ADR Systems Design/Part 2 of 2

Twists and Turns in Arbitrator Selection: The Labor-Management Context

BY ARTHUR PEARLSTEIN

Part I of this series last month established that there is a market for arbitration that exhibits some special characteristics. Among other things, it is a "matching market" where the buyers come in adversarial pairs, and it tends to be a "superstar market" subject to a type of "Matthew Effect" where success breeds success for arbitrators, while many highly qualified ones can be left behind.

Here, Part 2 explores the arbitrator selection process in more detail.

There is a wide array of potential factors that may go into a party's preference for one or another arbitrator in each case, but empirical research gauging the weight given any of these is quite limited in number and reliability, and most of it is somewhat dated.

This article examines each of the elements that might be considered by parties and discusses reasonable assumptions, research data where available, and impressions formed through experience. It also looks at the extent to which specific background characteristics might be predictive of an arbitrator's decision tendencies to establish whether parties would be well advised to take these into account.

Arbitrator selection factors are explored here in the context of labor (union-management) arbitration. As with the broad look at the labor arbitration market in Part 1, most of the takeaways are easily transferable to arbitration in other business settings, including those involving commercial and employment relationships.

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The most common method for selecting a labor arbitrator is through requesting, for each case, a selection "panel" of arbitrators from an administering body. Seven arbitrators per panel is most typical.

At the Federal Mediation and Conciliation Service, panels in most cases are randomly generated by computer based on party-designated parameters, which may include such factors as geography, certifications, and experience with designated issues or industries.

Parties then choose one arbitrator from the panel by agreement, usually through either alternate striking of names by the parties until only one arbitrator is left, or by confidentially submitting the names of the panelists in rank order of preference, with the administering agency appointing the highest-ranking arbitrator when the numbers are combined.

In some cases, parties instead will agree in advance on a limited list of acceptable arbitrators who are rotated through cases or otherwise selected, often referred to as a "permanent panel," though there is generally nothing truly "permanent" about them.

I. What Are Parties Typically Seeking in a Labor Arbitrator?

An Overarching Assumption: It might be considered axiomatic that each party seeks the arbitrator most likely to decide in its favor for any given case. If so, that begs the question as to how parties might make such determinations.

Moreover, things are not as clear cut as may appear. At least some research suggests that parties do not always select arbitrators who they might expect as most likely to decide in their favor. In one study, for example, union representatives appeared to avoid the youngest and least experienced arbitrators, even where arbitrators' backgrounds were expected to maximize their chances of winning. Nels Nelson, "Selection of Arbitrators," 37(10) *Labor Law Journal* 703 (October 1986).

Other considerations may also be involved. For example, in some cases an advocate's client may not expect (or, occasionally, even want) to "win." To avoid "duty of fair representation" claims, unions must sometimes represent employees known to have a weak case or to pose continuing problems to both union and management.

At the same time, company advocates may feel compelled to pursue a discipline case where they could not convince human resources officials or the manager involved that it was a losing proposition. In such circumstances, a party may not be as focused on getting arbitrators with the same characteristics as in other cases.

It is important to bear in mind that most aspects of an arbitrator's background are not truly independent variables—for example, one might expect age and experience to be correlated—and some elements may serve as proxies for other variables. Because it is difficult to control for such overlaps, this can be a limiting factor when attempting to draw conclusions.

Gender, Race, and Age: I have uncovered no research examining whether there is a relationship between arbitrator ethnicity/race and case outcomes. There have been some studies involving gender, though with inconsistent results. The most recent and perhaps most extensive study that examined the issue—the "Cooper Study"—concluded that a correlation between gender and outcomes depended on the type of case.

On the one hand, it found "… no statistically significant relationship between an arbitrator's gender and outcome in discipline cases" (reprimands or suspensions, not discharge); on the other hand, in cases where the grievant had

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ADR Systems Design

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been *terminated*, female arbitrators rendered more awards favoring management (60.17% vs. 50.88%), and male arbitrators rendered more split decisions (29.81% vs. 21.16%). Laura Cooper, Mario Bognanno, Stephen Befort, "What's the Relationship Between Labor Arbitrators' Backgrounds and Outcomes of Discipline and Discharge Awards? An Empirical Analysis," Vol. 31(3) *ABA Journal of Labor & Employment Law* 433, 435-436 (Spring 2016) (available at https://bit.ly/336JKok).

