

The selection of arbitrators

by David Winter OBE

David Winter OBE here looks at the various issues concerning the selection of arbitrators and what constitutes an ideal arbitrator.

This paper is about the selection of arbitrators, and it is one which divides itself into a number of sub-sets of that topic; but perhaps all that needs to be said at this stage is that in discussing the selection of arbitrators the process of the setting up of the arbitral tribunal is also included.

Selection of an arbitrator concerns such issues as whether there should be a one-person tribunal or three people or whatever, since these issues directly impact upon the process of, and thinking that goes into, the selection process.

If one were to talk to a lay person about this subject, the answer in relation to these matters might well be, 'Well what is the problem? One simply chooses a sensible sort of person with the requisite knowledge and who is suitable for the matter and that is that!' In this simplistic answer lies a great deal of truth, but unfortunately such an approach needs further examination; in other words, it is not detailed enough.

I believe that the first issue that should be addressed and considered in selecting arbitrators is, 'What is the nature of the case?' Let me take a very simple example of why this is one of the most important and preliminary issues. If the case is a maritime arbitration, I would not think it very sensible to appoint as an arbitrator someone who is unfamiliar with the maritime industry, its practices, the relevant law, its documentation and generally 'what it is all about'. Even within the maritime industry there may well be good reason to choose someone with specialist maritime knowledge, say in the field of salvage or charter parties or bills of lading and, in all cases, it might be sensible that someone has a knowledge of industry procedures and practice. The nature of the case is extremely important to ascertain before even considering a particular arbitrator.

To take the field of maritime arbitration as an example, there is such a wide choice of world-famous maritime arbitrators that it should not be difficult to find someone who is suitable to act in any particular case. The points stated regarding maritime arbitration apply equally to many other specialist fields such as aviation, the commodity trades, the construction industry and so on. To take the example of aviation, there is certainly good reason to choose someone with specialist aviation knowledge. For example, the dispute may arise out of matters of a highly technical nature relating to aircraft, and this might well demand a knowledge on the part of an arbitrator of issues relating to the operation, serviceability and maintenance requirements for aircraft. Again, the dispute may arise out of financing issues; this might involve the need for an arbitrator with knowledge of finance and banking. Yet again, the dispute may arise out of the leasing of aircraft or matters that are directly or indirectly connected with personnel, such as behaviour of the crew, whether it is an issue relating to the flight-deck personnel, or in-service personnel. The detail given in these examples is necessary so as to stress again the point that there are various

reasons to select someone who is a specialist in the field. By use of the word 'specialist' I wish to stress that it is someone who is not only familiar with the relevant law, but industry practices and, as I put it a little earlier, knows 'what it is all about'. The listing by me of these various specialist fields (and there are many more that I could enumerate), does not in any way exclude the fact that there are a huge number of disputes in what I may crudely call non-specialist areas, that is to say disputes of a general contractual nature.

A further point that needs to be considered is whether the arbitration is of an international nature, i.e. whether the parties are from different jurisdictions or whether, even if they are from one jurisdiction, the case involves matters 'foreign'. It is purely my personal opinion that an arbitrator who is used to purely domestic matters, without any foreign element or with no foreign parties, is possibly not a suitable person to hear a dispute with international elements. The converse is not necessarily so, because in my view international arbitrators very often have such a broad range of experience and knowledge, that they might very well be suitable to act in a purely domestic matter if the area of the dispute is within their field of competence.

INTERNATIONAL ARBITRATORS

I propose, in the remainder of this paper, to deal primarily with the case of the selection of arbitrators in relation to international matters because it is my experience that this is the area which is the most complex and causes the most difficulty. I shall also assume that the arbitration clause does not say that there should be a one-person tribunal or a three-person tribunal.

Having decided what the nature of the dispute is one then has to 'profile' the ideal arbitrator or arbitrators to hear the dispute. The arbitrator must obviously be thoroughly competent and know the subject, but in my view competence is not enough.

As regards the issue of whether the arbitrator (when I refer to arbitrator I mean arbitrator or arbitrators for the purpose of this paper) should be a man or a woman, it would be wrong to advance a preference for one or the other. I also do not wish to be trite or condescending when I say that, in my view, it is completely immaterial what the sex of the arbitrator is as long as he or she fulfils the necessary criteria to hear the dispute.

