Petillion

Selecting an Arbitrator

by Flip Petillion

How should you select someone you want to nominate as an arbitrator? What criteria should you use? Is a strategy useful at all? This article will consider these questions and give further insight. However, I should be clear from the outset: this is not an exact science. I have prepared this subject with an intellectual openness of mind: with the aim to be open to new ideas and to avoid partiality. And just such an intellectual openness is vital when making choices that concern the constitution of arbitration panels.

Starting point

It is only natural that parties to a dispute (and their counsel) should be curious about the identity of those in charge of examining and resolving that dispute. To this end, lawyers spend years building up experience; they will not hesitate to ask their colleagues whether they have met a particular mediator, arbitrator or judge and what impression she or he has made. A negative impression may be caused by a particular incident at a hearing, or simply (and perhaps more frequently) when a case is lost. A positive impression, on the other hand, will lead to the mediator, arbitrator or judge being praised and sought after when other disputes arise – with the hope (or perhaps, the illusion) that the same appointment will lead to another win. It's a people business!

Motive

The motive for interested parties to find out who will be part of their deciding bench is obvious: parties want to estimate their chances and predict whether, and to what extent, a dispute can be won. They also look for legal certainty. Clients have always raised these questions with their counsel, and their counsel is generally best placed to answer them – at least in so far as is possible. The impression made by judges and arbitrators affects the reputation of the institutions they serve, and sometimes it calls for improvement. The individual arbitrator determines to a large extent the image of his or her dispute resolution provider, whether they were selected voluntarily or not.

This interest in the identity of the decision maker is essentially no different whether a dispute is to be settled by arbitration or in a traditional court of law. Lawyers use their information to actively search for the system most suited to their client. They are 'forum shopping' (either internationally, or even domestically in cases where there is more than one possible jurisdiction to choose from). They are trying to find, either on their own, or with the help of the arbitration center concerned, the most appropriate arbitrator(s) for their case. In the case of court

proceedings, the choice is quickly limited by the structure and functioning of the judicial system over which the lawyer has no influence. But let there be no misunderstanding: even in arbitration proceedings, parties and their lawyers only have one bite at the cherry - namely when the arbitration tribunal is elected. Thereafter, it is out of their hands. Hence the importance of paying sufficient attention to the configuration of the arbitration tribunal.

Background

In the 1980s we were given arguments to explain the attraction of arbitration, arguments that remained popular for years: proceedings would be handled faster and more cheaply by arbitrators who were specialized in the appropriate area and who would keep everything confidential. The question is, do these arguments hold good today? Things have shifted somewhat over the past 30 years. On the one hand, there are now many more specialized judges. With regard to court proceedings concerning intellectual property rights, for example, Belgium has granted exclusive jurisdiction to the five districts of the courts of appeal. This specialization can clearly be seen in their judgments and rulings. What is more, the particular knowledge of individual judges is more publicly visible: judges are often members of editorial boards of specialized journals; now, more than ever, they publish their own works and often speak at colloquia; they take part in law firms' seminars and share their experience with young trainees. On the other hand, arbitrators are often said to suffer from due process paranoia: they sometimes act more like managers than decision-making experts; they can be hampered by a fear of making procedural mistakes that would lead to the annulment of their decision.

Nonetheless, arbitration still offers some substantial benefits over court proceedings, and it can still fulfill a unique and distinctive role in today's globalized world. For example, a well-handled arbitration provides an extremely efficient manner in which to solve disputes with complex cross-border aspects within one set of proceedings.

For many years, our court system has not allowed parties and their counsel to become active players in proceedings and hearings. Counsel often have to appear before judges that they do not know or for whom they are unprepared. The practical running of proceedings is as follows: counsel, appearing on behalf of their clients, will report to the clerk. Following this, the judge will be informed that all counsel are present and will then enter the courtroom. Those matters that are listed on the court's agenda will then be considered. In appeal hearings, it has become common for one of the judges to open the proceedings with a report on the case. The bench president will then allow the appellant's counsel to speak. Most of the time there is no introduction (in certain courts, there is not even a 'good morning' or 'good afternoon'). If a judge is late for a hearing, she or he does not have to, and general will not, justify the tardiness. Moreover, judges sit literally 'on high'. The entire court approach has grown out of a now long-outdated attitude towards 'normal' citizens, according to which the inaccessibility, but also the independence and untouchable nature of the judiciary is to be made clear. There is also now an element of impersonality in the proceedings. In the past, judges and counsel generally knew one another. However, because of the explosive growth in the legal profession, this mutual acquaintance has become rarer, and the link between counsel and those passing judgment has been lost.

