Choosing the Best Arbitrator for your Case

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The opportunity to select your own arbitrator is one of the attractions of arbitration. Your chosen arbitrator can be the defining factor in a victory for your case. In a recent survey done in 2018, almost half of in-house counsel surveyed stated that they had insufficient information to make an informed choice about the appointment of arbitrators. Considering a search for information on arbitrators can be difficult, due to the general confidentiality of arbitration proceedings, how can you go about selecting the best arbitrator?

Professional Expertise

A deep range of knowledge regarding the nature of the dispute can be very beneficial to the arbitration. There is a common notion that the arbitrator must be expert in legal affairs. However, if your matter has a very niche nature, you will benefit from selecting an arbitrator who has experience in your specific industry.

This will save you time explaining industry concepts and terms as they will be familiar with the issues being discussed which will subsequently save you costs. For example, you have an industrial patent infringement dispute. Selecting an arbitrator with prior experience in this industry will avoid the need for you to explain from scratch the meaning of defensive patenting.

Relevant individuals should be approached to deal with a possible dispute of specific nature. Candidates, or the institution to which they are most known, will provide personal descriptions in the form of a curriculum vitae that

you may use to nominate a well-suited arbitrator for your matter. It is not only key to nominate an arbitrator who is familiar with the relevant industry, but it is also essential to understand the potential arbitrator's convictions, in order to determine their impact on the dispute. Thorough knowledge of the sector can be invaluable, but ultimately a party's interests will not be served if the nominated arbitrator has certain convictions about a matter that are diametrically opposed to the nominating party's arguments.

Are they available?

A busy arbitrator can be a major impact in the time it takes to obtain an award. An advantage of arbitration is the flexibility of the process and the management of this flexibility can have a significant impact on the length, efficiency and ultimate success. Choose an arbitrator who can commit in devoting enough time and attention to the matter and make sure their schedule allows them to take on the case. A highly sought out arbitrator will have a busy schedule, and this can lead to scheduling conflicts which may ultimately delay the proceedings. A personal conversation with the arbitrator that you wish to nominate can provide a sense of clarification. However, a conversation usually goes no further than providing reassurance as to the candidate's availability and knowledge. The chair of the International Bar Association (IBA) Arbitration Committee has recently stressed the need for arbitrators to be genuinely available, and an interview may reveal factors affecting a candidate's availability.

Personality

Looking for an arbitrator who has knowledge in the subject matter should be considered but also look for one with good people management skills. A good arbitrator must strike an appropriate balance between observing and actively steering the proceedings. The flexibility of managing the arbitration procedure, if not managed properly, can lead to protracted

disagreements which will result in more costs and time being spent on a granular issue.

Choose an arbitrator who is as good at managing people as they are the procedure. In a study conducted by Ponak et al in 2010 regarding Personality and Time Delay Among Arbitrators, the study found that conventional, case-based coding can explain about 30 percent of the variance in time delay, whilst another 30 percent is likely due to the personality predispositions of arbitrators. Ponak and his colleagues found that characteristics of the arbitration process that predicted faster decision time were: fewer pages of written decision (a proxy for complexity), the use of legal counsel, and the use of a sole arbitrator rather than a three-person panel. The study also examined one job-related characteristic of the arbitrator– his or her workload–and found that the busiest arbitrators took longer to render their decisions. Will your selected arbitrator be adapted to dealing with cultural differences and tensions that will eventually run high? Their management of the parties is a substantial factor in the efficiency of the case, and it must be done with sterling judicial demeanor.

When we talk about cultural differences, keep in mind that in disputes between parties of different nationalities, some arbitral institutions such as the Dubai International Arbitration Centre (DIAC), permit the arbitrator from having the same nationality as any of the parties. As per DIAC Arbitration Rule 10.3:

“Where the parties are of different nationalities, a sole arbitrator or chairman of the Tribunal shall not have the same nationality as any party unless the parties who are not of the same nationality as the proposed arbitrator, all agree otherwise in writing.”

The International Chamber of Commerce (ICC) follows a similar standard pursuant to Article 13(1) of the ICC Rules:

“In confirming or appointing arbitrators, the Court [International Court of Arbitration] shall consider the prospective arbitrator’s nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals and the prospective arbitrator’s availability and ability to conduct the arbitration in accordance with the Rules.”

The Language of the Arbitrator

Arbitrators and participants of the procedures will be of different nationalities in most circumstances; therefore, it is not uncommon that they will speak different languages. This brings about another factor of great importance – the language of the arbitrator. The language in which the procedure is conducted is a dominant characteristic for the consensual resolution of the dispute itself. The choice of language with respect to the arbitration proceedings in the agreement will play a significant role as communications will most likely be made in the language indicated in the arbitration agreement. This bears the questions, is an “implicit agreement” of the parties regarding the language of the arbitration, a *facta concludentia* (i.e. the use of the same language for the contract, the arbitration agreement, the correspondence etc.), allowed if it is absent from the agreement? The choice of the “wrong” language may result in the need for translation and interpretation for the majority of the proceedings, which can severely impact the cost and duration of the proceedings.

If the arbitration is conducted in English, but in a country where English is not the official language, such as the UAE, it would be advantageous to have an arbitrator who speaks both English and Arabic, to address their ability to deduce and analyze parties’ submission on application of legislation to the dispute, and the legislator’s intent in the drafting of a law, or provisions therein, as the parties present.

Therefore, determining what language or languages shall be

used in the arbitration is decisive on three dimensions: party equality, the composition of the arbitral tribunal, and the interaction with national laws. The latter being necessary in a country such as the UAE where the first language is Arabic but the majority of arbitrations are conducted in English; when it comes to the proceedings of arbitration, the choice between these languages can be a vast factor in the interpretation of the law and facts.

Conclusion

At the end of the day, much relies on choosing the most suitable arbitrator. Make sure to vet the arbitrator you wish to nominate accordingly and enhance your chance of success for your arbitration before it even begins.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile: https://waselandwasel.com/about/mahmoud-abuwasel/

Lawyers and consultants.
Tier-1 services since 1799.
www.waselandwasel.com
business@waselandwasel.com