

Choosing the Right Energy Arbitrator

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The manner in which arbitrators are appointed is opaque. This is partly a factor of the essentially confidential nature of arbitrations, and partly a factor of the tight knit community that makes up the international arbitration world. However, the closed nature of international arbitration means that access to information about arbitrators in general, and specialized arbitrators in particular, is limited. No other industry operates by appointing skilled workers without a review of their previous work or without a well-informed understanding of how they will carry out the work. The challenge faced by parties and counsel in appointing arbitrators is firstly, how to identify potential candidates for appointment and secondly, how to ensure, as much as possible, that they are appointing the right person for the job.

Given the lack of available information, particularly in relation to how an arbitrator is likely to conduct a case, parties looking for an arbitrator base their decision largely on three factors: word of mouth in relation to the arbitrator's experience, the arbitrator's nationality and legal education. In relation to word of mouth recommendations, the quality of the answer in terms of the provision of useful information is often driven by the identity of the questioner and the motive of the respondent. Because there is an element of fear of 'getting it wrong' (suffered both by the person soliciting the information on a candidate and on the solicitee, who may be blamed for giving the positive feedback) which is exacerbated by the difficulty of reviewing first hand an arbitrator's previous work, the result is a market where parties tend to overvalue better known arbitrators and less well known names struggle to be recognized.

There is surprisingly little information available on line when it comes to identifying potential candidates for appointment. When it comes to choosing an energy arbitrator, however, parties may be better informed than in relation to other industries. The Energy Arbitrators List was created by an ad hoc industry group in 2005 and is maintained by the International Centre for Dispute Resolution, which extensively overhauled and updated the list in 2014. Arbitrators are selected for inclusion on the list by an independent review committee of industry leaders and legal experts based in the UK, US, Europe and South America. The database is searchable by country, region and key words and includes detailed information on arbitrator experience in 13 separate industry categories. These include upstream, downstream and midstream contracts; petrochemicals; commodities trading; investor/state disputes; regulated utilities; and renewables. The CIArb also has a searchable database of arbitrators, with 29 categories of specialisms (including energy). There are other, more ambitious projects which are in the development stages that aim to provide information on how arbitrators conduct arbitration proceedings and, ultimately, issue a decision and will go some way towards providing better and more open access

to information about arbitrators. Probably the most remarkable project is Arbitrator Intelligence, a public database that will ultimately provide information on published and unpublished awards and feedback from users.

Ensuring that you are appointing the right person for the job once you have identified potential candidates is, of course, a far more challenging issue. The fear of getting it wrong encourages conservative choices in picking an arbitrator, which may not always lead to the best result. If the 'right' arbitrator for the case is one who is efficient, experienced and diligent, then parties and counsel need to test that with both the arbitrator and with others who have experience of that arbitrator. Although interviewing arbitrators is something of a controversial topic, the CI Arb has issued detailed guidelines on how to conduct interviews and those should be consulted prior to contacting the potential candidate. Selecting an arbitrator is one of the most crucial decisions a party will make in an arbitration. It is one of the reasons why the parties chose arbitration to resolve their disputes in the first place. Until there is more open access to information about individual arbitrators, the onus will remain on the parties to test the information they are given and to thoroughly vet their arbitrator candidates. Equally, arbitrators must ensure that they are providing up to date, accessible information on their experience and suitability for particular appointments to enhance their chances of being considered for appointment.

** Lucy Greenwood and Ann Ryan Robertson are co-chairs of the forthcoming CI Arb conference on Energy Disputes. Free to all CI Arb members, this conference will take place in Houston, Texas on 28 and 29 April 2017. Visit the North American Branch website at www.internationalarbitrators.org for more information.*