A summary of seven other studies conducted earlier found mixed results, with some finding little or no correlation between arbitrator gender and decisions, and others finding at least some relationship. Mark Gough and Alexander Colvin, Decision-Maker and Context Effects in Employment Arbitration, *Cornell University ILR School Digital Commons Special Issue* (November 2017) (available at https://bit.ly/3pPwC0z).

In any event, I found no reported study reflecting a level of difference involving arbitrator gender that would necessarily be persuasive to a party deliberating on selection. Studies of correlation between arbitrator age and case outcomes have yielded mixed results, and because age and experience often go together, it is difficult to draw conclusions as to a connection between an arbitrator's age and decision tendencies.

Perhaps unsurprisingly given the relative lack of correlation between these demographics and case outcomes, research into the extent to which race, gender, or age enter selection considerations suggests parties pay minimal, if any, attention to these demographics when taking the measure of arbitrators. See Jeffery D. Houghton, Randyl D. Elkin, and Sarah Stevenson, "Toward a Parsimonious Model of Arbitrator Acceptability: What Matters Most in Arbitrator Selection?" 24(1) *Int'l Journal of Conflict Management* 6-22 (and studies cited) (2013) (available at https://bit.ly/3pTkrQa).

That is certainly consistent with anecdotal evidence from my own experience looking at arbitrator selections as well as hearing from parties and arbitrators. As noted in Part 1 last month, minorities have been historically underrepresented on labor arbitration rosters. This is also true of women, albeit to a lesser extent.

While the trend is toward an increasing proportion of minorities and women on these rosters, there is clearly a long way to go. Given the importance to the parties of arbitrator experience and reputation, discussed below, it seems likely that the increased selection of women and minorities to hear cases will lag behind their entry onto rosters.

This may essentially be a kind of unintended bias, with parties failing, as described in one article on diversity in arbitrator selection, "to recognize equally competent and capable but somewhat less experienced neutrals."

Showcasing Selection

The inquiry: On what basis do parties choose arbitrators?

The surprises: Veterans may split the baby more than less-experienced arbitrators. And demographics are less of a factor than expected.

The selection points: It's many factors, explained in this article, but it's mainly reliability and predictability.

Homer La Rue and Alan Symonette, "The Ray Corollary Initiative: How to Achieve Diversity and Inclusion in Arbitrator Selection," 63 *Howard L. J.* 215, 221-222 (2020) (access at https://bit.ly/39SwpEu). The authors go beyond this to hypothesize that there is a separate "unconscious bias" involved in arbitrator selection, but consideration of this possibility is beyond the scope of this article.

There are, to be sure, exceptions to the above conclusions in cases involving specific parties or circumstances. In a paper presented to the National Academy of Arbitrators ("NAA"), for example, one arbitrator suggested that age

> can be a factor, on either end of the spectrum. A youthful arbitrator may have acceptability problems because of the perception they may lack experience or lack the "air of authority" to control a fractious hearing. But youth can be a positive if the parties have a case with evolving issues and may feel a youthful arbitrator is more likely to be on top of new issues and developing law, or be more likely to take a different approach than an older, established arbitrator who has developed a settled attitude toward certain issues.

Mei Lang Bickner, Arbitrator Acceptability: Arbitrators' and Advocates' Perspectives, Papers from the NAA 2003 Fall Education Conference (available at https://bit.ly/3nMmdB6).

Note here again the fact arbitration customers come in adversarial pairs means that each might be looking at this factor in a different way and the selection that emerges may not reflect either youthfulness or the most experience.

Experience: I have personally heard one facet of an arbitrator's background mentioned more often than any other as a top criterion for selection by parties: "experience." I have also found, however, that the word may refer to one or more different aspects of what advocates are trying to gauge.

Experience may refer, among other things, to years as an arbitrator, number of cases heard, prior years working in labor relations as an advocate or mediator, and/or extent of background with the very industry/issue involved in the case at hand. There are, of course, overlaps among these definitions, but the correlations are not always as one might expect.