In arbitration, there remains more freedom in the selection of arbitrators than there is in the choice of judges. The free market principle is probably the biggest reason for this difference. Selecting a court judge is not possible. Some predictability is provided in courts that have permanent judges. For example, the constitution of chambers is usually quite predictable. However, there are exceptions (the chambers of the court of appeal in Brussels can be changed quarterly). Also, in exceptional cases, a special seat must be constituted. In the Assize Court cases and the Fortis case the personality of the judges, according to

the file, gave a special color to the case.

Arbitration centers display a different attitude to the service they provide: they consider the parties before them more as customers and they do everything they can to highlight their added value in this regard. They have lists of possible arbitrators, but these are not considered to be exclusive. In practice, it is sometimes considered that certain arbitrators are appointed too often. Depending on the arbitration agreement or the applicable arbitration rules, a party may object to the proposed arbitrators or even nominate arbitrators themselves. Without a doubt, unofficial black lists and preference lists exist. Sometimes the parties' choice of arbitrator can be really surprising: in one international trademark dispute, a center made a short list of three experienced arbitrators but the parties selected the individual with no apparent knowledge of trademark law. What drove the parties to do this? Was it the hope of a possible minimum of partiality? Or of a maximum attention to procedure?

What are parties looking for?

Practical knowledge

The first thing for parties to check is which person would be most suitable given the economic sector or industry setting in which the dispute takes place. Also important to bear in mind is the requested relief. Is the party in question in search of a finding of infringement, or the determination of the degree of liability, or an estimation of damages, or all of these things? Will only a part of the dispute be handled in arbitration – the parties resorting to the courts for the rest of the proceedings? In other words, it is my opinion that it is not only vital to identify an arbitrator who is familiar with the relevant sector or industry, it is also essential to understand the potential arbitrator's vision (*e.g.*, concerning the development of a particular sector or technology, a particular legal standard, or any number of other factors) in order to be able to evaluate their impact on any given dispute. Although relevant experience from other cases and thorough knowledge of the sector can be invaluable, ultimately a party's interests will not be served if the nominated arbitrator has a vision diametrically opposed to the point of view of that party. Of course, persuasive argument may prompt an arbitrator to change his or her vision. This may be an appealing challenge to some, but the uncertainty of success would tend to make it an unwise course when choosing an arbitrator, especially if history has shown that the arbitrator in question is unlikely to change his or her position.

Personality

The main reasons why parties choose for arbitration are related to the personalities involved in examining the case and passing judgment. Depending on the binding nature of the measures prescribed by the judgment, these reasons can become important or even critical. It goes without saying that judgment by an unworldly boffin will generally be of no service to the parties. An arbitrator, especially if he or she is sitting as a one-member panel or is the panel's

chair, must have the necessary social skills to conduct a constructive process, involving counsel, the parties concerned, experts and co-arbitrators, in such a way as to facilitate the intended objective. Experience suggests that a good arbitrator must strike an appropriate balance between observing and actively steering the proceedings. The proceedings cannot be hijacked by the arbitrators; just like judges, their ability to listen is even more important than their ability to lead the proceedings. To be able to show their empathy and demonstrate an ability to hear the parties is essential. An arbitrator must be able to reassure the parties that he or she is listening to the different points of view and that there is room for dialogue. The Belgian compromise is a well-known and successful model for dispute settlement that is appreciated by many. The arbitrator who can balance the parties' interests rather than becoming fixated on the legal arguments will be able to engender flexibility among co-arbitrators and will achieve useful solutions. However, there is a danger to be avoided here, as this approach can lead to a decision wherein the facts are perfectly reproduced but the analysis of the points of view and arguments of the parties is seriously flawed, resulting in a judgment that reflects the compromise reached, but with all its bumps and scratches. In my view, a flexible approach must not be allowed to jeopardize the legal foundation of a decision. Indeed, a charismatic chair who can assure the steady course of the proceedings is to be preferred to heavy-handed leadership.

