Selecting the Ideal Arbitrator

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In addition to being well prepared, there is no more important step in arbitration than selecting the arbitrator. This article stresses the importance of identifying a well-qualified arbitrator who will be responsive to the client's side of the case. It also describes the "Enhanced Neutral Selection Process" that the American Arbitration Association recently launched, which is available in certain large, complex cases administered by the AAA.

The quality of an arbitration obviously depends on the fair-mindedness, experience and ability of the arbitrator or panel selected to hear the dispute. But is it sufficient for counsel to select arbitrators having such qualities? If the question were asked in the context of jury selection, the answer would clearly be "no." Litigators go to famous lengths to select jurors who seem likely to view their case favorably. Why shouldn't those who select arbitrators do the same?

Yet many attorneys seem to believe that, in arbitration, it is sufficient to select well-qualified arbitrators without regard to their potential responsiveness to the client's case. I believe that following such an approach misses a crucial step in the process. In over 28 years as a commercial arbitrator I have seen many cases in which intelligent and fair-minded arbitrators hearing the same evidence have reached significantly different conclusions as to the appropriate award.

Identifying arbitrator candidates who are likely to be responsive to one's case is a daunting task. However, with the Internet and ever-expanding data bases, information from which to make such a judgment is greater than ever before.

The Need for Early Evaluation of One's Case

Asked to identify the differences between arbitration and litigation, most lawyers and experienced business people would mention arbitration's relative informality and substantial limitations on discovery and the right to appeal, which generates savings in both time and cost. Many would also mention the ability to participate in the selection of a decision maker (whether a sole arbitrator or a panel of three) who has knowledge and expertise in the subject area of the dispute.

But a further major difference between the two processes is the fact that in arbitration the attorneys need to have much greater knowledge of their case when they are launching or preparing to defend it than is generally necessary at the early stage of a lawsuit. In litigation, by the time the attorneys select the jury, they have generally lived with the case for years.

In arbitration, the arbitrator selection process starts at the administrative conference held shortly after the case is filed. At that conference, counsel for both parties have the opportunity to tell the case manager what types of persons they want to see on the list of potential arbitrators. In order to do this well, both counsel must know their clients' case inside and out, and have determined their arbitrator preferences-for example, whether the arbitrator should be male or female; young or old; experienced or inexperienced; employed (full time or part time) or retired; a lawyer or non-lawyer; if a non-lawyer, an accountant, business person, or technical expert; an "in-demand" arbitrator with a busy calendar or an arbitrator who can deal with the case right now; an entrepreneurial or "establishment" type of person; a naturally bright high achiever or a serious hard worker; or a proactive or laid back individual.

To select sympathetic and qualified arbitrators, the attorneys need to understand the strengths and weaknesses of their clients' case and have a sense of the personalities involved. The ideal arbitrator always depends on the particular case. At the deepest

level, both counsel need to figure out the chain of logic whereby the client has the potential to win-whether based on the facts, the law, the equities, or sleight of hand. Then they must determine what types of potential arbitrators would be likely to respond in a favorable manner to such a case.

"Broad-Picture" People versus Sticklers

Perhaps the broadest distinguishing characteristic of arbitrators, cutting across such categories as age, gender, education, experience, profession and substantive knowledge, is a psychological one-the distinction between the conceptual, open-minded, equity-oriented person at one extreme, and the rule-oriented, no-nonsense, by-the-numbers strict constructionist at the other. These two types of individuals have very different ways of looking at the world and may generally be expected to view many fact patterns in very different ways.

It seems to me that the relatively few cases that go to trial do so largely because they involve a gray area of fact or law that causes each side to believe its position is correct. In such circumstances, there is often no strong objective basis for either side to convince the other it is wrong. One side often urges strict construction of the contract and related documents, while the other argues the parties' intent and the equities of the case. Daunting as the task may be, counsel for both sides need to anticipate the likely mindset of potential arbitrators in making their selections.

Importance of the Chair

The interpersonal dynamics on a panel, particularly between the arbitrator selected to chair the panel and the two co-arbitrators, can have a substantial impact on the outcome of a case.

In my experience, the chairperson usually has a strong leadership voice with one co-arbitrator and often with both. This multiplies the importance of the arbitrator who is likely to be designated to chair the panel.

In arbitration proceedings administered by the AAA, the AAA will designate the chair based on experience as an arbitrator, knowledge of ADR, the amount of AAA training the arbitrator has taken (for example, training for the large, complex case panel, and training as a chair), and good feedback from users of AAA services. There is no rule of which I am aware calling for a lawyer to be appointed to serve as the chair, although it appears to me that lawyers are often selected for this role. However, a non-lawyer who has more experience with, knowledge of and training in arbitration, who is positively reviewed by AAA clients, could be appointed to chair the panel.

