President's Message

Nobody Expects the Spanish Inquisition!
(Of Soft Cushions and Comfy Chairs)

The not-so-abstruse reference in the title of this President's Message should need no explanation. What requires explanation – no, not explanation: justification, and by the bucketful – is: why has what may be Monty Python's most famous sketch not been elevated to date to the status of World Cultural Heritage? The author was thus shocked to learn that some arbitration practitioners of a more tender age were not acquainted with Cardinal Biggles, Cardinal Fang and the unnamed Chief Inquisitor. (One of the author's more youthful colleagues ventured to suggest that our relative age differences would be an excuse; the author begs to differ.) With a heavy heart, the author must therefore outline some of the main features of this comic gem.

Imagine any given character in an otherwise dull 20th century scene feeling unjustly attacked by unnecessarily harsh words uttered by another character. Hurt, baffled and exasperated, the "victim" exclaims that he or she "*wasn't expecting a kind of Spanish Inquisition*". This is the cue for three red-clad cardinals[1] to burst through the door, barking, "*Nobody expects the Spanish Inquisition*". From then onwards, the scene spirals into a pinnacle of the absurd as the three demonic inquisitors proceed to "*extricate the truth from this unbeliever on pain of torture*" (with horrified gasps in the background). And the dreaded instruments with which the "*infidels*" are put to the question are soft cushions ("*Cardinal Biggles, poke her with the soft cushion*", shrieks the Chief Inquisitor) and comfy chairs (plush living-room sofa-chairs of the kind that went out of fashion at the end of the 1970s).

As may frequently occur with the President's Messages penned by *votre serviteur*, the reader could justifiably feel puzzled and query: what on earth does any of this conceivably have to with arbitration? The answer is that our three inquisitors serve as the perfect prop for (yet another) one of the author's pet rants.

This particular rant has to do with the way some arbitrators – many of them inhabiting the Olympus of our trade – view the role of experts; more specifically, quantum experts. To be even more precise, the issue here is the role of the respondent's quantum expert.

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[1] One of them (Cardinal Biggles), strangely, wears a First World War pilot's leather helmet and googles.

The ideal respondent's quantum expert must of course display a number of virtues with which there can be no quarrel. He or she must be measured in tone and respectful in his or her handling of the claimant's expert evidence. He or she must be to-the-point and eschew fogs and mirrors; in other words, refrain from obfuscation beyond the usual norm. He or she should take care not to dispute each and every invoice, bank statement, debit note or cash-flow projection, even the obviously justified or plausible, and to focus on genuine areas of disagreement. So far, so good.

Where things take what the author views as a seriously wrong turn is when arbitrators ratchet their expectations a click further and demand that the respondent's quantum expert not only explain what is wrong with the figures put forward by the claimant's expert, but also, *provide to the arbitral tribunal what he or she believes to be the correct figure of damages*. In other words, it is, according to some arbitrators, not sufficient to poke holes in the claimant's case: a diligent, responsible and praiseworthy respondent's quantum expert will actually make the claimant's case.

With all due respect, and although the approach may have considerable appeal for arbitrators, let us consider what this means.

To be fair, there are cases where a respondent, its counsel and its quantum expert would be taking a risk bordering on the irresponsible by refusing to agree on any figures at all or to formulate alternative figures that correspond to what the expert believes to be the "right" ones. To take one example, where a construction contract is terminated before completion of the works and the contractor is entitled to payment for works carried out and for materials and equipment on site, the quantum of the contractor's compensation can, in practice, never be zero. Moreover, given that the computation of the payment owed to the contractor is beyond the abilities of most arbitrators, a party that argues that the claimant has not proven its case at all and that, as a result, the figure should be zero is in effect extending an invitation to the arbitral tribunal simply to accept the claimant's figures, except where clearly wrong or unsubstantiated (and the arbitral tribunal is more likely than not to accept that graciously extended invitation). Similarly, where a party is claiming for reimbursement of costs incurred (for naught) with a view to performing the contract, or more generally, for expenses actually incurred, the correct figure can hardly be zero; to argue the opposite is to court if not disaster, then at least disappointment, since most claimants in international arbitration are capable of establishing expenses actually incurred.

But there are many other forms of monetary claims that are not as straightforward. Take, for example: unrecovered home office overheads in case of delay in construction projects; the loss of an opportunity to realise a

profit on a prematurely terminated contract; the loss of value of an investment; the loss of profit on other projects foregone as a result of having entered into the contract under dispute; reduction of the purchase of company shares as a result of misrepresentation of material circumstances relating to the value of those shares during the contract negotiations; etc. These forms of damages are a different breed from claims for reimbursement of expenses. Whilst one can say that an expense either was incurred or was not (or, more precisely, is proven on an item-by-item basis or is not), these other types of claims invariably involve a degree of speculation. And to award them is, to a certain extent, a leap of faith.

