

Kluwer Arbitration Blog

The Three Steps in Appointing Arbitrators, And Which One is Most Important

Catherine A. Rogers, Fahira Brodlija (Arbitrator Intelligence) · Monday, January 10th, 2022 · Arbitrator Intelligence

In most cases, arbitrator selection follows a basic 3-step process: (1) Start with a Long List of Potential Arbitrators; (2) Pare it down to a Short List of Suitable Arbitrators; and then (3) Pick *The Arbitrator* to appoint.



At first, research is very broad. Parties focus on fundamental elements of the case, such as applicable law, seat, industry, and such. Many of these qualities can be found in directories, rosters, or on the CVs of individual arbitrators.

To narrow down the long list, parties seek out every published case, every scholarly article, every treatise authored by the arbitrators on their list. From these publicly available sources, parties seek both to understand arbitrators' experience and to identify various connections with other parties, arbitrators, or counsel. As databases and directories become more detailed and sophisticated, this process has become much easier.

However, the single most important and difficult decision remains the last step: Which arbitrator do you ultimately pick for the tribunal? Ironically, this last, most important decision is when the most guesswork comes in.

Publicly available awards and academic publications run out of useful information on the most nuanced questions. Meanwhile, personal and professional networks are showing more limitations when researching newer and less well-known arbitrators from outside the traditional hubs. Parties need deeper insights on topics that are not in publicly available sources and outside the ambit of their personal networks.

That is where Arbitrator Intelligence's innovative new tools come in.

These tools provide essential, unrivaled insights about arbitrators on the most crucial issues. They help take some of the guesswork out of the most important decision about which person on the short list makes it to the arbitral tribunal.

Revolutionary New Sources of Information about Arbitrators

Arbitrator Intelligence collects both factual and evaluative feedback about arbitrators from parties and counsel in past cases (contribute your feedback [here](#)). This feedback goes well beyond what is available in published awards. Arbitrator Intelligence's unique feedback extends to cases that remain confidential and provides insights about arbitrators that cannot be gleaned from published awards.

Arbitrator Intelligence recently released a new [Arbitrator Perspectives Survey](#). In the Survey, arbitrators themselves provide details about their approach to issues such as how they improve efficiency, respond to alleged counsel misconduct, manage document production, approach substantive interpretation, and award costs and fees. At a time when pre-appointment interviews are increasing circumscribed, responses to the Survey give parties and counsel valuable answers to key questions that they cannot ask arbitrators directly in an interview.

Arbitrator Intelligence's Reports and Arbitrator Perspectives Survey ensure that parties and counsel have the information that they need to make informed decisions about which arbitrators to appoint to a tribunal.

Let's look at a few examples.

Efficiency in Proceedings

For virtually all parties, fairness and efficiency are top of mind. But if only a few awards are public, how can you understand an arbitrator's track record on these issues?

These topics are an important focus of feedback collected by Arbitrator Intelligence. For example, from Arbitrator Intelligence feedback you could learn that an arbitrator sat on a tribunal that "used a chess clock during the hearings to promote fairness and efficiency." Or you can learn that an arbitrator, when sitting as chair, was described as "efficient and well-organized" and as "in absolute control of the hearings and paying attention, with a likable personality, well-humored and approachable. ...[A]

very impressive performance.”

If you anticipate requesting or opposing dispositive motions, you might want to know how an arbitrator proceeded when “the Respondent’s defense included a Request for Expeditious Dismissal of Manifestly Unmeritorious Claims,” namely that “[i]n spite of being a provision not commonly applied in proceedings [sic], the Arbitrator was exceptional in acting in accordance with the relevant standards of said concept.”

Another fundamental concern that affects efficiency is whether arbitrators are prepared and familiar with the record. Even a published award can’t tell you much about an arbitrator’s diligence—only feedback can. That is why Arbitrator Intelligence collects information about an arbitrator’s questions during the hearings as indicia of preparedness.