Investigative Steps

Experienced counsel take steps to check out the people whose names are on the list of arbitrator candidates prepared by the ADR provider. The first step is to review the list of candidates and the accompanying biographical information and circulate them to the attorneys at the firm and to other trusted colleagues at other firms, seeking feedback about candidates of potential interest. Some law firms active in the field of arbitration collect information about arbitrators and potential arbitrators in a computer data base. In addition, it is important to send the arbitrator candidate list to the client, who may have access to independent information about persons on the list.

It is very useful to search for information about the potential arbitrators on the Internet using search engines such as Google and Yahoo, and legal and news-oriented data bases (for example, the Lexis/Nexus and Westlaw databases are available only to subscribers). These searches can yield valuable information about arbitrator candidates, which could include tides of articles and books they have written. Counsel should always read whatever the potential arbitrator has written in order to learn how this person thinks and perhaps his or her views on issues involved in the case. Sometime briefs can be found on the Internet

that were written by candidates who are (or were) litigators, as well as information about litigation in which candidates (or entities or persons with whom they are closely identified) have been involved. As to potential arbitrators of any prominence, it may be possible to find leads to people they have dealt with in other cases. Calling these people for information can mean avoiding a big mistake.

It can be helpful to interview potential arbitrators. However, arbitrator interviews should only be conducted on a joint basis with the adversary to avoid risking disqualification of the candidate or undermining the award.

AAA's Enhanced Neutral Selection Process

The AAA recently introduced the Enhanced Neutral Selection Process to facilitate counsel's selection of arbitrators in certain large, complex cases. This process has the potential to greatly facilitate the process of identification and selection of desirable arbitrators.

As part of the new process, the AAA will provide the parties with an early, initial sample of arbitrator resumes selected on the basis of qualifications identified by the parties. This should enable the parties' attorneys to determine whether the Association is on the right track in offering arbitrator candidates. If necessary, the AAA can redirect its efforts in preparing the list.

The AAA also will send out so-called "block lists" of arbitrators, categorizing potential panel members by professional expertise-such as attorney, retired judge, industry expert, accountant, or other categories of experience requested by the attorneys.

The new program specifically contemplates joint interviews of potential arbitrators by both sides, either by telephone or written questions. In the interview, both counsel (through the case manager) will have the opportunity to ask prospective arbitrators a reasonable number of general questions agreed upon by the parties and the arbitrator (but not questions specific to the fact pattern involved), in order to get a sense of the prospective arbitrator and his or her view of the world.

Given the importance of arbitrator selection, the opportunity to interview the candidates in large, complex cases is always worth taking.

The new process also contemplates that counsel may request references for prospective arbitrators. References would be of great value in evaluating candidates.

The AAA Enhanced Neutral Selection Process is only available if both sides agree and the case is administered pursuant to the AAA's Procedures for Large, Complex Disputes. Otherwise, the case will be administered according to the regular arbitrator selection process in the AAA Commercial Arbitration Rules.

Lawyers versus Industry Experts

How important is it to select arbitrators with industry expertise? Again, it depends on the case. Many experienced business people and attorneys provide arbitration clauses in their contracts precisely because arbitration offers the opportunity to have potential disputes resolved by decision makers who know the practices of the industry the parties are involved in and are likely to decide any dispute that arises in accordance with such practices. Being judged by one's peers is believed to lead to decisions that better reflect industry expectations. "Architects judging architects" should produce decisions that make sense in the context of architectural practice. Decision making by arbitrators with industry expertise also fosters efficiency, since less time needs to be spent educating them about technical matters. Arbitrators with such expertise can "cut through" the issues.

Yet once disputes arise, the law comes into play. The arbitrators, whatever their technical expertise, will need to have "process" expertise. By that I mean experience conducting arbitration proceedings effectively and expeditiously. Litigators who come to an arbitration with expectations derived largely from their litigation experience (i.e., those who do not have a great deal of experience in arbitration) may not understand this.

In cases involving substantial legal or procedural issues, each side will typically want at least one lawyer. In cases involving substantial technical issues, each side will typically want at least one technical expert. Yet such predilections should not be followed on a knee-jerk basis. Attorneys need to exercise judgment based on the specific case. If their client seems more likely to win based on application of the law, perhaps an effort should be made to select an all-lawyer panel. If the client seems more likely to win based on industry practice or other non-legal considerations, perhaps a panel made up solely of industry experts should be sought.

The issue is most acutely posed in a case to be heard by a single arbitrator where significant legal and technical issues are presented. In such a case, the attorneys for each side have to make the hard choice and seek to select the type of arbitrator believed to be most likely to respond favorably to their client's case.