The point that the author is making here is: establishing the quantum of a claim for lost profits claims, or the type of claims of which examples were given above, involves a significant degree of persuasion that is absent from hard-and-fast claims for reimbursement of actual expenses.[2] Without going into any details, the work of the claimant and its quantum expert is thus to *convince* the arbitral tribunal that: (i) the financial harm occurred; and (ii) the quantum claimed corresponds to that harm. The burden of proving both of these issues rests entirely with the claimant. And if the claimant does not convince the arbitral tribunal, the consequence is that the claim must fail as made. The respondent's expert can provide the arbitral tribunal with reasons why the claimant's case is not convincing; the respondent and its counsel may also decide to concede certain figures, for example, because it would be unconvincing not to make the concession. But it is never the role of the respondent's quantum expert to make the claimant's case.

The author sees this as a matter of basic equal treatment: why train the searchlights only on the respondent's expert? How many of us have seen arbitrators demand that the claimant's quantum expert give the arbitral tribunal all the reasons why the figure to be awarded should be zero? Why should only one side's expert be arm-twisted into making what is, in effect, an admission to the detriment of the party having appointed him or her – an admission that will almost invariably find its way into the final award in the form of a "minimum stipulated amount of damages"[3] – even where that expert's professional opinion is that the claimant has simply not proven its case and has no alternative figure to suggest? Cannot arbitrators make up their own mind about whether they are convinced? And if they are not entirely convinced, can they not decide on their own what they believe the

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2 For the latter, the main issue that leaves scope for argument is the causal connection between the expense and the ground for liability.

3 Much to his shame, the author must confess that in the past he has not always been an entirely innocent arbitrator in this respect.

right figure should be if it is neither the amount claimed nor zero? And if they do not see the evidence they need to award any damages at all, why would the consequence be anything else than the dismissal of the claim? After all, specialisation and experience are the two main selling points for arbitrators: that should include an ability to weigh the evidence with a critical eye and to draw appropriate conclusions therefrom.

Enter the cardinals.

Let us begin with the "soft cushions" (this being the milder form of torture). When are the soft cushions pulled out? First, perhaps, at conferences or in publications on "best practices". This is a subtle form of pressure, a low-cost and low-risk way of instilling in the minds of the arbitration community that arbitrators should have the right to sub-contract part of their job to the expert retained by one of the parties. But, in practice, the Chief Inquisitor usually commands "*Cardinal Biggles, fetch the soft cushions!*" either at the first case management conference, or, if it is held, at a subsequent case management conference at which expert evidence is discussed before it is actually put on record. On this occasion, one or several members of the arbitral tribunal (or all of them) drop(s) a not-so-subtle hint about what is expected of the respondent's quantum experts. The hint is then reinforced by way of altogether unsubtle stares (glares?) in the direction of respondent's counsel – this is the "*Cardinal Biggles, poke him / her with the soft cushions!*" part.

In the Monty Python sketch, the "victim" of the soft cushions ordeal is a sweet-looking little old lady. Despite Biggles' best efforts to "*extricate the truth from* [her]", she merely smiles. Hence the Chief Inquisitor's grudging admiration: "*Ah! She must be made of stronger stuff!*" And – to the horror of all present, except the little old lady – the Chief Cardinal (in arbitration: the arbitral tribunal) issues the dread command: "*Fetch the comfy chair!*"

The respondent's quantum expert can be subjected to the "comfy chair" in a variety of ways. Sometimes, highly unsubtle arm-twisting may take place when the arbitral tribunal (very commendably) organises a procedural hearing to manage the expert evidence on record, in particular when providing "guidance" for meetings of experts before a hearing. At this stage of the proceedings, the discussion is no longer of an abstract nature on the general expectations that the arbitral tribunal may harbour vis-à-vis the experts (and the respondent's quantum expert in particular). On the contrary, the talk can be about very specific claims, with sometimes very clear directions given to the experts (and, again, to the respondent's quantum expert in particular) about what they should do and not do in relation to these individual claims. Another typical "comfy chair" is hauled out at the hearing, when the arbitral tribunal puts its own questions to the respondent's quantum

expert (and even more so when there is expert witness conferencing). At this juncture, not infrequently, the respondent's quantum expert is asked outright to provide an alternative figure. It takes an experienced, intelligent, tough and brave expert indeed to withstand these pressures. It also takes courageous counsel to intervene, for example by pointing out to the arbitrators that the claimant's quantum expert was never pushed to make admissions that were damaging to the claimant's case.

Of course, it often makes sense not to resist: arbitrators send messages (some subtle, some less) in this way and well-timed and thought-through concessions are a good way to reduce exposure and to sometimes even score points. However, it can also happen that, despite the arbitral tribunal's desire – expressed more or less delicately – that the respondent's quantum expert simplify the drafting of the award, the respondent can and should stick to its guns. In the Monty Python sketch, the little old lady actually appears delighted when cast into the comfy chair. In the face of repeated calls to "*confess the heinous sin of heresy*", she remains calm and composed and, in the end, comes to no harm. The author has seen many cases where the respondent's fate was no worse – and when sitting on the arbitral tribunal he has admired the courage it takes to achieve that result.

The author realises that this particular rant may be more irritating than others. After all, arbitration is, among many other things, a search for efficiency. Experts (of whichever discipline) that do not concede a millimetre, even in the face of the obvious, are the very opposite of efficient. However, the search for efficiency should never take precedence over minimum guarantees of fairness. On that note, the author eagerly returns to his collection of Monty Python sketches.

ELLIOTT GEISINGER

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