Specific comments can add to general assessments, such as the following comment, which explains that all “panel members, particularly the chair and [one co-arbitrator] clearly demonstrated that they read and synthesized the material submitted and the issues of the case.”

This crucial feedback about efficiency is complemented by perspectives offered by arbitrators themselves through Arbitrator Intelligence’s Arbitrator Perspectives Survey.

For example, arbitrators identify in our Survey their perspectives on the efficacy of:

- Tribunal efforts to encourage settlement
- Use of Redfern Schedules
- Page limits on parties’ submissions
- “Documents only” arbitration
- Online hearings even over party objection
- Broad and/or electronic document production

These topics can be important in picking the right arbitrator from your short list, or in assessing proposed chairpersons. But for the most part, an arbitrator’s approach to these topics cannot be readily assessed from public sources.

Responding to Guerilla Tactics

As allegations of so-called guerilla tactics have been on the rise, those who have been (or anticipate being) on the receiving end may want to know arbitrators’ approach to dealing with alleged counsel or party misconduct.

Concerns have been expressed that some arbitrators take a passive approach during arbitral proceedings. This more laissez-faire approach is sometimes presumed to be a way of avoiding time-consuming fact-finding and procedures or potential backlash.

Whatever the explanation, if avoiding potential guerilla tactics is on your list of concerns when picking arbitrators, past awards can’t tell you much about arbitrators’

handling of such matters. Most often, arbitrators' assessments to such alleged misconduct are behind the shield of tribunal deliberations or clandestinely embedded in the assessment of evidence or allocation of costs and fees.

In sum, most alleged guerilla tactics and arbitrator responses are hidden from view, even in published awards.

Again, that is where Arbitrator Intelligence comes in.

Through the feedback AI collects, you can find out that one arbitrator on your short list was described, while sitting as a sole arbitrator, as having "issued general admonitions to dissuade further instances of allegedly improper conduct and made specific findings regarding the allegedly improper conduct." That source also added: "During the hearing, the Arbitrator was quick to identify objections and resolve them efficiently and fairly."

From AI Reports, you can also know that an arbitrator on your shortlist was on a tribunal that "showed great professionalism and courtesy in dealing with unexpected challenges to their own decisions by one of the parties when they walked out of the proceedings, the tribunal showed great professionalism in continuing forward in completing their task of hearing the remainder of the arguments and issuing the award." Not surprisingly, the person provided this information concluded "I highly recommend the case management skill shown by this panel."

By contrast, you may also find that an arbitrator you were considering "did not give much attention to the allegations" that the opposing party engaged in "[o]bstructionist, uncooperative behavior, making outrageous allegations."

Meanwhile, in responding to our Perspectives Survey, arbitrators identify which kinds of behavior they consider cross the line from zealous advocacy to improper misconduct: continuously interrupting opposing counsel or witnesses, unfounded refusal to produce documents, continuously raising untimely new arguments, using unprofessional language, etc.

The Perspectives Survey also invites arbitrators to indicate which, in appropriate circumstances, they regard as appropriate tribunal responses to alleged counsel misconduct: oral admonitions, drawing negative inferences, considering when awarding costs and fees, referring counsel to national bar associations, etc.

Substantive Interpretation

Arbitrator Intelligence Reports and its Perspectives Survey also provide innovative new tools to assess arbitrators' approaches to substantive interpretation.

Historically, legal education and nationality were used as rough proxies for how an arbitrator might approach contract interpretation. But today, those assumptions are not always good predictors—arbitrators from similar backgrounds may use strikingly different approaches. Foreign graduate degrees, working for multi-national firms or

foreign clients, or sitting with other tribunal members from other backgrounds may affect an arbitrator's allegiance to interpretative traditions from their national legal background.

