Presenting No Evidence at Arbitration Hearings is Not Good Faith Participation

Arbitration Participants Beware

By Daniel Patrick Jackson

In Illinois, and Cook County in particular, court-annexed arbitration is a mandatory and non-binding procedure that strives to resolve disputes in an expedient and inexpensive fashion. *See Court Annexed Mandatory Arbitration, State Fiscal Year 2006, Annual Report to the Illinois General Assembly 1,* available at www.state.il.us/court/Administrative/ManArb/2006/ManArbRpt06.pdf (hereinafter "2006 Annual Report").

Cook County's mandatory arbitration program is governed by the Supreme Court Rules for the Conduct of Mandatory Arbitration Proceedings. *See* 245 Ill. 2d R. 86, *et seq.*; *see also* Local Rule of the Circuit Court of Cook County 18.2. The Cook County arbitration program began in 1990, and over the past five years, an average of 14,260 cases are referred to it annually. *See* 2006 Annual Report at 68.

Pursuant to Local Rule 18.3(b) of the Circuit Court of Cook County, "[a]ll actions filed in the Municipal Districts after the effective date of these rules, involving personal injury (regardless of whether a jury demand has been filed) and those actions for property damages or breach of contract in which a timely jury demand has been filed, seeking money damages only, not to exceed thirty thousand dollars ($30,000), shall be assigned to an arbitration calendar."

Although these arbitrations are mandatory, the U.S. Constitution still guarantees litigants the right to trial by jury. In order to protect this constitutional right to a trial by the jury, Illinois Supreme Court Rule 93 grants litigants who have been ordered to mandatory arbitration the right to reject the arbitrator's award. *See, e.g.*, *Stemple v. Pickerill*, 377 Ill. App. 3d 788, 791, 879 N.E.2d 1042, 1046 (2d Dist. 2007); *see also* 145 Ill. 2d R. 93. However, in certain circumstances, a party can be forced to accept an arbitration award. *See, e.g.*, *Stemple*, 377 Ill. App. 3d at 791, 879 N.E.2d at 1046; *see also* 145 Ill. 2d R. 91(b).

When Can a Litigant Be Forced to Accept an Arbitration Award, or Be Barred from Rejecting It?

Illinois Supreme Court Rule 91(b) requires that parties to an arbitration hearing participate in *good faith* and in a *meaningful manner* and allows a trial court to impose sanctions, including barring the offending party from rejecting the arbitration award, if a party fails to do so. *See* 145 Ill. 2d R. 91(b); *see also Lopez v. Miller*, 363 Ill. App. 3d 773, 776, 844 N.E.2d 1017, 1019 (1st Dist. 2006). How does a litigant participate in good faith and in a meaningful manner under the strictures of Rule 91(b)?

A trial court need not find intentional obstruction of the arbitration proceeding in order to find bad-faith participation on the part of a party to the hearing. *See Employer's Consortium, Inc. v. Aaron*, 298 Ill. App. 3d 187, 191, 698 N.E.2d 189, 192 (2d Dist. 1998). Instead, the purposes of Rule 91(b) are defeated whether a party's conduct is the result of inept preparation or intentional disregard for the process. *See id.* The Committee Comments following Rule 91(b) indicate that "[a]rbitration must not be perceived as just another hurdle to be crossed in getting the case to trial." 145 Ill. 2d R. 91(b), Committee Comments.

Simply put, Rule 91(b) requires that parties participate in an arbitration hearing in good faith by subjecting the case to the type of adversarial testing that would be expected at trial. *See Campuzano v. Peritz*, 376 Ill. App.

3d 485, 488, 875 N.E.2d 1234, 1236 (1st Dist. 2007); *see also Martinez v. Gaimari*, 271 Ill. App. 3d 879, 884, 649 N.E.2d 94, 98 (2d Dist. 1995).

Presenting No Evidence Is Not Subjecting a Case to the Type of Adversarial Testing That Would be Expected at Trial

A plethora of Illinois appellate court decisions make it clear that when litigants present no witness testimony or documentary evidence at an arbitration, they have failed to subject the case to the type of adversarial testing that would be expected at trial and as such, have failed to participate in good faith under Rule 91(b).

Opening statements, closing arguments, and cross-examination of opposing witnesses by a litigant's counsel are not evidence; they need to be coupled with the presentation of actual evidence at the arbitration to support a finding of good-faith participation. *See Anderson v. Pineda,* 354 Ill. App. 3d 85, 89, 819 NE 2d 1157, 1161 (1st Dist. 2004). In *Anderson,* the defendants' participation at the arbitration was "limited to presenting opening and closing arguments and cross-examining plaintiff." Following the arbitration, the panel found in favor of the plaintiff. *Id.* at 86, 819 N.E.2d at 1158. Sometime thereafter (presumably within the requisite 30-day time frame), defendants filed a notice of rejection. The appellate court held that in only giving opening and closing statements and cross examining the plaintiff, the defendants had failed to offer any evidence. *See id.*, 819 N.E.2d at 1161.

