

## 4 Things To Ask When Picking An International Arbitrator

By **Keith Goldberg**

*Law360, New York (February 4, 2016, 6:21 PM ET)* -- In the high-stakes world of international arbitration, picking a seasoned and impartial arbitrator might be one of the most important decisions attorneys have to make.

The list of well-regarded international arbitrators is a relatively short one, which makes it a challenge to select one who has the necessary time and expertise to consider a particular dispute and is free of any potential conflicts that could call their impartiality into question.

"It's really an area where no one size fits all," McDermott Will & Emery LLP international arbitration partner Lisa Richman said. "Where you have a three-party arbitration panel, it's about making sure you have someone who will have sufficient gravitas with the other party-appointed arbitrator and the president of the tribunal."

Whether that arbitrator is deciding a commercial dispute between two companies, or an investor-state throwdown between a national government and a foreign investor, credibility is king, attorneys say.

"If you try to game the system and put in someone who won't play by the rules, it's going to hurt the whole system and it's going to backfire on you," said Ed Kehoe, the co-head of King & Spalding LLP's international arbitration practice.

Here are the four questions attorneys should ask when looking for an effective international arbitrator.

### **Does the arbitrator know the business and the law?**

While most commercial arbitration fights center around contract disputes, simply picking an arbitrator who's well-versed in contract law isn't good enough, attorneys say. Lawyers need to find an arbitrator who's well-versed in their client's business — a company in a fight over a soured energy deal, for example, is best served by an arbitrator with an energy background.

"You want your arbitrator not to advocate for you, but make sure all your points are being understood, and ... is going to make the [panel] chair understand them," Kehoe said.

Not only that, the arbitrator should have plenty of experience in the jurisdiction that will govern the dispute. Kehoe says he will frequently reach out to arbitrators well-versed in New York state law, since

many disputes he handles are decided under New York law.

"Laws are different in different states, and ultimately the facts and the law come together to decide a case," Kehoe said. "It's not helpful to have an arbitrator who needs to be helped on what the law is."

For investor-state disputes, which frequently turn on interpretations of international treaties, having an arbitrator who specializes in international law is a must, attorneys say.

"I would never send a commercial arbitrator into that world, Kehoe said. "It's just an entirely different body of law. It would be like asking me to try an antitrust case."

### **Is the arbitrator free of conflicts?**

When doing your homework on a potential arbitrator candidate, identifying any potential conflicts of interest is the first item on the checklist. That includes ensuring the arbitrator doesn't have any ties to your law firm, your client or even other attorneys or firms that have represented your client, attorneys say.

But attorneys must also be wary of potential conflicts involving their opposing counsel, according to Mayer Brown LLP partner Mike Lennon.

"If an arbitrator I'm thinking of appointing has been appointed by opposing counsel in other cases, I may stay away," Lennon said. "If I know my opposing counsel has had a losing experience in front of that arbitrator, that might factor into my decision."

In fact, combing through an arbitrator's prior rulings is an ideal way to determine whether he or she is a worthy candidate to oversee your dispute, attorneys say.

"One of the things one can look at are any publicly available awards, they can give you a sense of, for example, where a particular arbitrator may have sympathy for a very large corporation," Richman said. "Looking at what they've said and written publicly on the various issues that may be critical to your case ... does give a very good indication of where they're leaning."

### **Will the arbitrator be sympathetic but not too sympathetic?**

When it comes to investor-state disputes, attorneys say there are arbitrators that tend to be more sympathetic to investors and others that tend to be more sympathetic to states.

Attorneys say finding an arbitrator who has the necessary expertise and experience to handle their client's dispute and might have some sympathy toward the client's position is ideal, and combing through a candidate's arbitration history is a good way to suss out both qualities.

"Depending on the magnitude of the case, you'll dig into previous decisions to try and get a deeper feel of your arbitrator," Lennon said.

But finding that sympathy sweet spot is tricky. Selecting an arbitrator who is clearly biased toward your client's position ends up doing more harm than good, attorneys say.

"The last thing you want is someone in there who's an advocate. That basically eliminates your

arbitrator from giving any input," Kehoe said. "Over time, they're going to get marginalized. The [panel] chairman is not going to look to your person."

### **Is a bigger name better?**

While clients want to win their arbitration cases above all else, they also highly value getting their arbitration resolved as quickly and efficiently as possible. That means attorneys should tailor their arbitrator search to the scope of the dispute they'll be overseeing.

"If it's a bet-the-company case, I better pick from some of the best, most well-known arbitrators in the world," Lennon said. "If it isn't, I might take someone who's not as well-known that might be able to push the case quickly to a conclusion."

While you don't want to pick an unqualified arbitrator, insisting on the best of the best isn't always a winning strategy. Those arbitrators are in high demand and therefore work on many disputes. That may leave them unable to devote the necessary time or attention to properly oversee your dispute, placing your client at a disadvantage, attorneys say.

"You don't mind losing a case, but you do mind losing because the arbitrator didn't take the time to understand the nuances of the case," Kehoe said. "You need to be direct with them on whether they have time to do this."

--Editing by Katherine Rautenberg.

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