

Selecting the Party Appointed Arbitrator: Key Considerations

1 April 2019

Author: [Paul Friedland*](#)

The objective of any party facing the selection of a party-appointed arbitrator is to maximize its chances of winning. The ideal party-appointed arbitrator is an individual who, once convinced of the merit of the positions advanced by the appointing party, will be motivated and able to convince the presiding arbitrator and the other party-appointed arbitrator of this point of view. What kind of individual can best fulfill that role?

What to Avoid

AN APPEARANCE OF BIAS. It is imprudent to name an individual who, because of a visible link to either the appointing party or counsel, will be seen as predisposed in favor of the appointing side, whether or not the individual actually has such predisposition. For example, in the case of a government entity appointing an individual with links to and, therefore, knowledge of the government, any advantage that might be derived from the appointee's knowledge would surely be offset by the risk that the two other arbitrators would regard the appointee's independence with skepticism. The likelihood would be that any arguments made by this appointee in favor of the government party during arbitrator deliberations would have diminished impact on the other arbitrators.

THE RUBBER STAMP. Parties should avoid naming an individual so beholden or thankful for having been named that the appointee will act as a rubber stamp for the positions advanced by the appointing party. Such an individual will inevitably be perceived by the other arbitrators as a cipher for the appointing party, with the result that the tribunal will become, in effect, a two-person panel.

THE CUSTOMARY PRESIDING ARBITRATOR. It is dangerous to name an individual so accustomed or predisposed to being a tribunal chair that he or she will feel no need to fulfill what is commonly recognized to be one of the key roles of a party-appointed arbitrator in international arbitration; namely, assuring, insofar as possible, that the presiding arbitrator and the co-arbitrator adequately consider the arguments advanced by his or her appointing party. This function requires a certain effort by the party-appointed arbitrator, and there are individuals who, one can predict, will have no inclination to make such effort.

THE OVER-WORKED ARBITRATOR. There are terrific arbitrators who are over-worked. But it is a rare skill to be both terrific and over-worked. More often, it is overly risky to appoint an individual who is over-worked, or even worse, someone who is lazy or manifests no enthusiasm for taking on the case. Industriousness is a key characteristic of a good arbitrator. As between party-appointed arbitrators, the one who demonstrates both diligence with respect to mastering the factual record and activism with respect to drafting the award will likely be the one with greater input in the decision-making process.

**This article is an adaptation of an article previously written by the author, published in the ARIAS U.S.*

Quarterly, Second / Third Quarter 1999. While change is the norm in international arbitration, the essence of party appointment strategy is unchanged.

THE CONTRARIAN. It is risky to name a contrarian; such a person might alienate the other arbitrators and might be eager to write a dissent. No party wants to see a brilliant dissent written in support of its position.

SUBSTANTIVE DISSONANCE. One should avoid naming an individual with a history of espousing positions adverse to those that will be advanced by the appointing party in the arbitration. The risk is not that the appointee likely would be hostile or unfair to the appointing party but, rather, that an individual with this background might be less able to identify arguments in favor of the appointing party. Arbitrators are typically not passive adjudicators who merely weigh the relative merits of the parties' positions before choosing between them. Rather, arbitrators often take their own view of the facts and the law, and then develop their collective view during joint deliberations. It is during these deliberations that, a party hopes, its appointee, having been convinced of the merits of its position, will persuasively demonstrate an ability to summon arguments in favor of that viewpoint.

THE INEXPERIENCED ARBITRATOR. It is usually advisable to avoid an individual with no experience in international arbitration. The difficulty with an inexperienced appointee is not that there are secrets known only to the initiated. Rather, it is in part that familiarity breeds confidence and the lack thereof in a party-appointed arbitrator may limit the appointee's effectiveness. Inexperience in the appointee also may be harmful when the two party-appointed arbitrators consult to name the chair. This is because the appointee may be less able to identify or obtain the agreement of the other arbitrator to suitable and experienced individuals willing to act as chair. Moreover, inasmuch as the presiding arbitrator usually will be a lawyer experienced in international arbitration, there is an obvious advantage in naming an individual who will be known to the presiding arbitrator or who, at least, will share some of the presiding arbitrator's experience.