Pragmatism

Related to this is the parties' desire for pragmatism. An arbitrator will be expected to translate a decision concerning claims into an outcome that is clearly understandable to the parties and does not require endless interpretations or requests for clarification. The very formula of alternative dispute resolution (arbitration, accelerated arbitration, expert determination, etc.) seems to make this clear. Alongside a finding (*e.g.,* of a contractual non-performance or of liability and the causal connection with damage) and an order (*e.g.,* the obligation to pay damages), an arbitrator will also be expected to list the

necessary practical consequences (*e.g.,* the calculation of the actual damages a party must pay to another party, the details of all allocated costs). Admittedly, much will depend on the parties. Counsel are expected to provide all the necessary information to allow the arbitrator to make a decision quickly and efficiently. Except in those cases when parties actually prefer a so-called 'bifurcation' (*i.e.,* a breakdown between the treatment of the litigation on competence and the grounds of the case, or between the merits of the claim and the quantification of damages, or between the claim and counterclaim), counsel must appreciate that a satisfactory resolution for a dispute cannot be obtained purely through a decision of principle. Their clients require their specific problems to be addressed and resolved in a practical, pragmatic way that allows them to continue with the successful running of their business.

Procedural knowledge

Finally, what of the arbitrator's knowledge of procedure, and his or her familiarity with the law and the arbitration rules? In my experience, parties express two different priorities: some put great importance on their arbitrator being familiar with the procedures; while others focus more on his or her technical knowledge. In my view, one is no good without the other. It goes without saying that an arbitrator must have full mastery of the procedure. Knowledge of procedure is a *conditio sine qua non* to the acceptance of an assignment. At the same time, precisely because procedural knowledge is essential and must be present, it is perhaps the least important element in the search for the best arbitrator. Only someone who is aware of the importance of the grounds for the arbitral decision, its validity and its enforceability, should be appointed as arbitrator. Anyone falling short in this respect can, at the most, act as an advising expert in a particular matter; they cannot be charged with the management of a procedure that is a matter of public order (arbitration decisions are subject to judicial control before being enforced and executed).

In a multi-member panel, it might be sufficient if the chair is more thoroughly familiar with the procedure than the co-arbitrators. In simple matters, this can be to everyone's advantage. However, in complex international disputes, it soon becomes impossible to run a proper arbitration unless all those involved have a good all-round knowledge and sufficient experience.

Being Qualified, and Being Seen to be Qualified

Anyone with the ambition to act as an arbitrator or mediator is likely to demonstrate their own suitability for the role (whether consciously or unconsciously) in one or more of the four areas described above. Ability in each of these areas can be improved, and for this, self-knowledge is an asset. Furthermore, it is the parties' perception of a potential arbitrator's ability regarding knowledge of the subject matter, suitability of personality, pragmatic attitude and procedural knowledge that will determine to what extent the parties are prepared to nominate and eventually appoint that candidate as a member of the arbitration panel.

While this perception of a candidate's personality and abilities is always important in the selection of a party arbitrator, it becomes crucial where there is selection of one single arbitrator and during the selection of a chairman. It is of equal importance when a center makes the selection (either alone or in consultation with the parties). Moreover, a center will build up a special knowledge of these four important areas for a continuously growing number of individuals. Even if it is true that centers tend to make repeat appointments of the same individuals, new talent does seem to be given a fair chance. And in my view, repeated appointments need not be a problem: better to appoint an arbitrator more than once than to appoint a less qualified or less experienced individual merely for the sake of diversity. Parties with experience in arbitration proceedings will expect the arbitration center to make suggestions or choices that are not devoid of a certain amount of bias. It is our experience that most centers are well aware of the situation, however, there is no harm in repeating that it should be born in mind.

Where to find the necessary information?

Where can information on possible arbitrators be found? Such a search is by its nature incompatible with one of the essential features of arbitration, namely confidentiality. That is why the search often begins with a consultation of publicly available and verifiable information on possible candidates.

