President's Message

Dangerous "Da-Da-Da"
(Ich liebe mich, Du liebst mich nicht)[1]

This President's Message is best understood if the reader first views a video using the following link: https://www.youtube.com/watch?v=_JmA2ClUvUY or by looking up "twin toddlers babbling" on YouTube. For the reader in a hurry, a short description of the video is called for. It shows two diaper-clad young gentlemen, more precisely twin toddlers, engaged in lively conversation. The broad smiles, the intermittent chuckling and the highly animated body language suggest that they are enjoying themselves immensely. Regrettably, the viewer cannot share their insights, for the twins are speaking in a language that only they can comprehend. Their dialogue is along the following lines, approximately:

Twin A: Da-Da-Da-Da-Da-DA?

Twin B: Da-Da-Da-DA!

Twin A: Da-Da-Da-Da-DA?

(At this juncture, Twin B giggles and gesticulates.)

Twin A (more emphatically and imitating his sibling's foot-lifting and windmill-like wrist movements): Da-Da-DA?

Twin B (concurring heartily): Da-Da-Da-Da-DA!

(This continues for several minutes, ending somewhat inconclusively.)

The reader of this Bulletin may understandably wonder what this could possibly have to do with arbitration. The answer is: "If the arbitration world does not take care, *a lot*".

The experts in their ivory towers

We arbitration practitioners have a passion for intricate debate on all sorts of highly sophisticated and technical arbitration topics. Arbitration conferences and events, round-tables and panel sessions provide us with countless opportunities to indulge in our passion – more often than not to good effect since they allow us to stay abreast of recent developments, techniques and trends, and to engage in a healthy exchange of views.

[1] The title of this President's Message is once again rooted in popular culture. It is derived from one of the sillier pop music hits of the early 1980s, by the German band "Trio". The subtitle is slightly adapted from the original for the purpose of this article, and translates into "I love myself, you don't love me". Less assiduous aficionados than the author of inane 1980s music are free to look up the original on the Internet.

Condemning such gatherings and the intellectual pollination that they foster is the last thing that any self-respecting ASA President would imagine, not least because such conferences count among ASA's core activities.

However, and this brings us to the first point being made, for love of high-calibre legal science, we must be careful not to lose sight of those people that arbitration is designed to serve in the first place, namely the parties.

To take a few examples, what benefit do users actually derive from a debate on whether witness statements should be abolished altogether? Are the parties truly interested in across-the-board comparisons between nationalities or legal backgrounds of arbitrators, concluding with generalisations on the obvious superiority of this or that national group (made, predictably, by members of that particularly commendable lot)? All of this is reminiscent of a famous passage in Umberto Eco's *The Name of the Rose*, in which representatives of various church orders debate acrimoniously about a crucial question: Did Jesus actually own the clothes he wore? It might even be amusing, if only parties were not regularly complaining that the term "arbitration users" now means "arbitrators and counsel" more frequently than "parties" and that arbitration has lost its way.[2]

Of course, we arbitration practitioners are tempted to look down our noses at the (for us) pedestrian and (for us) uninformed concerns of users. To take an example, there is a persistent complaint among users that arbitrators tend to "split the baby" rather than make tough decisions. Some commentators (who need not be named here) have even ascribed this alleged tendency to a desire of professional arbitrators to secure repeat appointments. In fact, the supposed tendency of arbitrators to "split the baby" is a myth, as demonstrated repeatedly and convincingly by research over (at least) the past 15 years; in fact *all* empirical studies show that reality is the exact opposite of the myth.[3] As for the logic of the thurifers of this myth, namely that arbitrators allegedly split the baby in hope of being appointed more often, it escapes the author: how on earth could anyone in his or her right mind expect to get repeat appointments by doing something that users *complain* of? In short, on this topic the users and many commentators have it all wrong, on all counts.

But that is not the point. The real question is: Why is this myth so pervasive despite all evidence to the contrary and despite the flawed logic of those who propagate it?

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[2] This passage of the *The Name of the Rose* would be comical if, at the same time, a murderous monk were not on the loose. In the film based on the novel, while the grandees debate, the increasingly restive local peasantry is reaching ominously for the pitchforks.