Having disposed of the matter of the so-called 'gender perspective' the tricky issue of age then arises. I can take two extremes to illustrate this issue. One might have, in the first case, a situation in which the arbitrator was 'well past it' and, at the other extreme, an arbitrator who has really very little experience at all. There must be a happy medium and so one looks for an arbitrator who is competent and current in experience. Whether that person is 30 years of age or 70 years of age (there is no magic in these numbers) is really irrelevant, although there

might be a slight bias, in a complicated case, against a younger arbitrator who may not have the necessary experience to handle a complex dispute. An advantage of a three-person tribunal would be that one could have a good mixture of a very experienced arbitrator (for example, such a person might be the chairman of the arbitral tribunal) while the slightly less experienced arbitrators might constitute the remaining members of the tribunal.

PSYCHOLOGY OF THE ARBITRATOR

The next thing to look at is the psychology of the arbitrator. By this I do not mean a Freudian or Jungian analysis of a potential arbitrator but purely an analysis of practical issues. For example if the arbitration is to take place outside of the arbitrator's home country, will this cause a problem if the arbitrator is someone who does not like to travel and be away from home, particularly if there are long hearings? Is the arbitrator someone who, in certain circumstances, may have to work under adverse conditions as compared with those enjoyed in the home country? These adverse conditions might relate to matters such as the accommodation supplied, the office facilities put at his or her disposal and things of that nature. Someone who is rigidly 'home-bound' and likes to be 'at their desk' could very well be an unsuitable person.

Again, an arbitrator must be psychologically comfortable with people from other countries; they must feel at ease with them and very importantly, understand cultures, methods of presentation and so on which are literally 'foreign' to them. This point is one of the most important in relation to the selection of arbitrators. The opposite of this can prove quite disastrous. In a sense, therefore, the arbitrator to look for is a person who is reasonably well-travelled and is known to have an interest in peoples, cultures and countries outside his or her own country. To take a rather extreme example, but merely to illustrate the point in its most graphic sense, it is not sensible I believe (there may be exceptions of course), to choose an arbitrator in an international matter who has never been or is rarely outside his or her own country. I most sincerely believe that the ability to mix with people from different backgrounds, cultures and foreign countries is an important psychological facet of an arbitrator's make-up in dealing with international matters.

In fact I would go further and state that I would sub-divide this experience even more and that, at least in an ideal world, an arbitrator who may be very experienced in dealing with say, Western Europe, might not be suitable in considering matters arising from the Far East. I feel far less strongly about this particular point since, at least in my hypothetical example, the arbitrator would have had international experience and the more an arbitrator is familiar with and comfortable with people from other countries, the more desirable becomes that particular arbitrator.

A further issue is whether the arbitrator is familiar with the languages relevant to the dispute. Although it certainly helps for an arbitrator to be familiar with a given language in a dispute – particularly in relation to the reading of documents – I do not by any means think it essential.

Bias and independence

It goes without saying that a chosen arbitrator must be both independent and impartial and, of course, impartiality and

independence are different notions. One can be independent but very partial and equally, although I suspect this is controversial, one can be not independent and still impartial. Independence in this context means independent of the parties, and impartial means without bias towards either one of the parties, or indeed to a particular set of views. The issue of bias of an arbitrator is a delicate and sensitive issue. However it is obvious that in selecting an arbitrator it is not sensible to choose a person who is likely to be biased. Bias can manifest itself in many ways, such as bias towards a particular party's point of view or bias against a particular party itself, or nationality, or bias in favour of, or against, the way the law is interpreted. Bias against parties is quite clear and needs no further discussion, but bias towards a particular interpretation of the law deserves a word in explanation. I can best introduce this subject by giving an example of, say, two lawyers talking together about a particular arbitrator and saying that 'he is well known for his views about the topic'; and in this connection by 'the topic' I mean a particular interpretation of the law. I think it very important to have an arbitrator who is open to hearing legal argument without having preconceived or hard views which cannot be changed. To coin a phrase, the arbitrator should be 'legally liberal' in relation to his or her approach to the law. This does not mean that he or she can be easily swayed from one point of view to another like a weathercock in the wind, but rather must have an open, liberal approach to the law. It also means there is a need for arbitrators trained in a particular system to be sympathetic, in the sense of understanding, towards other legal systems and jurisprudence.

I believe also that an arbitrator should be practical. I do not mean by this that he or she should take a lay person's view of the matter, or necessarily exercise judgment on the basis of what seems fair to them, unless they are expressly authorised to do so by the relevant arbitration provisions. What I mean is that I do not believe that an arbitrator should be overly technical, that is to say, spend the whole time in raising legal niceties unless, as a practical matter, the issue raised is of such importance that the technical aspects under consideration are significant.