Judgments and arbitral awards

Judgments on requests for annulment of arbitral awards used to be an interesting source of information concerning arbitrators. However, the amount of case law is limited, and the grounds for annulment have been reduced in Belgium: requests brought after September 2013 are only handled in first and last instance by the court of first instance and judgments are only published anonymously. Therefore, in the absence of unofficial information, such judgments make us none the wiser.

The same goes for arbitral awards. Only a limited number of arbitral awards are published, often also anonymously. Recently, there has been a move towards more transparency at arbitration centers regarding the appointment of arbitrators and the applied method for appointment (by parties or by the center), without compromising the confidentiality of the arbitral procedure. Appointment lists contain useful information for parties about the experience and availability of arbitrators and allow arbitration centers to demonstrate their desire to foster more diversity.

Peer reviews

The list of organizations screening and cataloguing professionals constantly grows. You could be excused for thinking that they have already done the job, and made the appropriate search on behalf of parties and their counsel looking to appoint an arbitrator. But nothing could be further from the truth. These lists are unreliable and it has to be doubted whether they are based on any qualitative research. If someone who is no longer active as an arbitrator is nonetheless listed, this simple fact calls the

whole list into question. The lists are not intended to highlight the past performance or achievements of the individuals mentioned, but rather aim to be useful for new procedures. As a result, some individuals may appear in such a list despite never having received an invitation, sent a contribution or been interviewed. A small number of organizations have built up a respectable and long-standing reputation, are internationally active and offer none or hardly paying products like advertisements. Others, however, suggest that their listed individuals accept to be featured in their publications against payment (the so-called sponsored publications). Clearly, it is important to handle these sources with care when searching for an arbitrator. The award pageants of the last ten years aimed at rewarding legal representatives, lawyers or in-house counsels for their capabilities have developed an incestuous feel. The dinners that accompany the presentation of the accolades are undoubtedly fine occasions to meet up with people and strengthen old ties. However, whether the award ceremonies, with their attendant trophies, cups, dishes and medals (mostly in cast iron overlaid with gold foil, glass (crystal or plexi), wood or sometimes in the more modest form of ribbons and rosettes in artificial silk, jersey or cotton), should be taken seriously, is questionable.

Personal descriptions

Anyone interested in acting as an arbitrator will generally communicate this fact openly. The information made available by the candidate may include studies, publications and presentations, and it will usually clearly demonstrate the experience, specialization, nationality, cultural background and language knowledge of the person in question, and may also show their focus on procedure or a specific legal practice or both. For example, some candidates are very interested in construction disputes, while others focus on the financial world, technology, intellectual property, international investment treaties, etc. Candidates, or the centers where they are most known, will provide personal descriptions in the form of a Curriculum Vitae. Similar information can be found on

websites, marketing material or brochures. The individuals involved obviously need to respect their secrecy obligations and they have to become adept at providing a personal description that offers useful information without revealing any tie to a case or a party. In today's competitive society, it remains a difficult exercise for an arbitrator to find this balance between providing useful information and honoring secrecy obligations.

Interviews with candidates

Finally, a personal conversation with possible candidates can bring clarification. A conversation is of limited use, however, and will usually not go further than providing reassurance as to the availability and knowledge of the candidate. The added value of the centers' role and of their chairman or appointment committee in particular seems clear to me. Personally, I've never been contacted in this way other than to find out more about my availability, familiarity with a matter or experience. Within the foreseeable future, I can imagine that I may specifically be asked about my health (which is excellent for the time being). This is relevant, as it would make no sense for an assignment to be jeopardized for any personal reasons linked to the arbitral candidate. The chair of the IBA Arbitration Committee has recently stressed the need for arbitrators to be genuinely available, and I agree. In my view, a different point of view would only compromise one of the characteristic benefits of arbitration – speed through expertise – and would not do justice to the arbitration practice.

