

How does a new arbitrator get their first appointment? Q&A Session with Remy Gerbay

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Q: A common gripe at 'Young' Arbitration conferences is the difficulty of getting a first appointment as an arbitrator, do you think this is fair?

A: It is a difficult question. While there is little empirical evidence on the subject, in Western Europe, the more precocious arbitrators I know seem to have seen their arbitrator career take off in the latter part of their thirties or in their early forties.

Is that old? It is debatable...

- o On the one hand, you need to have the right skillset before you can be considered for appointment, and this, I think, requires suitable experience of arbitration as counsel, tribunal secretary or otherwise. You can acquire a good theoretical understanding of arbitration by taking a degree or diploma in arbitration like the ones we have been offering at Queen Mary University for the past thirty years, but ultimately there is no substitute for experience.
- o On the other hand, the statistics published by the leading arbitral institutions confirm that there are hundreds upon hundreds of relatively small international disputes referred to arbitration each year. Parties and institutions need to have access to a pool of qualified and reliable young arbitrators willing to give to these smaller disputes the time and attention they deserve. Therefore, the opportunities for appointment exist.

What is perhaps difficult in the process is that there is no clear path or roadmap to getting your first appointment. Less-experienced lawyers don't necessarily know what they can do to improve their chances of being appointed. There are, however, a number of things that one can do to become a more qualified candidate.

Q: What barriers do new arbitrators face when seeking a first appointment?

A: At the source of the problem is the obvious fact that, when making decisions on appointments, people tend to be risk adverse (as they should be). Both arbitral institutions and outside counsel tend to be reluctant to appoint individuals who have no track record, even if in my view arbitral institutions do a much better job of appointing new people than outside counsel.

While, notionally, everyone agrees that it would be good to appoint new arbitrators, when you have to make a decision in a real-life case, it becomes more complicated. Even for smaller cases, you always try to appoint the best arbitrator you can get for your case. And to many practitioners the very best arbitrator rarely looks like the one who has never sat on a tribunal! Sadly, in practice, there seems never to be a perfect case to appoint someone for the very first time.

I guess that what this boils down to is the fact that people do not always see the upside of appointing a new arbitrator. In my experience there are advantages, key among which is the fact that new arbitrators are usually keen to impress and therefore tend to dedicate more time and attention to their cases than some of the more seasoned arbitrators.

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As an aspiring arbitrator, therefore, the challenge is to demonstrate to outside counsel and institutions that, despite your lack of arbitrator experience, you are a reliable individual, who is perfectly capable of managing proceedings all the way to a final (and enforceable) award. In other words, you have to demonstrate that you are a safe pair of hands.

Q: How did you get your first appointment(s)?

A: My first appointment came in the form of a party nomination. It was an ICC arbitration and I was appointed as co-arbitrator on a three-member tribunal. The party that appointed me was represented by the London office of a US firm. Admittedly it was a very small case for the firm's standards (approx \$1m). I knew the partner in charge of the matter professionally from my time at the Secretariat of the LCIA.

My second and third appointments came relatively quickly after that first one. They were institutional appointments, from the ICC first, and then from the LCIA. Most other approaches and appointments so far have been from these two institutions. I feel genuinely grateful for the confidence that they have shown me so far with these appointments.

One recent appointment, as a Chairman of the three-member tribunal, came from the co-arbitrators. In that particular case, a professional acquaintance of mine who is a young arbitrator himself put my name forward to the other co-arbitrator who accepted it. It was interesting because the second arbitrator was a very senior lawyer. Having a younger and less experienced individual as Chair did not bother him at all and we all got along very well!

Clearly, working for the Secretariat of a leading arbitral institution for a few years has helped me immensely in getting my first appointments. I feel that I gained some useful skills (eg case management, procedural expertise, drafting etc.) but I also got to work with many arbitration lawyers in various parts of the world. As a result, I was able to start building a profile a little quicker than if I had remained in private practice. I also believe that being a London-based UK (and US) qualified lawyer without being English has played in my favour for some of my appointments as sole arbitrator. Another factor is that, being based at an academic institution, I have very few conflicts of interests. This means that, statistically, I am able to accept more cases than someone practising out of a large international law firm. I know many lawyers in large law firms who have been approached several times before they could accept a first appointment.

Q: Are the institutions open to 'new' arbitrators in the market?

A: I think they are.

In fact, conventional wisdom suggests that most people receive their first appointment from an institution rather than a law firm.

Arbitral institutions (but normally not the parties) are occasionally called upon to select all arbitrators on a three-member tribunal. When this is the case, they are in a unique position to appoint at least one, if not two, new arbitrators alongside an experienced Chair. Without getting into the debate about party appointments vs institutional appointments, there are different dynamics at play when the parties themselves nominate their arbitrators.

The ICC is well known for appointing new arbitrators when appropriate. It is true that their large and diversified caseload means that they are in a unique position to do so. Likewise, for some time now, the LCIA has been making a conscious effort to appoint new entrants and, more generally, to support 'diversity' (including gender-based).

But to me the question is not so much 'Are institutions open to new arbitrators in the market?', but rather 'Are parties and their counsel open to new arbitrators in the market?' At the end of the day, more appointments are made by the parties and their counsel than by institutions. In 2012, for example, the ICC saw 1,341 individuals appointed as arbitrators, of which 774 were party-nominated, 195 were selected by the co-arbitrators, and only 372 by the institution itself.

Q: Are there certain jurisdictions where first appointments are easier? Are there cultural differences on this issue?

