President's Message

The role of experts in the adversarial process and the arbitrator's capacity to absorb specialised knowledge

Arbitrators, like managers, politicians and many others, make decisions. For these decisions they need specialised knowledge in many different fields. They need not be experts in these fields but they must be able to identify what type of specialised information is needed, where to obtain it and, once they have obtained it, they must determine what to do with it when making their decision.

This process is not very different from what we do in our everyday life: we have developed to varying degrees the capacity of obtaining specialised knowledge from others, such as doctors, investment consultants, personal trainers, travel advisors and many others. This capacity of seeking specialised knowledge and integrating it into our decision-making process is essential to our survival and efficient operation in a complex modern world – and probably has been so for a long time.[1]

The process is complex and difficult. To some extent it relies on an element of trust in the specialised knowledge providers – let us call them "experts". Sometimes efforts are made to reinforce this trust by guidance and regulation. Governments have adopted Guidelines on Scientific Analysis in Policy Making, scientists have adopted Principles for the Treatment of Independent Scientific Advice[2] and politicians gain comfort when they are assured that these principles are applied; but in the end it is the politicians, and not the experts, who are responsible for their decisions, just as we, as arbitrators and in everyday life, are responsible for ours.

In the field of dispute resolution the process is rendered more complicated by the adversarial nature of the proceedings. Each side relies on a specialised knowledge which supports its case, and is entitled to do so. Courts have tried to resolve the problem by removing the specialised knowledge from the adversarial process: in some parts of the world, where specialised knowledge is presented by experts engaged by the parties, courts try to "neutralise" these experts by shielding them from partisan influence

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1 I owe interesting insights, including the concepts of Zugangswissen, Verfügungs-und Orientierungswissen, to Frank Rexroth, Wissen massgeschneidert, Experten und Expertenkulturen im Europa der Vormoderne, 2012 and his article in Merkur (2012, Heft 9/10).

2 Adopted by a Group of Scientists in the UK, see: www.senseaboutscience.org; for Germany: Leitlinien für Politikberatung, Berlin-Brandenburgische Akademie der Wissenschaften; for Switzerland: Wissenschaftliche Politikberatung, Empfehlungen der Akademien der Wissenschaften der Schweiz an Forscherinnen und Forscher.

and decreeing that they have a duty to the court which is higher than that to the parties who have engaged them. In other parts of the world the court appoints its own experts, hoping that their advice will be neutral and truthful.

Such approaches have been tried in or suggested for arbitration, too; either by importing into arbitration the corresponding rules or practices from the courts or by adopting some mixed approach. With the greatest respect for our distinguished colleagues who apply or advocate such approaches, excluding specialised knowledge from the adversarial process does not seem to be the most suitable solution. A different approach would seem justified both in the interest of an adversarial procedure and in view of the special nature of arbitration.

First, adversarial proceedings seek to ensure that parties may present different views on the facts and on the law and on their relevance for the resolution of the dispute at hand. It is difficult to understand why knowledge in fields other than the law should be excluded from this process. Experts in their fields of knowledge differ in their views, just as legal scholars do. Equally important are differences in the interrelationship between the facts of a case and the rules of science and technology applicable to them. A case argued in arbitration very often is a complex combination of the factual assumptions, the rules of science and technology and the law. It is the task of counsel to integrate these different components into a whole which forms her party's case theory. Extracting the expert opinions from this integrated case with the objective of "neutralising" them would mean the removal of one of its critical components and would constitute an interference with a party's right to present its case no less serious than "neutralising" its legal argument.

Secondly, the "neutralisation" of specialised knowledge also disregards one of the essential features of arbitration: contrary to judges who have to deal with cases as they come, arbitrators are chosen for a specific dispute. This does not mean that they must know all areas of specialised knowledge which may be required for the resolution of the dispute. However, they can be expected to be able to integrate these areas into the process, just as they must be able to examine the evidence that is brought before them and reach the conclusions necessary for ascertaining the facts decisive for the case to be decided; and as they must do when determining the relevant rules of law and applying them to these facts.

In international arbitration, the law applicable to the case often is not that in which the arbitrators have been trained. Experience in comparative law therefore is often one which international arbitrators must have so as to be able to integrate specialised knowledge of other legal systems into their decision making process. Similarly, and often more demanding, is the

integration of other areas of specialised knowledge, in the fields of science and technology, economics, accountancy and many others, into coherent arbitral decisions.

Such integration requires on the side of the expert a treatment of her specialised knowledge in a form which is responsive to the issues before the arbitrators; and counsel play an important role in assisting the expert in assuring such responsiveness. On the side of the arbitrator this requires the capacity to deal with specialised knowledge (and often a great variety of such knowledge sometimes of a high complexity) by identifying the issues for which it is relevant, determining those among the possibly conflicting answers from the experts which respond to these issues and integrating them together with findings on the facts and the law into a coherent decision – just as counsel had to integrate these different components into a whole which forms her party's case theory.

This work at the interface between arbitrators and experts is of critical importance for a proper understanding of the disputes which are brought to international arbitration. Mastering this interface is essential for ensuring that arbitration awards are responsive to the cases brought before arbitral tribunals and to the expectations of arbitration users. It requires attention to the process – collective interrogation of the experts at the hearing (also referred to as "witness conferencing" or "hot tubbing") is an important step in this direction; and it requires more attention given to the arbitrators' capacity to integrate specialised knowledge, a qualification which seems all too often forgotten, including by the arbitrators themselves.

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SAVE THE DATES

ASA Below 40 Spring Conference
31 May 2013 – Grand Hotel Kempinski, Geneva

ASA Conference & General Meeting
4 October 2013 – *Confidentiality in Arbitration*

For more information see www.arbitration-ch.org