Declarations of independence

How much importance is to be attached to the declaration of acceptance and independence by an arbitrator? In my view, its importance cannot be emphasized enough. IBA Guidelines on conflict of interest and any stricter rules (such as those of the ICC) must remain the ultimate reference. I have personally encountered over enthusiastic arbitrators who, wanting to get nominated at any cost, have not taken the necessary care (either through haste or negligence) and whose decisions have finally had to be annulled. By not taking the necessary care with respect to

potential conflicts of interest, they not only risk personal liability (even if such liability is strictly limited nowadays) they may also end up in a very unpleasant situation, making life difficult not only for themselves but also for the parties involved, who may suffer serious damage in such a case. Fortunately, most candidates are diligent in this regard, and bad handling of possible conflicts is the exception, but it must, of course, be avoided at all cost.

Arbitration agreement

In practice, the role of well-judged choice and selection parameters for arbitrators in a detailed escalation procedure seems of particular importance for large and complex, technical cases. Essentially, this is a way to ensure that problems are addressed according to their type; both as concerns the arbitrator and the parties themselves, only the relevant individuals need be approached to deal with a possible dispute (accountants decide on financial discussions, engineers on technology, lawyers on contracts, etc.). It follows that the person chosen to resolve a dispute need not always be a lawyer or private practitioner. In selecting the appropriate players, it can also be agreed that the dispute will be taken to a higher level should the so-called first filter not successfully lead to a solution. And the dispute can continue up the ladder until it eventually falls to those with ultimate responsibility, preferably with a final commercial authority (such as a company's CEO). The higher the level, the bigger the involvement and authority of the players, and the more important my abovementioned elements become (sector- and practice knowledge, personality, pragmatism and procedure). This approach prevents small problems from getting out of proportion and unnecessarily complicating a relationship. Parties can either postpone the selection of the appropriate dispute resolvers as long as possible or, on the contrary, appoint a so-called 'war panel'. Appointing a war panel is definitely effective in clearly defined projects for which the time span is predictable, such as large construction projects. Parties know very well beforehand who should be available in the first or second dispute resolution phase and until what stage of the project there

will remain a real chance that these persons can be called upon. We would, however, advise against contractually selecting arbitrators *nominatim* in advance of a dispute, if the timeframe and the individuals availability are not yet clear.

As regards certain types of dispute, I have come across the suggestion that centers establish a standing panel. Such a panel would, before any dispute arose, assign a limited list of individuals who are informed in advance about the project and any foreseeable problems. They would agree with their nomination in advance, subject, of course, to there being no conflict of interest. The aim of such a panel is clearly to obtain a back-up of expertise as well as a fixed direction in decisions (case law) and, in other words, legal certainty for all those involved in a certain sector. I, however, have a number of problems with this idea. Undoubtedly, it can be a useful and practicable approach as long as the number of members of such a standing panel is extensive, there are strict rules on independency and conflicts of interest, and each party involved can determine who is qualified to be part of the standing panel and decide who is nominated. However, if these conditions are not met, the chance is real that the party organizing the standing panel would appoint individuals unilaterally, and, potentially, in the light of a policy determined cleverly in advance. In the sports world there have long been groups of arbitrators from which parties are invited to choose. More recently, ICANN decided to work with an omnibus standing panel. ICANN, the Internet Corporation for Assigned Names and Numbers, is a Californian not-for-profit organization managing the Domain Name System and the access to domains and domain names. In April 2013, to resolve disputes among applicants for domains or internet extensions, ICANN introduced the idea of the standing panel. To date, however, the organization has not yet established such a panel. The initial aim was to appoint a very limited group of (rather ICANN-minded, if rumors are to be believed) panel members. ICANN would be the party determining

who was a member of the standing panel from which available members would be selected. This proposal has come under heavy criticism, for obvious reasons, and a lot of work will have to be done to give it a chance of success in the future.

Conclusion

It is a fact that the search for the right arbitrator in a dispute between parties is a tricky business and will never be a simple exercise. However, a good appointment can be achieved by minimizing pre-determined risks, and it will enhance the chances of success. In my opinion, the best way for experienced arbitrators to make sure they do not let down the parties in a dispute, is for them to recall that there was a reason for their appointment and that what they must offer is a reasonable approach and an outcome that is acceptable, effective, respectable, satisfactory, legally conclusive and, if possible, fair and just. Arbitration requires striving for the ideal goal; it is not an exact science.