

# Arbitrator Selection Is a Key Component of the Arbitration Process

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**A**rbitrator selection is a critical component of every arbitration proceeding given that the selection will determine who will adjudicate the dispute. Commercial arbitration is a creature of contract. The parties in their contract provide for the governing arbitral organization and rules, if any, and how the arbitrator or arbitrators are to be selected. The parties, assisted by their counsel, can also agree to revise any of these provisions for the particular arbitration at issue even after the dispute arises.

## **Sole Arbitrator or Three Arbitrator Panel?**

The use of a sole arbitrator is definitely less expensive and more efficient because the parties will only need to compensate a single arbitrator and will not have to deal with three different arbitrators' schedules and deliberations as to the numerous issues presented during the course of the arbitration. It can work very well when both sides can agree on the arbitrator and therefore have confidence in who will manage and hear their case.

However, there are potential advantages to the three-arbitrator tribunal that make that choice popular in contracts. First, there is the perception that three arbitrators working together are more apt to get to correct results and are less likely to make a mistake or overlook an issue. Related to this, most arbitration agreements and arbitral organization rules provide that for three-arbitrator tribunals, each party will select an arbitrator, who, in turn, will select the third arbitrator or tribunal chair. This allows each side to itself select at least one of the arbitrators in whom it will have confidence, even if, as is most often the case, the arbitration agreement and/or applicable arbitral rules

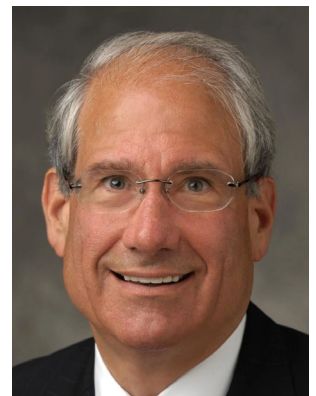
require the arbitrators to be fully disinterested and neutral. As for cost and efficiency concerns, a tripartite panel can share the workload to be certain that the schedule can flow expeditiously. Moreover, the parties have the option to agree during the proceeding to submit any or all prehearing matters such as discovery disputes solely to the panel chair. In international arbitrations, a tripartite panel also allows for selection of arbitrators of different nationalities to provide greater comfort in the decision making.

## **Selecting the Arbitrator(s)**

Here are some thoughts on arbitrator selection that every counsel and party facing an arbitration should consider:

- **Selecting a Sole Arbitrator**

You want someone who is smart, adept at understanding the type of dispute you are facing, fair and considerate to both sides and all witnesses, who knows how to manage the process and the players from the initial preliminary hearing to the Award, and who listens and is willing to dig in to the case to get it decided correctly in the time allotted. You are best off trying to agree with your adversary on a choice for sole arbitrator because otherwise you will be left with a selection by the arbitral organization or, if there is none, a court. Of course, there are "list and strike" methods that arbitral organizations provide (or you can use on your own) to get to an agreement, but in the end, you and



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your client should feel better if you have maximum input into the choice. Counsel for both sides can interview candidates via Zoom or other similar video to help you get to agreement should you feel that would help.

- **Selecting a Party-Appointed Arbitrator for a Three-Arbitrator Panel**

The party appointed arbitrator is a key appointment because this arbitrator, appointed by each side, will be responsible along with the other side's party appointed arbitrator for selecting the tribunal chair and will be one of the three arbitrators working together to decide the issues. Even in the vast majority of arbitrations in which all of the arbitrators are bound to be neutral and disinterested, the party appointed arbitrator is someone each side had the confidence to select.

In my view, the best attributes for a party appointed arbitrator are all of the sole arbitrator qualities described above, but also the ability and to communicate credibly with the other arbitrators in the tribunal's private group-decision making environment. To be effective, the arbitrator must be able to "play well in the sandbox" and have both the motivation and ability to listen and communicate well (orally and in writing) with fellow arbitrators.

Also super-important is the fact that under virtually all arbitral organization rules, the party appointed arbitrator is explicitly permitted to consult with the appointing counsel/party for input into selection of the tribunal chair by the two co-arbitrators at the outset of the proceeding. This is a truly important opportunity to provide the parties and counsel with confidence in the selection of the panel chair. When serving as a party appointed arbitrator, I take this process very seriously, using my experience, my network and research to propose the very best qualified arbitrators as chair candidates. In virtually all of my arbitrations in which I have been party-appointed, I have been able to agree with my co-arbitrator on the chair appointment rather than having to default to a selection by "coin-flip" or selection by the arbitral organization. That gives both sides maximum "buy-in" and confidence in the process.

Party-appointed arbitrators can interview the top candidates if they feel that they would benefit from such a meeting in making an agreed selection.

- **Selecting the Chair for a Three-Arbitrator Panel**

The arbitrator selected to serve as chair should be someone who is very organized, will listen well to, and

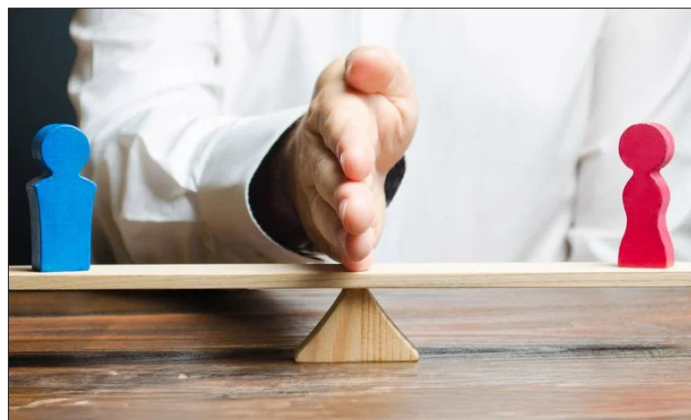


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communicate well with, the other arbitrators, counsel and witnesses, and who can manage the proceeding and the final hearing in a way that affords both sides the opportunity to present their case without wasting undue time or permitting any party to abuse the process. The chair should be someone who will be collaborative with the other arbitrators, and be sure to solicit and understand their inputs and views. The chair should also have the time and willingness to devote to the case so that the case will not be held up due to other matters on the chair's schedule.

In sum, arbitrator selection is a critical component of every arbitration. One of the great benefits of arbitration is that the parties have input into the selection of those who will decide their dispute. Counsel and the parties should take maximum advantage of that benefit with the above considerations in mind.

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