The foregoing comment clearly supports my view that where there are substantial legal issues involved then the arbitrator should be a lawyer. Provided he or she fulfils the requirements I have listed and continue to list, it does not matter if the person is a practising lawyer or an academic lawyer

Continuing the psychological profile, I mentioned the issue of impartiality and independence, but I would also try to find an arbitrator who is known to be a 'fair' person. This is because it is the duty of an arbitrator not only to be seen to act in a fair manner but actually to act in a fair manner.

Leadership

There is one further psychological issue which must, I think, be borne in mind; namely that if one has, say, a three-person tribunal, one of the members will have to be the chairman.

The chairman, even though he or she will no doubt be ably assisted by two co-arbitrators, will have to see that the matter is handled properly; for example, it should not be allowed to 'drift'. He or she must, within reason, be the leader of the team which comprises the arbitral tribunal; among equals the chairman is the most equal and the tribunal should act as a

collegial team. My experience is that the chairman leads the way and quite often bears a substantial part of the work involved in acting as an arbitrator; he or she may produce, for example (under the rules of the International Chamber of Commerce (ICC)), the first draft of the Terms of Reference or the first draft of the arbitral award for the co-arbitrators to examine and comment upon.

ACCEPTABILITY TO ALL PARTIES

Having stated the above it would be a proper question to ask, 'Where is one to find this paragon of virtue?'

There is one 'flippan't answer and that is that those who are in arbitration circles tend to know who the right people are, but a more serious response (or if not more serious, at least more helpful), is that certainly where an arbitration is being conducted under the rules of a particular institution, e.g. the ICC, the London Court of International Arbitration, the American Arbitration Association (AAA) or whatever, these institutions have considerable knowledge of people who are suitable to become involved as arbitrators in particular disputes. Indeed, under their rules, the institution concerned often makes the appointment. Some institutions publish lists of arbitrators. From the parties' point of view it is always sensible to try to agree with the other party the choice of an arbitrator and, for this purpose, the practice very often is for each set of lawyers to draw up a list of arbitrators acceptable to them and to try and agree names from among the lists. Very often the same names will appear on the lists.

However, in agreeing the selection of an arbitrator, whether it be a sole arbitrator or a three-person tribunal, one should bear in mind that the law of a particular country may place restrictions on who can act as an arbitrator.

WHAT SIZE TRIBUNAL?

Another issue is whether it is better to have a single arbitrator or a panel of, say, three arbitrators.

An advantage of a three-person tribunal is that there is room for flexibility in the choice of arbitrators, in that because there are three of them, one might be a lawyer while another member might have non-legal technical qualifications. This could be of practical benefit in the resolution of the matter. Another advantage of a three-person tribunal is that it allows for a balanced view of the matter and a discussion among the arbitrators as to matters of fact or law which result, hopefully, in an agreed opinion on any particular issue. Very often this is best established by allowing the arbitrators to debate matters among themselves. It could also be that one arbitrator is particularly 'strong' in assessing the value of evidence while the others' strengths may lie more in the purely legal field. Obviously the ideal balance is an arbitrator who is strong in evaluating evidence and in interpreting the law.

Disadvantages are the extra cost involved and the extra difficulty in selecting a three-person panel, also the possible extension to the length of the proceedings by reason of the fact that matters have to 'go the rounds' of three people and not just one arbitrator. There are many more points to be made but these are not the subject of this paper.

OTHER IDEAL QUALITIES

A further quality that an international arbitrator should have is one that I have alluded to already; that is, that not only should he or she be a competent lawyer in his or her own jurisdiction, but should be 'open' to an understanding of the jurisprudence of other legal systems. Thus, typically, if he or she is a common law lawyer then he or she should have an understanding of, for example, civil law concepts. The issue, however, is not only a question of an understanding of other legal systems but goes to such practical but exceedingly important matters as procedural issues. For example, a common law lawyer is brought up in the adversarial system and is used to cross-examination of witnesses and all that goes with that type of procedure. Such a common law lawyer should also be aware of the way in which the inquisitorial system works. For my part – and this is a purely personal reflection in relation to these matters – an arbitrator should be practical and strike a fair and proper balance between what is necessary for the fair and expeditious hearing of a dispute. Another very important procedural issue is the question of 'discovery' of documentation and this relates to the obligation of a party to produce documents in support of its case or indeed otherwise. It is typical of the common law systems that there be extensive and lengthy discovery involving a mass of documentation, while civil procedure is not the same. Again, a fair balance must be struck by the arbitrators in relation to these matters and depending on the facts of the case. They should not be hide-bound by their own training and what pertains to the procedures in their own particular country.

