



Technical Versus Legal Arbitrators: Considerations, Advantages And Disadvantages

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The selection of an arbitrator is a key step and often has a profound effect on the ultimate success of the arbitration. The authors provide some thoughts with respect to characteristics of good arbitrators, whether technical or legal.

Choosing an Arbitrator

A fundamental part of arbitration, and to some the most appealing feature, is the ability of the parties to choose the panel. While judge-shopping is frowned upon in the court system, shopping for a privately-appointed judge in an arbitration dispute is one of the main benefits of arbitration. It is probably also the most important decision the parties will make. The arbitrator has the ability to resolve disputes and grant substantial awards that are rarely reviewable by a court of law, so this is not a decision to be taken lightly.

A key part of the choice in selecting an arbitrator is whether to pick an arbitrator from industry with expert knowledge in the area of the dispute, or a legally-trained arbitrator such as a senior lawyer or retired judge. Both industry-expert arbitrators and legal arbitrators will have certain advantages and disadvantages. As Brian Casey states, "a weak judge is a disappointment, but a weak arbitrator can be a disaster".¹ So whom do you choose? And how do you ensure you are getting quality?

Industry-Expert Arbitrators

Arbitrators from industry have the advantage that they avoid the ramp-up costs required to learn the subject matter of the dispute, and may be better able to understand the parties' positions. They are also less likely to have the propensity for the formalities of the courtroom where judges and lawyers have spent their careers. While a legal arbitrator might be inclined to make an arbitration similar to a court process with analogous rules of procedure and evidence, an industry-expert arbitrator may employ a less formal process. Also, given his or her commercial experience, an industry-expert arbitrator is at times better able to assess the quality of the evidence. However, there is a risk that a highly qualified expert in a narrow industry field will decide the outcome of the dispute based on his or her own knowledge and expertise, rather than the evidence put forth by the parties. This may create a basis for appeal, or at the very least, unpredictability.

Legal Arbitrators

When senior lawyers and retired judges become arbitrators, they bring with them a wealth of experience in dispute resolution. Lawyers are able to make independent decisions based on an analysis of complex questions, statutory interpretation, and applicable law. They also have expertise in analyzing large quantities of expert evidence, interpreting contracts, and assessing witness credibility. They understand the mechanics of resolving disputes and have spent their careers dealing with other judges and lawyers, giving them sure footing with counsel during the arbitration process. However, as stated above, a legal arbitrator may unnecessarily complicate a straight-forward dispute resolution by enforcing rules of civil procedure. A legal arbitrator also may be challenged by a steep learning curve in complicated technical disputes involving significant quantities of expert evidence. The quality of the technical decision may be affected.

¹ Brian Casey, "Choosing an Arbitration Organization and an Arbitrator" (2007) 26 Advocates' Soc J 22 (QL)

The Best Quality: Arbitration Expertise

No one arbitrator is ideal for all types of arbitrations. The selection of an arbitrator ultimately depends on the type of dispute and how it is going to be solved. A dispute over a technical commercial issue could suit an industry-expert arbitrator, while a dispute over legal interpretations and concepts can perhaps best be dealt with by legal arbitrators. The most important question is, given the nature of the dispute, how can an arbitrator's skill set and experience contribute to resolving the dispute in the most effective manner?

However, whether an industry-expert or a legal arbitrator is selected, the most important thing the person must be is an arbitrator. No matter how advanced and technical an expert's knowledge might be, or how brilliant the lawyer is, if he or she does not have judge-like qualities, the parties risk an ineffective and costly arbitration process.

When choosing an arbitrator, one should look for a candidate with the ability to hear complex evidence, weigh credibility and make a decision in accordance with the applicable law. The best arbitrator for your dispute will understand the arbitral process as well as the commercial context of the dispute. He or she will have leadership qualities to manage counsel effectively, and be able to act in a fair, courteous and civil manner to all parties. In the end, the arbitrator must be able to reach a conclusive decision and enforceable award that will dissuade the parties from challenging it. These considerations should be part of any selection process, and given the importance of this decision, care and time at the outset is essential.

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