained below, while there is no reason to necessarily doubt that the Three-Arbitrator Panel Option would improve efficiencies in an arbitration, in some cases, those efficiencies may only be seen at the margins and could raise certain risks that, if not addressed at the outset of a case, may create problems down the road.

Streamlined Three-Arbitrator Panel Option

The Three-Arbitrator Panel Option is not explicitly included in the AAA's Arbitration Rules and, therefore, is not triggered by a specific filing or form. Instead, the parties are typically given an opportunity to opt into the Three-Arbitrator Panel Option during the initial administrative conference. Specifically, during the initial administrative conference, the AAA's representative overseeing the administrative conference may raise the Three-Arbitrator Panel Option for the parties' consideration if the AAA's representative believes that the dispute could benefit from the procedure.

If the parties opt into the Three-Arbitrator Panel Option, the AAA will seek to determine what form of the procedure the parties will utilize. Specifically, the Three-Arbitrator Panel Option comes in two flavors, which the AAA refers to as “Option 1” and “Option 2.”

Under “Option 1,” the parties will, during the arbitrator selection phase, appoint the entire three-arbitrator panel pursuant to the applicable rules or the parties’ agreement. In most cases, this involves the appointment of the panel through a roster of potential arbitrators (see, e.g., Commercial Rule R-12; Construction Rule R-14) or through direct party appointment (see, e.g., Commercial Rules R-13, R-14; Construction Rule R-15). Once the panel is formally appointed, the two party-appointed or “wing” arbitrators (*i.e.*, the arbitrators who are not chair) are placed on inactive status, with the expectation that they will only become active and participate in the arbitration during the evidentiary hearing and while preparing the final award. As a result, the chair will manage all preliminary stages of the case and may decide any dispositive motions before the hearing. However, if either party believes that a dispositive motion requires the full panel, the full panel can be made available to hear and decide the motion.

Under “Option 2,” at the outset of the case, the parties skip the initial panel selection process and only appoint a single arbitrator to manage the pre-hearing stages of the case. Like Option 1, the sole arbitrator is permitted to hear and decide any dispositive motions filed before the hearing. After the arbitration has proceeded for some time, but no less than 60 days before the scheduled evidentiary hearings, the parties will work with the AAA to appoint the two remaining arbitrators, with the initial arbitrator serving as chair.⁴

Lastly, the AAA provides that if the parties elect to use the Three-Arbitrator Panel Option, under either Option 1 or Option 2, but one party decides to withdraw from the procedure later on, that party is entitled to do so. If a party elects to withdraw from Option 1, the wing arbitrators are made active and will participate in all future proceedings. In an Option 2 scenario, the AAA will immediately work with the parties to select the two party-appointed arbitrators. However, if a party elects to withdraw from Option 2 before the formal appointment of the panel, the sole arbitrator will continue to manage the case; if a dispositive motion was argued or briefed before the sole arbitrator, the sole arbitrator will decide the issue before the full panel is appointed.

Considerations

As the AAA is likely to admit, the Three-Arbitrator Panel Option may not be well-suited for all disputes. Critically, parties must consider and actively manage the effects of the Three-Arbitrator Panel Option to ensure it produces the best results. Below are some issues that parties may wish to consider when deciding whether to opt into the procedure.

Dramatic Cost Savings or Benefits at the Margins?

First, parties should consider whether this procedure is fundamentally different from the practices they would otherwise experience during the course of any other arbitration. Specifically, it is commonly the case that, following the appointment of the panel, the chair takes the lead and makes determinations/decisions on procedural issues and other disputes leading up to the hearing without much, if any, input from the party-appointed arbitrators. Often, the parties will expressly agree to this delegation of authority, and their agreement will be recorded in an initial procedural order following the first procedural conference.⁵ However, arbitration management practices vary

between chairs and wings and, without the Three-Arbitrator Panel Option in place (or some other clear directive), the wing arbitrators could be more engaged in the proceedings than the parties would otherwise prefer. The point is this: Although the Three-Arbitrator Panel Option may offer parties some comfort that arbitrator fees will be kept down during the pre-hearing phases of the arbitration, whether the procedure will produce a dramatically different result in the overall efficiencies, as compared to customary arbitration management practices, may be debatable.

Is the Cost of Keeping Party-Appointed Arbitrators Engaged Worth the Expense?

Second, to the extent the parties decide that they will utilize the Three-Arbitrator Panel Option, the parties must carefully consider how much benefit they perceive will be lost by keeping the wing arbitrators on the sidelines. This is a cost-benefit analysis between ensuring that the panel members understand the intricacies of the dispute and minimizing unnecessary costs (especially considering the amount in dispute).