The defendants argued that because they had admitted negligence, there was no need to testify at the hearing, so their failure to do so did not indicate a lack of good faith or meaningful participation. The Appellate Court found this argument "unpersuasive," because in their answer to plaintiff's complaint, the defendants denied liability. *Id.* at 89, 819 N.E.2d at 1161. The court went on to say that the defendants could have presented evidence, but chose not to. The court also stated that the failure to present evidence at the arbitration hearing amounted to a failure to participate in good faith and illustrated "defendants' contempt and disregard for the arbitration process." *Id.*

The appellate court held similarly in *Hinkle v. Womack*, 303 Ill. App. 3d 105, 114, 707 N.E.2d 705, 710-11 (1st Dist. 1999). In *Hinkle*, defense counsel made opening and closing arguments and cross examined the plaintiffs at the arbitration hearing. Awards were entered on behalf of the plaintiffs. The defendants rejected the awards and the plaintiffs moved to disallow defendants' rejection. The appellate court affirmed the trial court's order barring the defendants from rejecting the award as "[defendants] attorney not only failed to present evidence to rebut plaintiffs' case in chief, but also admitted negligence. The defendants did not test the plaintiffs' case at all." *Id.* at 112, 707 N.E.2d at 709.

The *Hinkle* court articulated a clear warning to litigants involved in the mandatory arbitration process: presenting no evidence is tantamount to bad-faith participation. "A defendant does not participate as an adversary challenging a plaintiff's case for purposes of the arbitration process by presenting no evidence." *Hinkle*, 303 Ill. App. 3d at 113, 707 N.E.2d at 710. "Making 'arguments' is not the same as presenting evidence; a defendant who presents no evidence limits the defendant's possible arguments to the evidence presented by the plaintiff and the plaintiff's testimony on cross-examination. In other words, a defendant's arguments can only call into question the sufficiency of a plaintiff's evidence; it cannot establish any arguable concrete rebuttal evidence to the plaintiff's case." *Id.* "We [the appellate court] believe that merely cross-examining witnesses and making arguments to rebut a plaintiff's case in chief is not the type of adversarial testing of a plaintiff's case that would be expected at trial." *Id.* at 114, 707 N.E.2d at 710; *see also Martinez*, 271 Ill. App. 3d at 883-84, 649 N.E.2d at 98.

What Should You Do When Your Opposition Attempts to Reject an Award After Bad-Faith Participation in an Arbitration Hearing?

First, if you suspect your opposition has failed to participate in good faith at an arbitration hearing, request that the panel make note of this in its award. This will forestall the inevitable argument by a bad-faith participant that the panel found all parties participated in good faith. However, Illinois case law is rife with instances in which the panel did not find bad faith and the trial court later did (on a motion to bar bad faith participant from rejecting arbitration award). "[A] bad-faith finding by an arbitration panel is not a prerequisite to entry of a debarment order by the trial court…." *See Lopez*, 363 Ill. App. 3d at 779, 844 N.E.2d at 1022 (quoting *Glover v. Barbosa*, 344 Ill. App. 3d 58, 63, 800 N.E.2d 519, 523 (1st Dist. 2003)). The trial court may make its own bad-faith finding even where none is made by the arbitration panel. *Glover*, 344

Ill. App. 3d at 63, 800 N.E.2d at 523; *see also Campuzano*, 376 Ill. App. 3d at 489, 875 N.E.2d at 1237.

Second, determine whether your opponent has failed to comply with applicable Supreme Court Rules regarding participation in the hearing. Supreme Court rules 91 and 93 impose four conditions with which litigants must comply to reject an award. The party attempting rejection must:

(1) [H]ave been present, personally or via counsel, at the arbitration hearing or that party's right to reject the award will be deemed waived;
(2) [H]ave participated in the arbitration process in good faith and in a meaningful manner;
(3) [F]ile a rejection notice within 30 days of the date the award was filed; and
(4) [U]nless indigent, pay a rejection fee.

2006 Annual Report at 6. If your opponent fails to meet any of these bases, you should consider filing a motion to bar them from rejecting the award.

Third, contemplate how you will prove the opposition's bad-faith participation. Rather than deny the allegations and arguments raised in a motion to bar rejection, a common argument submitted by the bad-faith participant is that you cannot prove that they did not participate in good faith. This can be problematic, as parties do not generally bring court reporters to arbitrations, but it is by no means an insurmountable burden. Affidavits can be an effective alternative and can support a court's decision as to a litigant's good-faith participation in an arbitration hearing. *See Schmidt v. Joseph*, 315 Ill. App. 3d 77, 85, 733 N.E.2d 694, 700 (1st Dist. 2000); *see also, e.g.*, *Goldman v. Dhillon*, 307 Ill. App. 3d 169, 172-74, 717 N.E.2d 474, 478 (1st Dist. 1999).

Concluding Remarks

There is a simple way to avoid being forced to accept an arbitration award: do not "abuse the arbitration process so as to make it meaningless" and do not view it "as just another hurdle to be crossed in getting the case to trial." 145 Ill. 2d R. 91(b), Committee Comments. Present some evidence, as you would at trial, in furtherance of your clients' interests. In so doing, clients lawyers can ensure that this expedient and inexpensive forum for the resolution of claims continues to succeed. Conversely, if you notice that your opponent has not participated in good faith and/or a meaningful manner pursuant to Rule 91(b), you should strongly consider filing a motion to bar him or her from rejecting the award. ■

Daniel Patrick Jackson is a second-year associate at the Gloor Law Group, LLC, concentrating in civil litigation.

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