

Commentary**Selecting An International Arbitrator:
Five Factors To Consider**

By

Claudia T. Salomon

[Editor's Note: Claudia T. Salomon is an attorney with Squire, Sanders & Dempsey in Prague, Czech Republic. She is Coordinator of the firm's international arbitration and litigation practice in Central Europe. She would like to thank Michelle On-ja Choe for her assistance. Copyright by the author 2002. Replies to this commentary are welcome.]

An international arbitration's success turns largely on the quality of the arbitrators. Arbitrators make binding decisions, and they wield broad discretion to fashion remedies. Yet, the parties have a limited ability to challenge or appeal an arbitration decision if the arbitrators do not do their jobs. An arbitrator's credibility is therefore crucial to maintaining the parties' faith in the overall process and to securing those benefits that make arbitration so attractive in the first place, such as cost, efficiency, neutral forum and enforceability.

A variety of methods may be selected for appointing the arbitrators. Typically, however, when an arbitration is to be decided by a sole arbitrator, the parties have the opportunity to try to reach an agreement regarding who should be appointed. When an arbitration is to be decided by three arbitrators, each side typically selects one arbitrator, and the two party-appointed arbitrators select the chairman. In the case of a three-member tribunal, the very first responsibility of a party-appointed arbitrator is to negotiate with the other party-appointed arbitrator for the selection of a chairman.

Simply put, the selection of the party-appointed arbitrator may be the most critical decision in an international arbitral proceeding. When selecting an arbitrator in an international arbitration, these five factors should be considered.

One: Choose An Arbitrator With Legal And Professional Expertise

Choosing an arbitrator with a legal background such as a lawyer or former judge is important. In almost all instances, arbitrators must state the rationales for their decisions, and if challenged, judges review the award. Moreover, parties to international commercial transactions may select any governing law, so long as the law they select has some relation to the transaction. This election option means that today's arbitrators adjudicate questions of comparative law, conflicts of laws and statutory interpretation more often than one might expect. Selecting an arbitrator with a formal legal education and actual legal experience exponentially increases the likelihood that an arbitrator can handle complex questions of international commerce responsibly.

The arbitrator's legal background significantly affects the arbitral proceeding and the remedies that may be granted. Arbitrators from the United States or Britain, which operates under a common law system, expect that during the arbitration, the parties will exchange documents and other information. Arbitrators from continental Europe, which operates under a civil law system, will be less inclined to require the parties to exchange documents. When selecting an arbitrator, counsel should consider the legal training and the differences between civil law and common law trained lawyers.

Legal training, however, only sets the *minimum* standard. It may be beneficial to select an arbitrator who also possesses professional knowledge of the industry related to the dispute. This is particularly true in cases involving intellectual property issues or when the dispute is limited solely to a question of valuation. A 1985-86 ABA survey revealed a strong correlation between a party's perception that an arbitrator was highly trained in the relevant commercial area and its perception that the arbitrator was exceedingly fair. See Stipanowich, *Rethinking American Arbitration*, 63 Ind. L.J. 425, 457 (1988). In addition, professional expertise in the industry affects the other arbitrators. As James Wangelin observed, expertise "ensures respectability . . . and may even make [an arbitrator] disproportionately influential." Wangelin, *Effective Selection of Arbitrators in International Arbitration*, *Mealey's International Arbitration Report*, Nov. 1999 at 3.

***Two: Choose An Impartial But Known Party-Appointed Arbitrator
And A Neutral Presiding Arbitrator***

Although all arbitrators must be "independent" of the parties, the counsel appointing the arbitrator should "know" the arbitrator. The international arbitration rules typically require that an arbitrator should have no business, familial, or social relationships with the parties and can neither gain nor lose a material benefit from the outcome of the dispute. However, it is very common to appoint an arbitrator who is able to respond that he or she is "independent" but who has at least a historical connection to counsel by virtue of bar association activity, prior cases or other business contacts. Whenever possible, it is essential to appoint an arbitrator who knows the counsel making the appointment. This results in at least one voice on the arbitral panel who will listen to requests of the party who made the appointment. The requests may be as simple as scheduling or as complex as discovery, but having a party-appointed arbitrator who has regard, but no failing in independence, for the counsel making a request of the panel is invaluable.

Presiding arbitrators should also be "neutral." Here, the word "neutral" means more than just "objective." It typically refers to the presiding arbitrator's nationality. Because people tend to share similar value systems when they identify with the same home country, many parties and institutions require the presiding arbitrator to share nationality with neither of the parties. The general consensus is that nationality provides one easy and effective rubric for measuring and preventing bias. This rule makes obvious sense.

The presiding arbitrator or chairman of the tribunal performs a different role than the party-appointed arbitrator. As Andreas Lowenfeld notes, party-appointed arbitrators serve two key functions. First, a party-appointed arbitrator

gives some confidence to counsel who appointed him or her,
and through counsel to the party-disputant. At least one of

the persons who will decide the case will listen carefully — even sympathetically — to the presentation, and . . . will study the documents with care. That fact alone is likely to spur the other arbitrators to study the documents as well. . . .

Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 Tex. Int'l L.J. 59, 65 (1995). Second, the party-appointed arbitrator functions as a translator of “legal culture . . . when matters that are self-evident to lawyers from one country are puzzling to lawyers from another.” *Id.* A party-appointed arbitrator, in contrast to a neutral arbitrator appointed by the arbitral institution, therefore benefits all the parties involved. The party-appointed arbitrator’s understanding of a legal culture foreign to the other participants facilitates the arbitration process and crystallizes the issues. At the same time, the impartiality standard still requires the party-appointed arbitrator to retain full freedom to decide against his or her nominating party should the facts so require. In short, unless otherwise provided in the arbitration agreement, demand formal neutrality from the presiding chair, but nominate a sympathetic and impartial party-appointed arbitrator who is unbiased toward both parties.

Three: Choose An Arbitrator Who Manages People Well

Closely related to the topic of communicative skill, management know-how ranks high on the list of desirable characteristics in international arbitrators. International arbitrations today cover a broad range of issues and an even broader range of information. The presence of multiple parties and nationalities only complicates the task. As a result, a party-appointed arbitrator and a chairman should be able to manage people well. This includes the ability to “tread the very thin line between laxity and undue delay on the one hand and dictatorial, unreasonable demands on the other.” Bond, *Current Issues in International Commercial Arbitration: The International Arbitrator: From the Perspective of the ICC International Court of Arbitration*, 12 J. Intl. Bus. 1, 10 (1991). Without management expertise, the speed and cost-effectiveness typically associated with arbitration cannot be realized.

Four: Choose An Arbitrator Who Demonstrates Communicative Proficiency And Juridical Open-Mindedness

An arbitrator’s communicative style functions as a primary tool for listening to the parties, synthesizing their respective positions, and obtaining satisfactory results. Arbitrators must put forth arguments, pose questions that parties may not want to answer forthrightly, make decisions that the parties may not favor, and articulate each of these in a persuasive manner. Communicative skills cannot be overemphasized, but modern workplace parlance and human resource gurus have all but drained “good communication” of any meaning. What does it entail?

The ability to read others constitutes part of what makes someone a “skilled” communicator. Contrary to popular belief, the ability to “read” others does not inherently involve manipulation. Rather, it requires a degree of selflessness. Serious communication on the part of an international arbitrator must be other-oriented. Because an international arbitration involves people from different legal backgrounds, from different societies, and obviously with different interests, an arbitrator cannot simply pull other-oriented communication practices out of thin air. The international setting demands flexibility in communication styles.

Practitioners involved with international arbitration understand why it is so important to be other-oriented. For instance, Stephen Bond, former Secretary General of the International Court of Arbitration, observed that “parties from developing countries and Eastern Europe . . . placed considerable importance on proposing a co-arbitrator of their own nationality, while Western parties placed more priority on proposing a co-arbitrator with . . . expertise” in the field of law at issue or in arbitration, generally. Bond, *supra* at 6. Why does arbitrator nationality function as a potential source of tension? According to Bond, many non-Western parties with whom he worked considered expertise to be important, but they also believed that an arbitrator who originated from the same cultural perspective better understood their position on the issues. Professor Philip McConnaughay observed that customs in Asia, as well as developing countries, tended to “value nonconfrontational resolutions of commercial disputes far more” than “‘properly legal’ resolutions.” McConnaughay, *supra*, at 459. Why? Because, McConnaughay states, these cultures emphasize relationship preservation to a greater extent than Westerners. *Id.*

Some experts call this ability to understand others “juridical open-mindedness.” Lalive, *On the Neutrality of the Arbitrator and of the Place of Arbitration, in Swiss Essays on International Arbitration* 23, 24 (1984). Doak Bishop and Lucy Reed call it “an international outlook characterized by sympathy for other countries’ legal cultures and institutions . . . and an absence of legal nationalism or parochialism.” Bishop & Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, June 2001, available at <http://www.kslaw.com/library/articlelist/asp> (last accessed 10 July 2002). Regardless of the label, arbitrators must be able to understand these subtleties, not dismiss or disparage them.

Five: Choose An Arbitrator With A Manageable Caseload

As basic as this factor may seem, it warrants a friendly reminder. Well-known arbitrators schedule matters several months in advance. When the arbitrator’s caseload grows to mammoth proportions, it can effectively thwart a party’s ability to obtain a speedy resolution — one of the more attractive characteristics of arbitration. Remember, parties in an international arbitration need to iron out multiple issues in advance, such as arbitrator selection procedures, whether a given arbitrator appears sufficiently neutral, or which (if any) arbitral institution to use. Each of these considerations requires careful negotiation and time. Scheduling conflicts will delay the process even further. Measure the time sensitivity of the case, and consider whether the passage of time will sweeten or sour the dispute. Then seek out an arbitrator whose schedule meets those needs.

Closing Remarks

Professional knowledge is only one factor to consider in selecting an arbitrator in an international arbitration. The arbitrator’s availability, communicative style, managerial skills, and ethical conduct also warrant careful consideration. If the arbitrator or arbitrators possess these five characteristics, the international arbitration is off to a promising start. ■