

Selecting The Arbitrator

A Key Decision For Your Next Arbitration

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The ability to select the ultimate decision-maker is one of the key advantages of arbitration. Unlike trial, where the decision-maker is an assigned judge or an unknown jury, in arbitration the parties get to choose the arbitrator. Hence, a great deal of time, effort and thought should go into the arbitrator selection process. This article discusses that process, as well as how to use an arbitration simulation to predict how the arbitrator may rule.

The arbitrator selection process depends upon the arbitration agreement. Some agreements provide that the arbitrator will be selected through an arbitration institution's process, such as the American Arbitration Association ("AAA") or the International Chamber of Commerce. Similarly, if the agreement incorporates an arbitration institution's rules, that institution's process will be used. If the agreement is an ad hoc agreement, the parties must follow the provisions in the agreement and try to reach an agreement on the arbitrator(s).

Regardless of the process, thorough research of the proposed arbitrator's experience, education and decision-making process is key. Arbitration institutions provide the arbitrator's résumé, but your review should not stop there. Read the arbitrator's prior arbitral awards available through a legal research database, Google, or an institution's website, like AAA's Class Arbitration Docket. Review articles or speeches by the arbitrator. Awards, articles, and speeches can reveal how the arbitrator approaches a dispute, her decision-making process and how she has ruled on particular issues. You also may be able to determine whether arbitrators have served on the same panel and, if so, how they ruled on issues together. Investigate whether the arbitrator has served as the panel chair. Arbitrators may defer to an arbitrator with panel chair experience (or, similarly, to retired judiciary), making the selection of the panel chair that much more essential.

News reports and articles on the arbitrator can provide further insight, including into the arbitrator's involvement in either plaintiffs' or defense bars. Interviews of the arbitrator can expose unconscious biases for or against a particular position, industry, or approach to arbitration, even if the interview pre-dates her arbitration career.

gather intelligence

Attorneys with experience before the arbitrator can be one of your best sources. Ask colleagues how the arbitrator manages an arbitration, such as whether the arbitrator encourages quick resolution or allows the

parties to set the pace, or how she responds to dispositive motions or to discovery disputes. You can gain insight that cannot be discovered anywhere else, including whether the arbitrator likes to ask questions, favors policy arguments, or conducts independent legal research. Whether these attributes are good or bad for your client requires its own analysis, but gathering intelligence is crucial to making an informed decision.

Some arbitration agreements provide for a panel with two party-appointed arbitrators and a single neutral arbitrator, often selected by the party-appointed arbitrators. Arbitration institutions will require party-appointed arbitrators to be neutral, even though each party independently selects an arbitrator. Conversely, if the arbitration is not administered by an institution, the party-appointed arbitrator is essentially another advocate for that party, making the third arbitrator the only truly neutral decision-maker—and even more important for the resolution of your dispute. In both situations, make sure you are operating on a level playing field by defining what *ex parte* communications are permissible both before and after appointment of the arbitrator. In either case, it is wise to make sure your party-appointed arbitrator understands her role.

If the parties cannot agree on an arbitrator, a benefit of using an institution is that it will appoint an arbitrator for you per its rules. Conversely, in an *ad hoc* situation, you will have to go to court if the parties cannot agree. Both the Texas and Federal Arbitration Acts give the court authority to appoint an arbitrator if the agreement is silent on the selection process, if the parties cannot otherwise select an arbitrator or if the appointed arbitrator fails to act. Courts must first enforce the process in the agreement and cannot interfere with the contractual process unless "there is some mechanical breakdown in the arbitrator selection process or one of the parties refuses to comply, thereby delaying arbitration indefinitely." See *In re Serv. Corp. Int'l*. Otherwise, the court may appoint an arbitrator considering the dispute and the proposed arbitrators' qualifications.

Practice makes perfect

After the arbitrator is appointed, consider conducting an arbitration simulation. Similar to a mock trial, an arbitration simulation tests the strength of evidence, witnesses, experts and arguments for both parties' positions and reveals how an arbitrator may rule. A simulation can be organized internally or externally through a dispute services vendor. You can have an in-depth presentation including both parties' opening statements, closing arguments, exhibits and witnesses, typically by video or deposition transcript. Often the opposing party's position is presented by a colleague so that the parties' positions are presented by different advocates. Alternatively, your simulation can be as streamlined as submitting briefs. Selecting mock arbitrators with backgrounds analogous to the appointed arbitrators is paramount to testing how the arbitrator will react to the parties' positions and predicting how she will rule. It is also another advantage of arbitration because you will have a lot more information on the arbitrator than you would a jury. Armed with this knowledge, you can strengthen your case at the final hearing and better advise clients regarding settlement strategy.

When selecting an arbitrator, knowledge is power. Because courts have limited authority to hear appeals over the appointed arbitrator, the arbitrator selection process is a key initial step to determining the outcome of your dispute.

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