To Ask or Not to Ask

(Arbitrator Inquiries and the Obligation to Remain Neutral)

By Lisa D. Love, Esq., FCIArb

Questions will arise at various stages of arbitral proceedings that require answers for arbitrators to fully understand and consider the evidence presented by the parties and to issue an award. While many arbitrators are likely to issue formal arbitrator inquiries through procedural orders or oral questions during proceedings, others may refrain from issuing them for various reasons. Regardless of your arbitral perspective, the extent to which arbitrators participate in the arbitral process by asking questions and issuing arbitrator inquiries is not unlimited. Arbitrators must balance their need for information with their ethical duty to remain neutral. Thus, with every arbitrator inquiry, whether written or oral, arbitrators must initially answer the question: "to ask or not to ask"— that is the pivotal preliminary internal arbitrator inquiry.

Some Applicable Ethical Standards Concerning Arbitral Inquiries

Most arbitral institution rules, court rules and bar association canons contain provisions governing arbitrator impartiality. Under most arbitral institution rules, arbitrators must remain neutral and impartial throughout the course of the arbitration, absent an agreement by the parties to the contrary. Impartiality means freedom from favoritism either by word or action.[1] In New York state, an arbitrator must conduct the arbitration in an impartial manner and act at all times with the utmost impartiality and evenhandedness.[2] In addition, arbitrators in New York should refrain from providing professional advice to any party and should at all times strive to distinguish between the roles of arbitrator and that of adviser or party counsel.[3] Further, according to the American Bar Association Code of Ethics for Arbitrators, when the arbitrator determines that more information than has been presented by the parties is required to decide the case, it is not improper for the arbitrator to ask questions, call witnesses, and request documents or other evidence, including expert testimony.[4] However, the ABA Canons caution that arbitrators should avoid conduct and statements that give the appearance of partiality toward or against any party.[5]

Categories of Arbitrator Inquiries

There are at least five common categories of arbitrator inquiries that typically arise in arbitrations and a sixth category that arises in mock arbitrations.

Category 1: Clarification or Confirmation of Facts

Category 1 inquiries involve questions of fact that provide additional information regarding the background of the dispute and cover a wide range of basic, primary and historical information and the course of dealings between the parties. This line of inquiry assists the arbitrators in determining what actually occurred in the case. Where notice and opportunity to cure is in dispute in a construction defect case, a Category 1 inquiry could include questions regarding the names of the parties that were provided notice of a breach, the manner in which the notice was sent and conformance to the other contractual notice requirements in the applicable agreement.

Category 2: Clarification of Matters of Law

Category 2 inquiries consist of questions regarding legal principles and the application of such principles to the facts of the case. This line of inquiry assists the arbitrators in clarifying applicable matters of law. Examples of Category 2 inquiries include questions to elicit information regarding the standard of proof applicable to a claim and the shifting of the burden of proof, the particular law that applies to a claim and the satisfaction of statutory conditions to the award of punitive damages.

CONTINUED ▶

Category 3: Contractual Provisions in Arbitration Agreement Not Raised by Parties

Category [3] inquiries are questions that assist in the interpretation and enforcement of the arbitration agreement between the parties. This line of inquiry helps arbitrators adhere to their ethical obligation to conduct the arbitral proceedings in accordance with the terms and conditions of the arbitration agreement. [6] For example, a Category [3] inquiry is whether a minimum arbitration award provision in an arbitration agreement applies if the actual damages requested by claimant is less than the minimum award. Given the obligation of arbitrators to conduct the proceedings in accordance with the arbitration agreement, arbitrators are empowered to proceed with this line of questioning.

Category 4: Contractual Provisions in Principal Agreement Not Raised by Parties

Category 4 inquiries are questions that request clarifications regarding contractual provisions in the agreements directly related to the dispute that may be applicable but may not have been raised by the parties. Where the right to exercise a mandatory redemption is in question, a Category 4 inquiry could inquire into the applicability of other contractual provisions in the agreement that specifically relate to redemption rights but have not been raised by the parties. With Category 4 inquiries, arbitrators must exercise caution to perform the pivotal preliminary internal arbitrator inquiry to determine the appropriateness of the question. If the inquiry would appear to favor one party over another or give the impression that the arbitrator is acting as a party counsel, the inquiry should not be made.