For example, a person with more years as an arbitrator may be more likely to have heard more cases, but there are plenty of exceptions. Another problem with weighing relative experience stems from how advocates measure whatever aspect(s) they prefer: biographical information provided by FMCS, for example, does not include the number of years or cases for an arbitrator, though some arbitrators may specify it in the brief "professional statement" they are permitted to include. Parties often must rely on proxy elements such as reputation/visibility or education to assess experience, or simply their own degree of familiarity with the arbitrator.

There is one major indicator of experience that advocates can readily see when a requested panel is provided: membership in the NAA. Admission to the NAA has rigor-

ous requirements including at least five years as an arbitrator and at least 60 decisions in a six-year period. (See naarb.org/membership-guidelines.) Roughly 40% of FMCS arbitrators are members and if both parties agree, they can specify a panel including only NAA members. Though they frequently do so, in most cases they do not.

Most, but by no means all, research examining the importance of experience—however defined—in party selection of arbitrators has tended to support the hypothesis that it is given substantial weight. One study found that experience was the strongest indicator of arbitrator acceptability and cited several earlier studies consistent with the conclusion that experience is a "key factor in the arbitrator selection process for both unions and employers." See Houghton, et al., at 9, 16.

In the Houghton study, participants were asked about their perception of "overall experience [number of cases]" and of "experience with type of case you will be presenting." Looking at the 10 most frequently party-selected arbitrators from the FMCS Roster in Fiscal Year 2019 reveals seven had 25 or more years of experience as an arbitrator on the roster, two had 20-24 years of experience, and the one outlier still had 11 years of experience. Nine of the 10 were NAA members.

Interestingly, most research on the connection between arbitrator experience and case outcomes evidences little, if any, effect of experience on arbitrator decisions and approaches, suggesting that parties may place excessive emphasis on this variable.

The authors of one study went so far as to suggest that "the experience factor may largely be a myth," and point to other research that "reveals the parties cannot distinguish between the awards of experienced arbitrators and those of inexperienced arbitrators. More importantly, experience does not seem to be significantly related to arbitral outcomes." Perry A. Zirkel & Robert J. Thornton, "The Predictability of Grievance Arbitration Awards: Does Arbitrator Experience Matter?" Proceedings of the Forty-Second Annual Meeting, National Academy of Arbitrators, 147, 158 (1989) (available at http://bit.ly/3p5nsfp).

The Cooper study did find that NAA members tended to decide in management's favor a bit more than generally less-experienced nonmembers (54.15% vs. 50.45%). Surprisingly, it also found NAA members were substantially more likely than nonmembers to reach a kind of decision often associated with "splitting the baby." That is, awarding reinstatement of a terminated employee *without* back pay (NAA members did this in 20.34% of discharge cases while non-members did so in only 12.58% of cases).

Such a result tends to be often criticized since reinstatement suggests the employer did not meet the standard of "just cause" for firing the grievant, in which case, so the argument goes, the employee should be entitled to back pay. Conversely, if the employee engaged in such misconduct as to merit no compensation for having been out of a job for a period, then arguably the employer did, indeed, have just cause for the termination.

Compromise decisions such as reinstatement without back pay are usually thought of as more common among less experienced arbitrators.

Education: There is some research evidence that parties often find the arbitrator's level of education to be an important selection consideration, but not very much to demonstrate that one type of degree or another makes a big difference. To the extent it is an important factor for the parties, they may not find it very easy to distinguish among the choices.

A significant majority of labor arbitrators are well educated. For example, about two-thirds of FMCS Roster arbitrators have a J.D. At one time, a significant proportion of arbitrators held PhDs, which some parties found attractive, but now such arbitrators are few and far between. It is not clear whether advocates consider the prestige of universities attended by an arbitrator or such things as academic honors or awards.

At least as important as the education level, in research findings as well in my observations, is the field of study. This is discussed in more detail under "Occupation/Professional Background" immediately below. In any event, there is little evidence that, other than as relates to professional background, school credentials taken as a separate variable has much connection to case outcomes, so parties may have not much to gain from a granular look at an arbitrator's educational pedigree.