[3] See the excellent recent study by Carter Greenbaum, *Putting the Baby to Rest; Dispelling a Common Arbitration Myth*, 26 American Review of International Arbitration [2015] 101-130.

Similarly, we arbitration specialists can be remarkably tone-deaf to user complaints. We always hear the same thing, we carp: we're fed up with being told that arbitration has become over-lawyered, that it apes judicial processes, that as a result it has become too expensive, too time consuming, too complicated... too just about anything anyone can think of. It's true that we often hear the same things. However, the repetitiousness of the complaints should prompt self-interrogation and innovation, not self-justification – let alone resentment for the bearers of bad tidings.[4]

The lesson that we arbitration practitioners should draw from all of this is that we are not sufficiently engaging with users. We must do much more to include more users in our debates – and by "users" the author means representatives of the business, state or sports communities that may appear as parties in international commercial, investor-state or sports arbitration. Otherwise, the two groups will increasingly get the impression that they are living in parallel worlds. And this brings the author back to the title of this President's Message and the dialogue between our distinguished toddler twins: if we do not take care to involve users more frequently, we arbitration practitioners will be seen as engaging in a dialogue that only we appear to understand and enjoy, just like the babbling toddler twins. That is a first danger of Da-Da-Da.

The congregation of the faithful

There is another kind of arbitration gathering: the congregation of the faithful who, in the face of criticism levelled at arbitration by the miscreants (read: non-members of the arbitration world) exchange lofty pronouncements on the benefits of arbitration for the world at large, and bemoan and righteously condemn the ignorance and mendacity of those who have not yet been touched by grace.

This type of *grande-messe de l'arbitrage* is a pernicious animal. The generalities and platitudes uttered on these occasions cannot by any standard be viewed as a contribution towards critical thinking, innovation or even, and more simply, continuous legal training. Worse, they are nothing more than arbitration practitioners convincing other arbitration practitioners that invention of arbitration is the most wonderful thing to have befallen the world since the advent of sliced bread.

[4] That said, the type of hysteria one often observes at arbitration conferences is no better. Endless war stories from despairing practitioners about cases gone hopelessly wrong can be entertaining (perhaps), but they do little to help and only make the challenges that arbitration is facing more daunting than they actually are.

Now, don't get me wrong: of course we should defend arbitration, because it remains one of the best methods, and often *the* best method, of resolving international disputes, be they commercial, sports-related, investment-related or between sovereign states. Of course we should discuss ways of improving the process, taking care not to sink into orgies of self-flagellation. However, to do this, we cannot remain among ourselves, however excellent and distinguished the company may be.

In this vein, the fact that some one hundred judges, Attorneys-General and Solicitors General harking from a large spectrum of nations – in particular African nations – attended the 2016 ICCA Congress in Mauritius was a particularly positive feature of that important event.

More importantly still, we must reach out and include those who criticise arbitration – whether rightly or wrongly. At the ASA Winter Conference of January 2016 on commercial arbitration involving states and state entities, Howard Mann was one of the panellists. He spoke his mind. He may have ruffled a few feathers. He said many things with which the author did not agree and some with which the author cannot agree. But whether Mr Mann ruffled feathers or said things with which the author agreed or disagreed is irrelevant. What matters is that he was there in the first place, that he was able to express his views and that there was an exchange of ideas.

This is all too rare. Let's be frank: how many conferences organised by arbitration specialists have readers attended at which arbitration sceptics or even anti-arbitration speakers were on a panel? And when this happened and a rogue speaker voiced arbitration-sceptical (or even, perish the thought, downright arbitration-unfriendly) opinions, how many times were these opinions greeted by anything else than shocked gasps?

We cannot afford to isolate ourselves from those who do not share our *Weltanschauung*. We must reach out and include them at our events, and strive to be included in theirs. We are not doing this, at least not enough. For arbitration, this is folly, for while we engage in blissful self-admiration at our own events, the arbitration sceptics (or worse) are setting the agenda in parliaments, within the European Commission and, lest we take care, in the courts. That is the second danger of Da-Da-Da.

We ignore these dangers at our peril. The toddler twins have an excuse. We don't.

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