A: I am not sure whether there are significant cultural differences. Conventional wisdom suggests that in some Asian jurisdictions seniority plays a more important role in society than, say, in Western Europe or North America.

But to an extent it is a question of supply and demand. It should be easier to get a first appointment in a jurisdiction where there is a smaller pool of reliable arbitrators and a large pool of cases. Some of my colleagues in more exotic jurisdictions have indeed received their first appointment when they were still associates in their firms. This seems to be rare in places like London, Paris or New York.

In some jurisdictions language skills can help get a first appointment (eg Russian, Portuguese or Arabic). I know a few individuals who have received a number of appointments over the years primarily because they were amongst the few people with both the right experience/qualifications and the right language skills.

Q: Did you undertake any particular arbitrator training?

A: I did not. However, I can see how training courses like the award writing module of the Chartered Institute of Arbitrators, could be useful. There are jurisdictions (in particular in Africa) where these certifications are looked at very positively. They are particularly useful for non-lawyers, or for non-arbitration specialists who are trying to transition into arbitration.

But ultimately the training that you really need is exposure to arbitration cases. I have met some students who express the desire to become arbitrators without first practising. I guess that many assume that since in some countries one can become a judge immediately upon graduating from law school, it should be possible to do the same for arbitration. This, sadly, is not realistic. Any appointment requires a measure of confidence on the part the person making the appointment, and it is difficult to foster that confidence unless you have worked in the field for a little while.

Q: What tips do you have for those seeking a first appointment?

A: There are a number of practical things that can be done, some of which are common sense.

Let people know you are accepting appointments

It should be obvious but once you feel that you have acquired enough experience to sit as arbitrator, let people know that you are accepting appointments. This means mentioning this to outside counsel and the staff of any relevant arbitral institution. For institutions it is useful to get to know not only the Secretariat staff but also the members of the institution's deciding organ (the 'Court', or 'Board' etc.). More generally, it is useful to understand how decisions on appointments are made, by whom, on what criteria etc. The process varies greatly from one institution to the next.

Prepare an arbitrator CV, and make it available

An arbitrator CV does not have to look like a traditional solicitor's or attorney's CV (for one thing, it can be longer). In my view, it should ideally contain a short biography followed by an anonymised list of cases as counsel and/or secretary to a tribunal. For inspiration, you may wish to look at the CVs of the Barristers at some of the leading commercial chambers in England.

The list of cases is useful because if someone is hesitating between you and another candidate, finding confirmation in your CV that you have done the relevant kind of work may well be the deciding factor.

Get your CV on arbitral institutions' rosters or databases. However, don't expect this to be enough, or even to be a key step (building your profile is more important). Going forward, I believe that online networking tools will play a greater importance than they do today. You can already use LinkedIn or other online tools to showcase your qualifications and experience and to make your CV widely available.

Try to raise your own profile within the arbitration community

In a law firm, as a younger member of a team of lawyers, you don't really have much opportunity to impress arbitrators and other outside counsel because of the limited opportunities for advocacy. You can, however, show your talents in other ways.

Speaking at conferences, for example, allows you to demonstrate a number of attributes: (1) You can show that you are reasonably smart, (2) that you are a good technical lawyer, and (3) that you have a certain gravitas. At the beginning, I was accepting almost all proposed speaking engagements, even if sometimes they were really inconvenient in terms of timing or location. I also try to treat every conference paper as if it were the single most important job I have ever done. The objective is to show to your colleagues not just that you are good, but that you are consistently good. I remember, earlier on in my career, being disappointed by a conference presentation given by one of international arbitration's leading figures. I remember that this left me questioning not just whether that person was unprepared, but also whether he was, in fact, as good as his reputation. In sum, seek out and accept speaking engagements, but then ensure that you take the time to do a good job.

Write (good) articles with (reliable) information that will be useful to practitioners. The first example that comes to my mind is Anthony Sinclair's 2009 article *ICSID Arbitration: How Long Does it Take?* ((2009) 4(5) GAR) Anthony and his colleagues analysed 115 ICSID cases that went to a final award, breaking down their timetables and ascertaining how long, on average, each phase takes.

Becoming a member of young arbitration practitioners groups is also an easy step to start building a network. There are many such groups including the LCIA's YIAG, the ICC's YAF, ICDR Young and International, ASA Below40, CFA-40, Young ICCA, the Young IBA, Club Espa ol Del Arbitraje -40, DIS 40, YAP, Y-ADR, SCC's YAS, CPEANI40, NAI Jong Oranje etc. Once you are a member, attend as many events as you can. Try to be involved in the preparation of events (this way you can often get a speaking slot).

Teach

One of my old professors who successfully transitioned from practice to a full time career in arbitration once told me that teaching was a good way to build a profile. I did not quite realise at the time how insightful his advice was. I have no doubt that many of the students that take our arbitration classes today will be successful arbitration practitioners and in-house counsel tomorrow. Nowadays, it is not difficult to find some teaching opportunities as an "adjunct" or a "visiting lecturer" at a local University.

Build a different profile

Sometimes having a unique profile can be useful. You can be 'the' new insurance/re-insurance arbitration specialist in Paris. Or 'the' new common law practitioner based in Geneva that speaks Arabic.

Of course, building or changing a profile is a long term project but the least you can do is think actively (and regularly reassess) what your profile is and what it should be.

But, no matter what profile you craft for yourself, there are some attributes that any arbitrator need to demonstrate: (1) Absolute integrity, (2) total respect for the confidentiality of the proceedings, and (3) an understanding that being an arbitrator means being at the service of the users of the system, and not the opposite.