Occupation/Professional Background: As noted in Part 1 last month, most who pursue work as a labor arbitrator do so as a second career following years as a labor relations advocate or neutral, or added onto a current career as an academic or as a lawyer handling cases outside the workplace arena.

In decades past, a great many arbitrators were full-time academics; nowadays, that is the case with well fewer than 10% of arbitrators on the FMCS Roster. More than six times as many are currently, or once were, practicing attorneys.

Clearly, profession, education, and experience are related, and it may be difficult to separate them when examining party preferences. Still, some studies have suggested specifically that an arbitrator's current occupation and/or prior professional background is often a factor considered by parties in the selection process.

There are indications that many advocates are particularly interested in whether an arbitrator has a legal background. In addition to study data, it is something I frequently hear from parties. Indeed, when requesting a panel from FMCS, parties often opt for one consisting only of attorneys, present or former.

Though by no means conclusive, it is worth noting that of the 10 arbitrators selected in FMCS arbitrations most often in FY19, all but one were attorneys, while in a random sampling of 10 arbitrators selected only a single time during that period, four had no legal background.

A study many years ago reached some interesting conclusions on arbitrator professional backgrounds and party choice. It found that both employers and unions tended "to prefer individuals with law degrees to labor relations practitioners." But it also found that employers preferred economists to both groups, while unions prefer both these groups to economists. See David Bloom & Christopher Cavanagh, "An Analysis of the Selection of Arbitrators," National Bureau of Economic Research Working Paper No. 1938, 1, 16 (June 1986) (available at https://bit.ly/393PT8D).

These days, there are far fewer economist arbitrators to choose from and considerably more arbitrators with a legal background.

For what it is worth, the Cooper study concluded that professional backgrounds correlate with case results to an extent. It found that "arbitrators who were also practicing attorneys were significantly less likely to render management awards than other arbitrators. Man-

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ADR Systems Design

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agement prevailed in 57.51% of decisions by academics and 62.5% by arbitrators who were neither academics nor practicing attorneys, but only prevailed in 48.04% of decisions by practicing attorney arbitrators." (Cooper et al, 36).

Fairness: Few would argue with the proposition that parties prefer arbitrators known to be "fair" and, of course, fairness is a fundamental requirement of the arbitral profession. For purposes of relating it to selection criteria, however, we need a definition of fairness, particularly as understood and applied by parties considering their choice of arbitrators.

There is substantial reflection and study in the literature on fairness in the context of arbitration, but I find the framework used in one study especially useful. Applying "organizational justice theory" to the acceptability of labor arbitrators, the authors broke down the concept of fairness into three categories: arbitrator distributive justice, procedural justice, and interactional justice. They concluded that when parties perceive the arbitrator to be fair, they are more likely to select the arbitrator, though parties do not consider all three types of fairness to the same extent. Richard A. Posthuma, James B. Dworkin & Maris S. Swift, 39(2) "Arbitrator Acceptability: Does Justice Matter?" *Industrial Relations* 313 (April 2000).

Distributive justice refers to the parties' perceptions of case outcomes—the fairness of arbitrator decisions and demonstrated lack of bias. Procedural justice focuses on the parties' perceptions of the process used to reach the outcome—especially the conduct of the hearing and a demonstration of appropriate professional responsibility. Interactional justice, considered by some to be a subset of procedural justice, involves a more personal focus, such as the degree to which an arbitrator treats parties with respect and demonstrates a "human" dimension.

Perceptions of procedural and interactional justice "are significantly related to the parties' evaluation of the arbitrator even after the distributive justice of prior rulings have been taken into account." Posthuma, et al., at 330.

More recently, Houghton, et al., also found procedural justice to be a major factor in parties' assessment of arbitrators. Houghton, et al., 16. Input I have received from parties is certainly consistent with findings on the importance of procedural and interactional justice.

Parties frequently seem to tie their satisfaction, or lack thereof, with how the arbitrator ran the hearing, explained the decision in cogent and reasonable terms, and treated the parties and advocates in the process. The most common party complaints about arbitrators that come to my attention are process and deportment oriented.