SUMMARY

The process of choosing an arbitrator can be divided into twelve points that bear consideration:

- (1) The nature of the case and the need to obtain an arbitrator who is comfortable with that kind of case by reason of experience.
- (2) Is the arbitration of an international or domestic character?
- (3) The arbitrator must be thoroughly competent.
- (4) It matters not, provided the right criteria for the selection of an arbitrator are chosen, whether that arbitrator be a man or a woman.
- (5) The age of an arbitrator does not matter so much if the arbitrator is experienced and competent.
- (6) In relation to an international matter one must find an arbitrator who is comfortable dealing with matters 'foreign'. It is important that the arbitrator has knowledge of a foreign language which may form a significant part of any particular arbitration.
- (7) An arbitrator must be independent and impartial. Bias should not be taken in its usual sense of being biased either for or against one of the parties, but the arbitrator should not be legally biased and the arbitrator should be 'legally liberal' in relation to his or her approach to the law.
- (8) An arbitrator should be practical and a 'fair person'.
- (9) The role of the chairman of an arbitral tribunal where there is more than one arbitrator forming that tribunal is extremely important.
- (10) When searching for the ideal arbitrator, people in arbitration circles generally know who are suitable

arbitrators, but specialist arbitration institutions such as the ICC, the London Court of International Arbitration, the AAA or other institutions have considerable knowledge of suitable people to act as arbitrators, especially as they often make appointments.

- (11) There are benefits to having a three-person tribunal although there are undoubtedly certain disadvantages.
- (12) In international matters, not only must an arbitrator be competent in his or her own jurisdiction but he or she should have an understanding of other systems of jurisprudence or of other legal systems.

I have set out what I believe to be most of the relevant factors in the selection of arbitrators and although much of what I have said might be regarded as counsels of perfection, the plain fact is that, for the most part, international arbitration and international arbitrators rightly deserve the high reputation that they have. This is in no small part due to the fact that there has been a correct selection of arbitrators. 

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Myths surrounding the PFI in the UK

by Christopher Bovis



Christopher Bovis

In this article the author endeavours to demonstrate the theoretical and practical background of some of the most important issues surrounding the PFI as part of the government's attempt to institutionalise governance by contract.

The PFI represents a process of public sector management which envisages the utilisation of private finances in the dispersement of public services and the provision of public infrastructure. The principal benefit from such an exercise could be that the public sector does not have to commit its own, often scarce, capital resources in delivering public services. Other reasons put forward for involving private finances in delivering public services include:

- quality improvement,
- innovation,
- management efficiency and effectiveness,

elements that are often underlying private sector entrepreneurship. Consequently, the public sector would receive value for money in the delivery of services to the public, whereas it could also be maintained that, through this process, the state manages public finances in a better way, to the extent that capital resources could be utilised in priority areas.

ROLE OF THE PFI

The PFI has arrived in times when the role and the responsibilities of the state are being redefined. Also, alongside the privatisation and contracting out processes, it has been seen as part of the exercise in slimming the state down to a bare minimum of fiscal responsibilities towards the public. The PFI has resulted in changing the traditional nature of the state with regard to asset ownership and the delivery of services to the

public. The state, under the PFI, assumes a regulatory role, whereas the private sector is elevated to asset owner and service deliverer.

There are two broad categories under which privately-financed projects can be classified.

Financially free-standing projects

The first covers the so-called *financially free-standing projects*, where it is expected that the private sector designs, builds, finances and then operates an asset. The recovery of its costs is guaranteed by direct charges on the users of the service which the particular asset provides. These projects are often described as *concession contracts*, where the successful contractor is granted an exclusive right over a period of time to exploit the asset that it has financed, designed and built. The state and its authorities may also contribute, in financial terms, to the repayments in order to render the project viable or the service charge to the end users acceptable.

Provision of services by the private sector

The second category of privately-financed projects embraces those which have as their object the provision of services by the private sector to the public, in conjunction with and subject to the relevant investment in assets that are necessary to deliver the required service to the public. In such cases, the private sector provider is reimbursed by a series of future payments by the