I do not mean to suggest that there is always a disconnect between decisions based on application of law and those based on industry practice or other non-legal considerations. Having participated in many deliberations on panels with lawyers and industry experts, it seems to me that industry practice is generally substantially consistent with the law and provides a fair result. Yet there are cases where law and practice conflict and where strict application of law conflicts with considerations of fairness and equity. One of the distinctive advantages of arbitration is that it offers the potential for decision-making based on industry practice and equitable considerations in such circumstances.

Yet such decision making does not come automatically. Attorneys must seek to select arbitrators who are potentially amenable (or not amenable) to decision making on a particular basis.

One potential problem with basing the selection of an arbitrator largely on industry expertise is that the arbitrator candidate may have gained the expertise working on one side or the other of the relevant issue. This could make the person desirable to one party and undesirable to the other.

Retired Judges

Do retired judges make better arbitrators than lawyers? This depends on the judge and the case. Perhaps the central questions for parties who are seeking to obtain (or avoid) decision making based largely on industry expertise and equitable considerations are: (1) is the retired judge open to such decision making? (2) does the former judge have the arbitration mindset of expedition and economy? and (3) will he or she be open to spending substantial study time in a particular case if necessary and desired by counsel?

If a case fits into a familiar legal paradigm, the party whose case fits that paradigm may fare better with a retired judge. Correspondingly, the party who needs to overcome that paradigm may fare better with an arbitrator who is not a judge, perhaps a lawyer who specializes in an area of law other than the one involved in the case, or a nonlawyer. Such a person may be more inclined to take a fresh look at the matter.

Some retired judges are more sympathetic to requests for extensive discovery (particularly depositions) than arbitrators imbued with the arbitral mindset of speed and expedition. So retired judges may appeal to parties who think there is something to be gained (but not a speedy proceeding) from more discovery.

An important consideration in deciding whether to select a retired judge is the attitude of the client toward arbitration. If a client is nervous about the prospect of arbitrating, having a prominent former judge as the arbitrator might increase the client's comfort level and acceptance of the result, even if it is adverse.

Single Arbitrator or Panel of Three

Should there be a single arbitrator or a panel of three? Often this question is answered in the parties' arbitration agreement. Of course, the parties can always reach a new agreement on that point when the dispute arises. So the issue is always, in a sense, open.

The question is an important one in a case where expense or a speedy decision is of major concern. Having three arbitrators increases the arbitrator fees. It also makes scheduling more difficult and can cause delays.

On the other hand, having a panel brings more perspective to the decision-making process. I never cease to be amazed at the range of recollections and perceptions of the evidence that members of panels bring to deliberations. Lawyers who do jury trial often say that the jury sees everything. In my experience, the same can be said of a panel of arbitrators.

A key factor in deciding whether to have a sole arbitrator or a panel is the attorney's level of confidence in the potential sole arbitrator. After all, in federal and state courts throughout the land attorneys regularly appear before a single trial judge, even in the largest of cases. However, at the appellate level there are at least three judges and sometimes more. Given the limited scope of appeal in arbitration, arbitrators in a sense act as both trial and appellate judges.

Reasoned v. Conclusory Awards

Should you ask for a reasoned decision? This question is closely related to the type of arbitrator and, in a broader sense, the type of process, desired for a given case. Requiring a reasoned decision requires the selection of at least one arbitrator who is capable of writing the decision. It also raises the likelihood that the arbitrators will view the case in a legalistic fashion, focusing on the fine points of counsels' arguments rather than an overall sense of the equities of the case. It also will increase the cost of the process.

Use of Consultants

Understanding a case does not necessarily imbue counsel with the wisdom to fathom which arbitrator candidates are likely to be favorably disposed to the client's side. Many litigators who do jury trials use consultants to help with jury selection. It seems that jury consultants are used little if at all in arbitrator selection, although the same expertise is involved. Based on a recent informal survey conducted by a law student at my request, jury consultants regard themselves as qualified to provide arbitrator selection services and would be interested in such assignments.

An Arbitrator Who Has Time

An arbitrator may be superb but must have time for the case. The most experienced and capable arbitrators may be overbooked in the short run. However, in my experience, most complex commercial cases need at least three to five months from the preliminary hearing for document production and preparation of expert reports, pre-hearing memoranda, and exhibits and witness lists. When additional discovery is sought or substantive motions are made, more time-over a longer period of time-is needed to deal with the case. This reality generally allows for the selection of very sought-after arbitrators (as long as they commit to be available for discovery and pre-hearing issues in the interim).

Conclusion

Arbitrator selection is one of the most important steps in the arbitration process. Counsel for both parties must have a solid grasp of their case before they go into the administrative conference so they can tell the case manager what kind of arbitrator or panel they want. Then, using available investigative methods and information provided to the parties about the arbitrator candidates, counsel should strive to find arbitrators who are most likely to be responsive to the client's case.

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