ARBITRATOR SELECTION

By Kimberly Taylor, Esq.

Much has been written in recent years about whether arbitration has lived up to its billing as a "better, faster, cheaper" alternative to litigation. No matter one's views about this, litigation is undoubtedly very costly, and wise counsel must look for ways to reduce unnecessary costs and time delays. Unlike litigation, arbitration affords the parties much control over the process, including the selection of the arbitrator, arguably the most important decision in the process.

Also unlike litigation, if parties are unhappy with the decision of the arbitrator, there is very little recourse, because a fundamental tenet of arbitration is finality. Grounds for vacatur are limited, and unless the parties have selected an appellate arbitration remedy, the arbitrator's decision will likely not be overturned. Therefore, selection of the arbitrator is a critical step.

Institutional rules generally provide a process for selection of the arbitrator if the parties cannot agree amongst themselves, often by use of a "strike list," where several arbitrators are proposed and parties are permitted to strike names until an acceptable arbitrator remains. Matters calling for a tripartite panel are handled differently, as each party usually selects its own party arbitrator (assumed to be neutral, but the parties can agree otherwise), and those two arbitrators select a neutral chair. Having three arbitrators on the arbitral panel can alleviate the concern that a single arbitrator may not apply the law correctly and can justify the additional cost.

Whether the matter is to be determined by a sole arbitrator or a tripartite panel, there are important considerations to keep in mind in selecting the tribunal. First and foremost, counsel should review the language of the arbitration clause, as it often dictates the qualifications of the arbitrator. Second, counsel should review the arbitration laws of the place where the tribunal will sit. Certain jurisdictions have restrictions regarding the nationality of members of domestic arbitration tribunals. Beyond that, what should counsel look for when selecting an arbitrator, and how should those qualities be investigated?

Above all, parties want to select as their arbitrator someone who is familiar with the law and has a track record of fairness. Certain disputes require someone with significant subject matter expertise (e.g., patent disputes, engineering and construction, entertainment, employment), so it is important to review the background and prior caseload (whether as a former judge, arbitrator or practitioner) to determine whether the proposed neutral has the requisite background to understand the unique facts and legal issues at stake.

Choosing an arbitrator with strong management skills, who can give the parties a fair and thorough process while moving the case along expeditiously, can be critical in achieving the cost- and time-saving benefits of arbitration. If the arbitrator is a former judge, what was her reputation as a judicial officer? Characteristics such as integrity, fairness and stature in the legal community are critical. If the arbitrator is one of three on a tribunal, is the arbitrator known to be articulate and able to effectively communicate his or her views of the facts and the law? If the arbitration is international in nature,

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is the arbitrator well-versed in the different cultures, legal systems and languages, as well as the differences between domestic and international arbitration? Some arbitration institutions direct that a sole arbitrator or chair of a tribunal must be of a different nationality than the parties, unless the parties agree otherwise.

Arbitral institutions can be quite helpful in the selection process. Some make the biographies of their arbitrators public, so counsel should review the information available online and ask questions of the arbitrator's case manager. Others provide that service for a fee. Counsel should also consult with colleagues about their prior experiences with different arbitrators. Increasingly, parties are asking to interview potential arbitrators to assess their suitability for appointment, allowing parties to assess availability, language capabilities in international matters, demeanor and other qualifications. Because ex parte communications are generally prohibited in arbitrations (except to discuss fees and availability), these interviews are generally conducted with all parties to the arbitration, and the parties should avoid any discussion of the merits of the dispute. Advances in technology make video interviews increasingly easy to conduct.

Arbitration continues to be an effective alternative to costly litigation, particularly if the right neutral is selected as the arbitrator. A fair, impartial arbitrator who helps guide the parties through a well-managed arbitration process can be an invaluable resource in resolving disputes in the most efficient manner. ■

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