These differences can become quite clear from feedback about specific arbitrations and awards, including those that are not publicly available to compare. For example, Arbitrator Intelligence has feedback about these two cases with similar tribunal compositions and applicable law, but very different approaches to interpretation:

- In an arbitration governed by Russian law, a tribunal relied on the contract's "*plain meaning and interpretation of INCHOATE terms*"
- In an arbitration governed by Ukrainian law, a tribunal applied a "*flexible interpretation*" and "*consider[ed] the award considers previous amendments to the contract*"

To supplement feedback from individual cases, our Perspectives Survey asks about arbitrators' approach to interpretation: In interpreting contracts, statutes, and treaties, when do you believe it is appropriate to look outside the "plain meaning" of the relevant language? Please check all that you believe may potentially be applicable, recognizing that specifics will depend on the details of individual cases.

Below are two actual but anonymized arbitrators' responses from the Perspectives Survey:

Arbitrator

A:

- Never, unless the relevant language is ambiguous on its face
- If there is relevant evidence regarding the negotiation history
- If there is relevant evidence regarding the parties' subjective intent
- If the meaning of the relevant language is or should be influenced by its context
- To give the source more greater commercial efficacy or policy coherence
- To achieve a fair result as between the parties
- To avoid an unfair result

- Never, unless the relevant language is ambiguous on its face
- If there is relevant evidence regarding the negotiation history
- If there is relevant evidence regarding the parties' subjective intent
- If the meaning of the relevant language is or should be influenced by its context
- To give the source more greater commercial efficacy or policy coherence
- To achieve a fair result as between the parties

Arbitrator B: To avoid an unfair result

If your client's case relies on a plain meaning interpretation of contract language, other things being equal, you might be more inclined to pick Arbitrator A. On the other hand, if your client's case relies on a more flexible interpretation that takes considers commercial realities that have changed since signing the contract, you might be more inclined toward Arbitrator B.

Given that only a tiny percentage of arbitral awards become publicly available in any particular year, this kind of indirect assessment can be invaluable in assessing an arbitrator's approach to interpretation.

* * *

To be sure, these tools won't necessarily tell you how an arbitrator will rule in your particular case. No source can (or should purport to). But these new sources of information can help you make better-informed decisions and reduce inaccurate guesses about which person you should appoint from your shortlist to your tribunal.

As the pool of arbitrators expands both in size and geography, traditional research exclusively through public sources and professional networks is not enough. These limited sources can leave you and your client unaware of crucial insights about an arbitrator's track record and perspectives.

Arbitrator Intelligence's innovative new sources provide one-of-a-kind insights that can mean the difference between picking the right arbitrator or the wrong arbitrator, between winning and losing.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe [here](#). To submit a proposal for a blog post, please consult our [Editorial Guidelines](#).

Kluwer Arbitration Practice Plus now offers an enhanced Arbitrator Tool with 4,100+ data-driven Arbitrator Profiles and a new Relationship Indicator exploring relationships of 12,500+ arbitration practitioners and experts.

Learn how **Kluwer Arbitration Practice Plus** can support you.

Kluwer Arbitration Practice Plus

Offers an enhanced **Arbitrator Tool** with 4,100+ data-driven Arbitrator Profiles and a new **Relationship Indicator** exploring relationships of 12,500+ arbitration practitioners and experts



The image shows a screenshot of the Kluwer Arbitration Practice Plus web application. The interface is displayed on a blue background. At the top right, there is a checkmark icon and the text "Explore Practice Plus". Below this, there are two overlapping screenshots of the application. The larger screenshot shows a profile for "Gary R. Egan" with a profile picture, name, and various statistics. Below the profile, there are three circular charts labeled "Relationship Indicators" showing data for different categories. The smaller screenshot on the left shows a "Relationship Indicator" section with a table of results based on cases within Kluwer. At the bottom of the image, there is a dark blue banner with the text "Kluwer Arbitration" on the left and the "Wolters Kluwer" logo on the right.

This entry was posted on Monday, January 10th, 2022 at 8:04 am and is filed under [Arbitrator Intelligence](#), [Arbitrator Selection](#). You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.