Wing arbitrators who remain engaged in the proceedings will no doubt better appreciate the nuances of a dispute and thus, will be better able to appreciate the points at issue during an evidentiary hearing. By contrast, declining to keep the wings apprised of the proceedings until the weeks before the hearing may cause those arbitrators to be less familiar with the issues in dispute, potentially leading to a sub-optimal result. This is particularly significant for complex arbitrations involving a large number of contested issues, highly technical facts, and bifurcated evidentiary hearings.

On the other hand, the more the wing arbitrators are involved in the proceedings, the more expensive the arbitration becomes. If the issues in dispute are relatively straightforward or the amount in controversy is relatively small, little may ultimately be gained by asking the wings to remain intricately involved in the arbitration.

The Added Importance of Controlling the Chair Selection Process

Third, under either Option 1 or Option 2, the Three-Arbitrator Panel Option makes the chair selection process all the more significant. Specifically, the Three-Arbitrator Panel Option amplifies the effect of an ill-qualified chair by leaving an individual who might lack the requisite background, personality or arbitration experience with the sole authority to decide substantive issues in the arbitration. By contrast, if the wings are more involved in the procedural elements of the case, the impact of an ill-qualified chair could be better contained. This is a problem that parties' counsel should seek to manage during the initial phases of the arbitration. For the construction industry, this issue is critical, as arbitrators serving in construction-related arbitrations are frequently appointed because of their expertise in the field. If the parties intend to utilize the Three-Arbitrator Panel Option, they would be well-advised to ensure they can exert significant control over the selection of the chair to avoid the compounding the problems generated by an unqualified chair.

Option 1 or Option 2: Which Do I Choose?

Fourth, and lastly, if the parties opt into the Three-Arbitrator Panel Option, the choice between Option 1 or Option 2 will require another cost-benefit analysis. While Option 2 will likely generate more cost savings than Option 1, Option 2 may present unique challenges during the arbitration. Specifically, under Option 2, the parties will begin to work with the AAA to appoint the remaining two arbitrators at least 60 days before the evidentiary hearing. If, during the course of the arbitration, one party concludes that its likelihood of success in the case has diminished,

that party could engage in tactics aimed at stalling the proceedings and disadvantaging the other party in the lead up to the hearing. Indeed, even if each of the two remaining arbitrators were to be independently appointed by the parties, a dissatisfied party could stall its appointment process to create leverage over its opponent. Relatedly, if a party concludes that the sole arbitrator has a favorable view of its case, it could take advantage of Option 2 by briefing/arguing a dispositive motion and having the motion decided by the sole arbitrator, without allowing of the opposing party to first engage the full panel. As a result, if the parties are interested in the cost savings generated by Option 2, they must ensure that there are adequate procedures in place to limit gamesmanship by a dissatisfied party later in the proceedings.

Conclusion

Without a doubt, the Three-Arbitrator Panel Option reflects the AAA's ongoing efforts to develop and adapt arbitration rules to suit the needs of its users. For that, the AAA deserves to be commended. When the disputes are relatively simple and the amounts in controversy are low, the Three-Arbitrator Panel may be an option worth considering. However, as would be true for any procedural decision in an arbitration, if the parties elect to structure the arbitration using the Three-Arbitrator Panel Option, they must carefully consider and manage the effects of the procedure to ensure it generates the best results.

Endnotes

¹ The term "AAA Arbitration Rules" refers to the various arbitration rules offered by the AAA, including, for example, the Construction Industry Arbitration Rules, the Commercial Arbitration Rules, and the Employment Arbitration Rules.

² See Press Release, Am. Arbitration Ass'n, American Arbitration Association Offers New Streamlined Three-Arbitrator Panel Option (May 1, 2017), https://www.adr.org/sites/default/files/document_repository/AAA_ICDR_Press_Release_2017_AAA%20Offers%20New%20Streamlined%20Three-Arbitrator%20Panel%20Option.pdf.

³ See Am. Arbitration Ass'n, Streamlined Three-Arbitrator Panel Option for Large Complex Cases, http://go.adr.org/Streamlined_Panel_Option.html.

⁴ Under either Option 1 or Option 2, the AAA makes clear that if the parties want to proceed with the sole arbitrator during the evidentiary hearing and award phases, they will be permitted to do so.

⁵ In fact, one of the AAA's reasons for adopting the Three-Arbitrator Panel Option was to effectively codify this practice as an option of which users should be aware.

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