Distributive justice, surprisingly, has not emerged as so strong an element in selection criteria as procedural justice. To the extent parties view decisions in their favor as "fair," the distributive justice consideration may simply involve gathering information about how frequently an arbitrator has ruled in the past for one side or another. If a party has access to no other information about an arbitrator besides the "win-loss" record, it may take on more weight.

Sophisticated parties, however, will focus to the extent possible on the reasonableness of decisions under the circumstances of each case rather than raw numbers. They understand that an arbitrator with a track record that suggests bias toward one side or the other will not survive long in the marketplace.

Moreover, many cases involve "split" decisions—for example, an employee is terminated, and the arbitrator reduces the discipline to 30 days suspension and no back pay, so numbers do not tell the whole story.

II. Overarching Selection Factors

Reputation and Visibility: There is considerable evidence that, in the words of one arbitrator, "among personal characteristics of arbitrators, of most importance to the parties when selecting, or not selecting, an arbitrator is her or his reputation." T. Zane Reeves, "Researching the Arbitrator: The Chicken Noodle Soup Approach," *Conference: Southwest/Rockies Region, National Academy of Arbitrators* (March 2012) (available at https://bit.ly/2UOHXj0).

Likewise, there is data suggesting the importance of the related element of visibility. One study, for example, concluded that "visibility characteristics," including books and articles published, listing on rosters, published awards issued, professional activities, and being listed on permanent panels, was the most important variable in arbitrator selection. Steven Briggs & John Anderson, "An Empirical Investigation of Arbitrator Acceptability," 19(2) *Industrial Relations* 163 (March 1980), which has been cited repeatedly in more recent scholarly work for the proposition that reputation and visibility are important selection variables.

Reputation is also tied with other arbitrator characteristics in addition to experience. To the extent parties consider educational and professional backgrounds, for example, these factors become interrelated with reputation.

Predictability: Emphasis on reputation may be closely linked to another fundamental element of concern, namely the degree to which a party can predict an arbitrator's approach and even likely case outcomes.

As described in Part 1 last month, parties frequently complain when they are unfamiliar with those on a panel that they want to "know" the arbitrator, which is to say they want to be able to form expectations for how the arbitrator would handle a given case.

Parties to labor disputes tend to be risk averse and they prefer to reduce the uncertainty of case outcomes as much as possible. This ties back to reputation and party perceptions about experience. Parties frequently assume that more experience means greater predictability. "As long as the persons doing the selecting believe that experienced arbitrators are more predictable …, experience as an arbitrator will be important, whether or not it is justifiable on an objective basis." Zirkel and Thornton at 160.

III. Gaming the Arbitrator Selection Process

On countless occasions, I have observed advocates engage in tactical ploys during the process of selecting an arbitrator, in some cases even attempting to ensure that no arbitrator at all would be appointed. Much of this is made possible by language (or lack thereof) in the collective bargaining agreement that may fail to address certain circumstances or create ambiguity as to selection procedures.

During contract negotiations, it is not unusual for the arbitration clause to be all but ignored. Much of the time, the same clause may have been carried over from contract to contract for a lengthy period, often spanning decades with little consideration of the implications. Other tactical maneuvers may not involve the arbitration clause but instead be an argument based on different technicalities. Some examples include the following:

Non-cooperation: In numerous cases, when FMCS issues a panel of arbitrators at a party's request, the other party then simply fails to cooperate. Sometimes this may consist of stalling tactics, where an advocate claims an inability to meet and engage in the designated selection process based on circumstances such as an overloaded schedule. Frequently, a party will simply fail to respond to messages when the other party seeks to arrange a time for selection or insist there is no point in selecting an arbitrator since pending cases are already backed up.

In these situations, the requesting party will often contact my office in frustration, asking that we force cooperation of the other party or appoint an arbitrator from the panel. FMCS has no enforcement authority or ability to appoint an arbitrator except to the extent the contract expressly provides it. Frequently, the arbitration clause will create a selection process but have nothing to say about what happens if one party fails to cooperate, leaving FMCS powerless to appoint an arbitrator.

