Kluwer Arbitration Blog

Why Picking an Arbitrator is Like Playing Guess Who™?

Paul Baker (Clyde & Co. LLP) · Friday, September 1st, 2017 · YIAG

(a.k.a why is it always Bill?)

To those unfamiliar with this popular Hasbro™ family game, each team has a board with 24 faces on it – the faces vary in colour, shape, gender, facial hair and attire. In the conventional game each side 'picks their person' and the other player has to whittle down the people on the board by asking questions (to which the responder answers yes or no), 'knock down' those on the board who do not meet the relevant criteria and continue until they have correctly guessed who their opponent 'picked' by virtue of them being the only face left standing.

Common questions would be:
'Does this person wear glasses?'
'Does this person have blue eyes?'
'Does this person have hair?' (note to players – this is always open to interpretation)

Imagine now an advanced game of Guess Who™ snappily titled 'Arbitrator Guess Who' with the cheeky characters replaced by upstanding members of the arbitral community from whom parties choose their arbitral nominations or appointments. To be clear, it is not proposed that all with blue eyes, glasses and no hair be promoted to the upper echelons of arbitration or dismissed from the game entirely depending on the answer to the question, but there is, perhaps, a certain similarity between a good Sunday-evening family game of Guess Who™ and a Monday-morning meeting to discuss potential arbitrators.

So how do you choose an arbitrator?

While there are noteworthy moves afoot to develop more formal directories of arbitrators, at present party-appointed arbitrators will largely be chosen based on research backed up by prior experience and recommendation. In a sense, the potential arbitrators are lined up in their rows and columns and knocked down based on criteria they either reach or fail to meet. Questions in this version of the game include:

'Are they of the same nationality as either party? (and if so does this discount them?)'
'Are they qualified or experienced in the particular area of law in question?'
'Do they have a strong reputation for procedural robustness/case management?'
'Are they efficient?'
'Are they available to do the work in the given timeframe?'

The list goes on until a shortlist of up to say five are identified and 'remain standing' on the Arbitrator Guess Who board. In this version of the game these potential arbitrators would be discussed at length amongst the team and the client before one is nominated or appointed depending on the relevant procedure.

This is not to make light of the importance of choosing the right arbitrator or the research that goes into that process – choosing the right decision-maker can make or break a dispute for a number of reasons ranging from ability to grasp technical issues, through procedural preferences to ability to make correct although tough decisions. Arbitrator Guess Who is not meant to bely this complexity but by framing suitable questions the 'Arbitrator Guess Who' game remains in play.

So why is it always Bill?

In the family game of Guess Who™ the character 'Bill' always seems (although shockingly no scientific experiments appear to have been conducted) to be 'picked' more often than other characters. Bill has a largely bald head with a smattering of ginger hair around his ears, no glasses, brown eyes, rosy cheeks and a ginger goatee. Maybe it is some combination of his features that attracts players to him, or maybe it's that he fits a 'least controversial' category. In our Arbitrator Guess Who game 'Bill' would be the arbitrator who was not of the same nationality as the parties, with experience in all relevant fields, with a good reputation for efficiency who is available to take the appointment – in reality there are likely to be several 'Bills' all of whom could do a perfectly respectful job as arbitrator. But does this lead back to the perennial thorny issues of repeat appointments and the difficulties of widening the pool? Of course the pool in Arbitrator Guess Who is not limited to 24 individuals but, in reality, how many individuals make it onto the 'long list' before the narrowing begins? Likely not many more than 24. Also, if it is known that one of the 'Bills' could do a perfectly good job, is there any incentive to search further afield?

Of course, the above is hyperbolic (and the author is certainly not rushing out to trade mark 'Arbitrator Guess Who'). However the analogy is such that perhaps next time the reader is selecting an arbitrator, they could prepare a two cm square photo for 18 of the Arbitrator Guess Who pieces and six 'new' pieces for the game and see whether 'Bill' is still the chosen one.

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