

RESOLUTION 10-01-06

DIGEST

Consumer Arbitration: Selection of Arbitrator

Amends Code of Civil Procedure section 1281.6 to provide a mechanism to select randomly an arbitrator for consumer arbitration.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Code of Civil Procedure section 1281.6 to provide a mechanism to select randomly an arbitrator for consumer arbitration. This resolution should be disapproved because there is no guarantee that providing another layer of bureaucracy will ensure more impartial arbitrators.

The existing mechanism provides for qualified neutrals to hear consumer arbitrations. No matter how the process is formulated, more frequent users will always feel more comfortable proceeding to arbitration.

The proponent desires to level a decidedly uneven playing field, but it is the court that has the obligation to maintain a fair and impartial forum on behalf of consumers. The existing provisions allow the court to get a list from a private disinterested association and to appoint an arbitrator when the parties cannot agree. If the parties can agree on a method to select a neutral arbitrator, the court does not need to intervene.

SECTION/COMMITTEE REPORT

COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION

DISAPPROVE

The ADR Committee has reviewed the proposed amendment to California Code of Civil Procedure Section 1281.6. The existing statute provides a method of selecting an arbitrator when there is no agreed method or if the agreed method fails. This Resolution provides an alternative selection method in a Consumer Arbitration.

The proposal provides that when a petition is made for appointment of an arbitrator in a Consumer Arbitration, the court will designate an ADR provider which will provide a randomly selected neutral arbitrator. This procedure eliminates party participation in the selection process, regardless of the reason for the petition. When there is no provider designated in the contract or if there is a provider designated in the contract but that provider is unable or unwilling to administer the arbitration, the parties should have input in the selection of an alternate provider

or arbitrator. In either event, the parties should have the historically essential “right to reject” the selected arbitrator for valid reasons. The ADR Committee is also are concerned that the proposal would eliminates sole ADR practitioners from the selection process.

The ADR Committee believes that whenever the court is asked to choose an ADR provider in a petition brought under Section 1281.6, that choice should be made from a list provided by the parties. That allows selection of an arbitrator with substantive expertise. To some extent, the parties also should have a voice in determining the cost of the arbitration. Some arbitrators have a greater hourly rate than others and some arbitrators have a reputation for conducting an arbitration more efficiently than others. Since there is wide variation in experience and cost of panel members in the various ADR providers, random selection could result in the appointment of an arbitrator who is very expensive and who has no relevant experience to handle a relatively simple Consumer Arbitration.

If there is a problem with a proposed arbitrator giving favorable rulings to one of the parties, it is addressed by the detailed arbitrator disclosure requirements and the right to reject.

In sum, the ADR Committee believes that Section 1281.6 works in its present form and that proposed subdivision (b) should not be adopted.

This position is only that of the State Bar of California’s Committee on Alternative Dispute Resolution. This position has not been adopted by the State Bar’s Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Section 1281.6 of the Code of Civil Procedure Code to read as follows:

- 1 §1281.6.
- 2 Except as provided in subsections (a) or (b), if the arbitration agreement provides a
- 3 method of appointing an arbitrator, that method shall be followed. If the arbitration
- 4 agreement does not provide a method for appointing an arbitrator, the parties to the
- 5 agreement who seek arbitration and against whom arbitration is sought may agree on a
- 6 method of appointing an arbitrator and that method shall be followed. In the absence of an
- 7 agreed method, or if the agreed method fails or for any reason cannot be followed, or when
- 8 an arbitrator appointed fails to act and his or her successor has not been appointed, the court,
- 9 on petition of a party to the arbitration agreement, shall appoint the arbitrator.
- 10 (a) When a petition is made to the court to appoint a neutral arbitrator, the court shall
- 11 nominate five persons from lists of persons supplied jointly by the parties to the arbitration
- 12 or obtained from a governmental agency concerned with arbitration or private disinterested
- 13 association concerned with arbitration. The parties to the agreement who seek arbitration
- 14 and against whom arbitration is sought may within five days of receipt of notice of the

15 nominees from the court jointly select the arbitrator whether or not the arbitrator is among
16 the nominees.

17 If the parties fail to select an arbitrator within the five-day period, the court shall
18 appoint the arbitrator from the nominees.

19 (b) When an arbitration is a Consumer Arbitration the parties to the agreement shall jointly
20 select a dispute resolution provider organization which shall provide a randomly chosen
21 neutral arbitrator . When a petition is made to the court to appoint a neutral arbitrator, the
22 court shall designate a dispute resolution provider organization which shall provide a
23 randomly chosen neutral arbitrator. The parties to the agreement who seek arbitration and
24 against whom arbitration is sought may within five days of receipt of notice of the
25 organization from the court jointly select the dispute resolution provider organization
26 whether or not the organization is that designated by the court.

(Proposed new language underlined, language to be deleted stricken)

PROPONENT: Beverly Hills Bar Association

STATEMENT OF REASONS

Existing Law: Requires the neural arbitrator to be chosen from a list of five jointly chosen arbitrators. When arbitrations occur between parties whose use of the arbitration system is disparate, the party with the more frequent use is able to influence the theoretically neutral arbitrator.

This Resolution: Provides for a random assignment of arbitrators to ensure neutrality and to prevent winnowing of arbitration pools by the non-consumer parties.

The Problem: Longstanding precedent and law recognizes the need for the random assignment of judges to cases filed in the courts. Appendix Division VI Standard 2 defines Consumer Arbitrations and the ethical standards that must be met in the appointment of arbitrators in those arbitrations. We should jealously guard the right to a neutral arbitrator. The existence of these detailed standards is an acknowledgment of the problem of selecting a true neutral in the disparate use situation. It is not, however, a solution. Arbitrators who are not acceptable to the frequent user will quickly be gleaned from any pool of neutrals, simply because they will rarely be chosen. Only those acceptable to the frequent users can survive. The traditional solution is to randomly assign from a qualified pool. For example, we jealously guard the right to a neutral judge by denying the parties to a civil suit the right to choose from a panel of five judges. This resolution provides the same protection to consumers in arbitrations.

IMPACT STATEMENT

The proposed resolution does not affect other laws, statutes or rules.

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COUNTERARGUMENT

SACRAMENTO COUNTY BAR ASSOCIATION

This resolution precludes the use of independent neutral arbitrators, not affiliated with an organized dispute resolution provider, from participation in consumer arbitrations. While no disparagement of JAMS or AAA is intended, it does not appear to be necessary to legislate an oligopoly for organized providers, with resulting increased costs to the parties, to protect the interests of consumers in a neutral arbitration.