

Kluwer Arbitration Blog

Choosing the Weathered Veteran or the Young Buck?

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We have all seen it before. The same names, the same faces are chosen consistently to act as arbitrators. Is it bad? No, but it certainly occurs. The same names are respected, experienced professionals that undoubtedly anyone would be grateful to have serve as an arbitrator for their proceedings. However, are there downsides to always selecting the same crew? Absolutely.

This is not a new topic. I find myself often standing amongst professional peers when it comes up. You see it when someone is talking about the lack of female arbitrators. You hear it when someone is once again frustrated over the significant delays occurring in their arbitration proceeding because the arbitrators do not have time to meet or review or consider anything concerning the arbitration for another few months....the lists go on.

As I already alluded to, using the same arbitrators frequently does ensure a “recognized name” is working on your arbitration. It is easy to choose, because you have actually heard of them – no research required. You can feel confident that they could likely quote every important book written on the subject matter which may greatly influence the outcome of your arbitral proceedings. There is definitely confidence in their capabilities, their expertise.

The downside? I would say two are the most obvious: (1) time and, of course, (2) money. As the most sought after, they are likely the busiest as well. They always say “yes” because they truly want to do it, but can they truly do it? An oft-quoted remark when discussing a client’s perspective on using international arbitration is that the costs are simply too high. These costs are too high because proceedings can be dragged out for excessive lengths of time. The arbitrators are too busy. The costs are also too high for the second reason: money. With impressive experience comes a very high price tag.

In large, complex disputes, going to the big, experienced names makes sense. It may be a high profile case because a state is involved or it may simply be over an enormous amount of money. Maybe then it is worth the risk of increased costs due to time delays and large hourly rates.

But, what about all the other times? There are plenty of international arbitration practitioners who are either very willing to transfer their skill set to act as an arbitrator for a significantly smaller hourly rate (than the always chosen names, for example) and a more flexible schedule, or there are those who have done a few arbitrations and could continue to reasonably handle more. These practitioners have the experience. They have worked arbitrations. They have studied the crucial decisions. The benefits of international arbitration are not all lost: it can be a quicker, more cost efficient process. This will depend entirely on flexibility in choosing an arbitrator and the

willingness to research and learn of those with the valuable skills and knowledge sought after – but a flexible schedule and reasonable rate.

Maybe the burden falls on those who complain about the costs and delays of international arbitration to expand their list of whom they would consider – or their outside counsel. There exists a temptation to want a certain arbitrator for the sake of claiming you are working on an arbitration with this known name. Maybe that kind of practice should be avoided...

The “young” or newer would-be arbitrators are an eager bunch. They are ready to open their schedules and dedicate themselves to timely, efficiently and skillfully serving as an arbitrator. Consider this pool of talent!

Another option is for these same clients or their counsel to directly ask the arbitrator about their availability. I do not mean the standard – do you have a conflict, are you available and willing, etc. I mean: how many arbitrations do you have actively going on right now? What is your calendar like? If a meeting needed to be held in a month, would you be available? You get the idea.

I know an up and coming arbitrator. He is a friend and a sort of mentor. Once we were considering him as an arbitrator for one of our arbitrations. He gladly passed on his CV, etc., but he also made sure we were aware of his schedule and another large arbitration for which he was also sitting as arbitrator. That is ideal. Yet, not everyone is going to do that or even admit to themselves the reality of their availability. We are a service industry. We say yes to cases; we do not turn them down. So, to those counsel representing the parties, ask the right questions, research outside the box and consider all the possible arbitrators – weathered veteran or young buck – to really find the best fit.

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This entry was posted on Saturday, January 8th, 2011 at 3:02 am and is filed under [Arbitrators](#), [Availability of arbitrators](#)

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