In some contracts, parties have the foresight to include language such as the following: "If a party fails or refuses to participate in the alternate striking of names, FMCS is empowered to appoint the arbitrator from the panel that is the cooperating party's first choice …," or "… is empowered to select and appoint an arbitrator from the panel."

A requesting party may have other recourse if the other party fails to cooperate in selection, such as filing an unfair labor practice charge with the National Labor Relations Board. But this can involve considerable delay and expense. Often, the very purpose of the noncooperation tactic may be to wear down the other party—or at least soften it to reach a more favorable settlement.

Arbitrability Ploy: In a surprising number of cases, after FMCS has issued a panel in response to one party's request but before an arbitrator has been selected, we will receive a notice from the other party declaring that FMCS may not appoint an arbitrator because the case is "not arbitrable."

They may argue this because procedures have not been followed (e.g., the requesting party did not file for arbitration within the specified timeframe) or because the case at hand involves a subject matter excluded from arbitration under the contract.

Sometimes, I am startled to find that an advocate has submitted an extensive brief for our consideration, as if we are sitting as a court. While in some of these instances there is a good-faith misunderstanding by the advocate of our role in the process, I have no doubt that often the advocate knows full well.

FMCS regulations prohibit the agency from considering arbitrability arguments, as we always remind the advocate. A procedural arbitrability argument is generally for the arbitrator to determine, and a substantive arbitrability argument is for the court, though in the latter case the CBA often provides that substantive arbitrability must be argued to the arbitrator. When advocates learn that FMCS does not accede to the tactic, they typically revert to the noncooperation approach described above.

Insisting on a Disqualification: In some cases, a party will see the panel that has been issued and advance an argument that one of the arbitrators should be disqualified for one reason or other, thereby triggering issuance of a whole new panel.

There are often legitimate reasons for this (e.g., an arbitrator was a recent law partner of the opposing party's advocate), but much of the time it is a considerable stretch, such as a claim that an arbitrator showed bias in a previous case or that the party once engaged in a billing dispute with an arbitrator on the panel.

It frequently appears to be a tactic used when a party is unhappy with a panel and wants an excuse to get a new slate of arbitrators. I state this because if an arbitrator on a panel is disqualified, FMCS offers to replace the arbitrator with a different one, randomly selected based on the requested parameters, and keep the rest of the panel intact when both parties agree.

If the concern were truly about the one arbitrator, then this would be the obvious resolution. But in many instances the party insists on the default, which is providing a new slate, suggesting a motive aimed at replacing the panel rather than at removing a potentially biased arbitrator.

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There are many elements that parties may consider when selecting an arbitrator.

Some of the factors often assumed to be in play, such as gender, race, and age, have been shown to have little, if any, influence on party preferences and minimal correlation with case outcomes. Parties appear to weigh an arbitrator's perceived experience quite heavily, despite little evidence of an effect on outcomes.

They also place substantial emphasis on their understanding of an arbitrator's fairness, particularly when it comes to procedural probity, and to a lesser extent on an arbitrator's educational and professional background.

The more important factors appear to be connected to overriding considerations: an arbitrator's reputation and predictability. As discussed in Part 1, this tends to place newer, lesser-known arbitrators at a distinct disadvantage. But the fact that the arbitrator selection is made by customers who come in adversarial pairs can dampen some of the effects, since parties are not always looking for the same elements or may interpret an arbitrator's manifestation of the elements differently.

Most of what goes into selection considerations of parties to labor arbitration likely is similar to that found in other kinds of business-to-business settings. Addressing the context of international commercial arbitration, for example, the authors of one study concluded that "five constructs of arbitrator characteristics—reputation, practical expertise, legal expertise, experience and procedural justice—statistically significantly explain arbitrator acceptability." Yongkyun Chung, Hong-Youl Ha, "Arbitrator Acceptability in International Commercial Arbitration: The Trading Firm Perspective," 27(3) *Int'l Journal of Conflict Mgmt.* 379-397 (July 2016) (available at https://bit.ly/3pMhjpz).

Parties to labor contracts sometimes find ways to "game" the arbitrator selection process to gain a tactical advantage. Both within the labor arbitration context and in other business-to-business arbitration settings, parties are well advised to fashion arbitration clauses to anticipate and thereby avoid such maneuvers.