Category 5: Damage Calculations – Compliance with Principal Agreement

Category [5] inquiries are questions designed to ensure that the calculation of damages is consistent with the contractual provisions of the agreement. In a situation where the damage submission calculation does not align with the terms of the agreement, a Category [5] inquiry permits the arbitrators to request compliance with the contractual provision regarding delay damages, present value adjustments, interest accrual, offsets to damages, liability caps and other contractual provisions governing the assessment of damages that may not have been included or properly reflected in a party's damages submission. For arbitrations subject to the International Chamber of Commerce (ICC) Arbitration Rules, Category [5] and Category [4] inquiries are consistent with Article [21](2), which provides that "[t]he arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages." [7]

Category 6: Neutral Evaluator or Arbitrator in Mock Arbitration

In mock arbitrations or neutral evaluations performed as arbitration preparation in complex disputes, arbitrators are given great leeway to participate in the arbitration. Arbitrators are encouraged to ask wide-ranging questions that may favor one party over another, point out discrepancies and deficiencies in the arguments of a party and highlight the strengths and weaknesses of the dispute. In this limited forum, arbitrators may freely issue inquiries requesting information that favors or disfavors a party since the legal authorities regarding arbitrator neutrality are not applicable in this mock setting.

General Principles Regarding Arbitrator Inquiries

Although arbitrator inquiries may be extremely helpful in arbitral proceedings, several general principles are useful to determine the appropriateness of their content and their timing.

Principle 1: Do not issue arbitrator inquiries until both sides have had an opportunity to present on the issue.

Many questions that arise at various stages of an arbitration should be clarified or addressed after the parties have presented their respective positions. An exception might be in a complex dispute where the receipt of additional information regarding the parties and their relationships, the transaction flow or structure, or other factual matters might initially be required to understand the dispute. In this situation, arbitrator inquiries might be appropriate prior to the presentation of both parties' cases.

Principle 2: Do not ask questions that may raise possible additional claims.

There is a distinction between an arbitral inquiry that sheds light on a claim that has already been raised and one that raises a new claim not previously alleged by a party. Arbitrator inquiries should not introduce new claims.

CONTINUED ▶

Principle 3: Do not ask questions that may raise issues of affirmative defenses.

During many arbitrations, the arbitrator may already know typical defenses to certain claims based upon their knowledge, experience and analysis of the facts and circumstances of the claims. However, if such defenses to a claim have not been raised and affirmatively pursued by a party, it would be inappropriate for an arbitrator to inquire regarding it. Examples of inappropriate inquiries include those related to the statute of limitations, impossibility, statute of frauds, unclean hands, release, accord, satisfaction or any other affirmative defense not raised and pursued by a party.

Principle 4: Ask questions in an impartial manner.

If the arbitrators make an inquiry in an arbitral proceeding, it generally reflects an issue that they deem to be important. Although the party's response to such inquiry will usually favor one party over the other, the inquiry itself should be asked or written in a manner that does not favor one party and maintains the arbitrators' neutrality and impartiality.

Conclusion

Properly exercised, arbitrator inquiries are effective tools with ample legal authorities that support the power of arbitrators to make inquiries during arbitral proceedings. However, in making such inquiries, arbitrators must avoid asking questions that may be construed as providing professional advice or favoring one party over the other, or may be misconstrued as an inquiry that should be made by party counsel instead of the arbitrators. Thus, the arbitrators' analysis of the pivotal preliminary internal inquiry, to ask or not to ask, is always relevant and a prerequisite to asking any question or issuing any arbitrator inquiry.

Lisa D. Love, Esq., FCIArb. *is an accomplished arbitrator, mediator and neutral evaluator with JAMS who brings to her work as a neutral extensive experience as a complex commercial transactions attorney. Ms. Love has served as a neutral in a wide range of complex commercial transactions and legal disputes, including those focused on investments, corporate finance, securities, mergers and acquisitions, construction and infrastructure projects and development, energy, life sciences, licensing and technology transfers, franchises, commercial real estate, antitrust, government and public agency, and corporate governance matters.*

1. *See JAMS Arbitrators Ethics Guidelines – Guideline VI(A).*
2. *See New York State Unified Court System Rules Ethical Standards for Arbitrators and Neutral Evaluators – Ethical Standard I – Impartiality.*
3. *Id., Standard VI – Quality of the Process, Ethical Consideration No. 4.*
4. *See American Bar Association/College of Commercial Arbitrators Annotations to the Code of Ethics for Arbitrators in Commercial Disputes Canon IV(E)*
5. *Id., Canon I(D).*
6. *Id., Canon I(E).*
7. *See International Chamber of Commerce Rules of Arbitration effective January 1, 2021 – Article 21(3).*