

Kluwer Arbitration Blog

Puppies or Kittens? Join the debate

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GAR Live Stockholm recently shone a spotlight on our article [“Puppies or Kittens? How To Better Match Arbitrators to Party Expectations”](#), published in the Austrian Yearbook on International Arbitration earlier this year.

In our article we proposed that arbitrators complete a questionnaire to help parties select candidates that match their expectations. Our proposition is simple: arbitrators themselves should state their preferences with respect to certain issues relevant to the conduct of proceedings. The arbitrators would not be asked about their views on substantive legal issues.

In appointing an arbitrator a party is seeking to identify an individual with an approach to procedural issues, case management and handling of evidence and settlement, which aligns as closely as possible with the party’s view on how the arbitration should be conducted. Yet, there is a dearth of available information as to how an arbitrator is likely to conduct a case. Obtaining this information can be the single most difficult challenge when identifying candidates for nomination.

What is lacking is easily accessible information about the procedural preferences and soft skills of the people that parties may consider appointing as arbitrators. As a result, parties tend to rely on two proxies for these qualities: the arbitrator’s nationality and the arbitrator’s legal qualification. Both of these, however, may be based on inaccurate assumptions that may disappoint the parties’ expectations. But parties have no choice — in no other field are users expected to hire professionals in such a vacuum of information.

The situation can be remedied if arbitrators make such information available, for example by completing a questionnaire about their approach to case management, to delegation of work to tribunal secretaries, to settlement discussions, to disclosure, and to costs, amongst others.

The proposal was discussed by Kai Hobér, Jean Kalicki, Peter Leaver QC, Michael J Moser and Carita Wallgren-Lindholm at GAR Live Stockholm when they considered how to ascertain arbitrators’ predilections and preferences in order to make effective appointments. Although our proposal was met with some skepticism by the panel of arbitrators, the ensuing discussion was itself a good demonstration of how our proposal could benefit users of arbitration. Peter Leaver QC was quoted as saying: “People are often surprised at how reluctant I am, as an English lawyer, to grant disclosure.” Eliminating such incorrect stereotypes and assumptions is precisely what our

proposal is designed to accomplish.

Further, the arbitrators lamented – as do we – the reluctance of parties to appoint arbitrators who are young or relatively unknown. People are reluctant to embark on risky endeavors, even if there is a potential for a significant gain. Parties who are facing a potentially long-lasting and exhausting dispute are understandably even more risk-averse. Consequently, they want to know as much as possible about the conduct of their case. This leads to repeated nominations of “familiar”, well-known arbitration names, even when better choices might be available.

People also show aversion to anything uncertain and unknown. Familiar arbitrators (more known/certain) will hence appear more attractive than potentially better, but less known/certain candidates. In other words, experienced arbitrators, who have already earned a reputation (be it a great or simply an acceptable one) will almost always trump a younger, less known candidate. This is not because of the younger candidate’s age or gender, but because they represent an additional “unknown” and an “uncertain” element to an already risky situation.

For very large cases people will always want experienced “big names”. But even there our “Puppies or Kittens” proposal has value and can help better match arbitrators with party expectations. As for “smaller” disputes of just a few million dollars, there needs to be some proportionality and ability to appoint unfamiliar and more diverse faces. Our proposal will increase how familiar the less experienced arbitrators appear to the parties. This will make it easier for the parties to appoint an arbitrator they have not encountered in the past.

Young arbitrators can make themselves more familiar — by disclosing their procedural preferences from the outset. This would bridge the bias against the unknown, which in the world of international arbitration that was for many years dominated by senior Caucasian males, would mean reducing the bias against appointing women arbitrators, young arbitrators, and arbitrators of color.

We have established a survey to gauge the reaction of the arbitration community to our proposal, which is available [here](#). If you are reading this, it means that like most of us, you are interested in actively developing the future of international arbitration. Please help us shape it by taking a minute to complete the linked survey.

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