THE NON-LAWYER EXPERT. The preceding considerations may militate against naming non-lawyer industry experts as party-appointed arbitrators in most international commercial disputes. There are, however, exceptions to any rule, and in certain cases, the best course may be to name an individual who is an insider to the trade, even though an outsider to international arbitration.

What to Seek

The best party-appointed arbitrator would combine as many of the following traits as possible.

INTELLIGENCE/STATURE. The appointee should be an individual of intelligence and stature in his or her field, which may be as narrow as the one in question or as broad as the field of international commerce.

INDEPENDENCE IN FACT AND APPEARANCE. The appointee should be independent of the appointing party in fact as well as in appearance, and should have sufficient eminence and/or interpersonal skills to assure against being perceived as a rubber stamp. There should be no doubt in the minds of the other arbitrators that the appointee will, if the facts and law so require, vote against the appointing party.

SHARED VIEWS. Based on experience, the appointee should have an intellectual predisposition in favor of the positions to be advanced by the appointing party. This does not mean bias; this attribute would be undermined by bias. What this calls for is an individual inclined by experience to identify and sympathize with arguments and equities in favor of the appointing party.

MOTIVATION. The appointee should be motivated and have the time and ability to master the facts of the case and play an active role in drafting the award. There is no way to generalize about the type of individual who might possess these critical attributes. Some arbitration practitioners believe academics are best suited for this role because of their drafting ability and that attorneys are often unwilling to spend substantial time on cases that remunerate them at less than their usual hourly rate. Others find attorneys are able and willing to dive into fact-intensive files.

COLLEGIALITY. The appointee obviously should be capable of acting collegially with the other arbitrators.

COGNIZANCE OF ROLE. The appointee should be cognizant of the role required of a party-appointed arbitrator, *i.e.*, to make the effort to assure that the rest of the tribunal gives due consideration to the facts and the law favoring the appointing party's side.

KNOWN QUANTITY. As a practical matter, the appointee should either be known to the appointing party or its counsel or well known to others known to them. The appointment is usually the most important decision that counsel and the party will make during the arbitration, and common sense dictates that the selection should be made on the basis of either personal knowledge or a careful investigation of the individual's capability to meet these criteria.

Conclusion

The fact that arbitrator appointments are made with the objective of maximizing one's chance of winning does not mean appointments should be or are made in the hope of bias. An appointee can be both independent of the appointing party and faithful to the integrity of the arbitral process, as well as intellectually predisposed in favor of the appointing party. There is an inherent safeguard in the arbitral process: the neutrality of the presiding arbitrator. No presiding arbitrator will find a rubber stamp party-appointee persuasive. This safeguard gives parties the incentive to name arbitrators of stature and independence, even as they look for an individual predisposed by experience in favor of the positions likely to be advanced by their side during the arbitration.

In Brief

SEEK OUT...

- Intelligence and high stature.
- Prior experience as an arbitrator in international cases.
- Independence of the appointing party.
- Interpersonal skills.
- A viewpoint that has commonality with that of the appointing party.
- Motivation and enthusiasm about participating in the case.
- A willingness to endeavor to have the appointing party's arguments heard.
- Collegiality

AVOID...

- An appearance of bias.
- A tendency to rubber-stamp the views of the appointing party.
- Laziness or lack of motivation or commitment to the case.
- A contrarian temperament.
- Inexperience in international arbitration.

White & Case LLP
1221 Avenue of the Americas
New York, New York 10020

T +1 212 819 8200

In this publication, White & Case means the international legal practice comprising White & Case LLP, a New York State registered limited liability partnership, White & Case LLP, a limited liability partnership incorporated under English law and all other affiliated partnerships, companies and entities.

This publication is prepared for the general information of our clients and other interested persons. It is not, and does not attempt to be, comprehensive in nature. Due to the general nature of its content, it should not be regarded as legal advice.