

President's Message

Let's Get Rid of Arbitration!

Four years ago, a little-noticed President's Message suggested a revolutionary idea: solve all (or, if not all, many) problems in international arbitration by abolishing the Presiding Arbitrator.¹ Regrettably, this innovative (if somewhat unconventional) brainchild of two august practitioners did not elicit the enthusiasm it deserved.

Recently, the two heroes of the Art-Buchwaldian dialogue that set out the obvious advantages of doing away with the Presiding Arbitrator – Sir Reginald Muddle, QC and Maître Paul-Philibert Confus, Avocat à la Cour – dined together at their favourite restaurant and, having done justice to more than one bottle of claret, combined their considerable intellectual firepower to produce an even more formidable proposal: why not get rid not only of the Presiding Arbitrator, but also of Arbitrators, of Tribunal Secretaries, of Institutions, of Experts – the whole lot! Why not, very simply, rid the world of arbitration? Their dialogue was scintillating:

Confus: *Ah my friend! What kind of a world are we living in?*

Muddle: *What do you mean? Why this maudlin snivelling to spoil a luminous evening?*

Confus: *Well you know, sometimes I wish I could be British like you and leave this lamentable European Union!*

Muddle (grumbling): *Should have thought of that before setting up the silly thing...*

Confus: *Mon ami, that's not very kind...*

Muddle: *Well, get to the point, man! I won't wait much longer for my Stilton and port!*

Confus: *Well, once you've left the EU, you will no longer have to take notice of the ECJ, that's why!*

Muddle: *What makes you think we British took any notice in the past?*

Confus: *Stop teasing! You know what I mean.*

¹ "Let's Get Rid of the Presiding Arbitrator", 32 ASA Bulletin 2014 (June).

- Muddle: *I know what you mean, but what is troubling you?*
- Confus: *They are taking away arbitration in intra-EU BITs! C'est un scandale! They are taking away my very gagne-pain! And there is nothing we can do about it!*
- Muddle: *Well, frankly, you know, I think the chaps in Luxembourg have got it spot-on! Really... what's all the fuss? I say power to the people! Well – power to well-educated people with decent table manners, and who don't wear brown shoes after 5pm – I digress. Yes, power to the people and to the agents of democratic legitimacy!*
- Confus: *Such as the House of Lords, I presume?*
- Muddle: *Spare the sarcasms. No... really: what business do these well-paid specialists of international investment law have in telling states what they may and may not do? I say, keep it in the courts! You'll get the best justice there!*
- Confus (with a horrified gasp): *How can you say that? C'est monstrueux! I'm speechless...*
- Muddle: *That would be a first for a Frenchman!*
- Confus: *Please, my friend, your manners, s'il vous plaît!*
- Muddle: *Sorry, old boy... got a bit carried away there. But think about it!*
- Confus: *Just wait a minute! You cannot be serious! Investors seeking protection in the very courts of the state that they are suing? Come on! OK, OK, I know: there is talk of alternatives, but so far it's just talk.*
- Muddle: *So what? What's wrong with courts?*
- Confus: *Well, fine for the UK. Actually, I love those horsehair wigs. But there are other places... like illiberal democracies. Would you really want to go there? And if not there, where? Nothing but uncertainty!*
- Muddle: *My dear boy! How can you be against uncertainty? After all, without uncertainty there would be no legal profession! So this will make us even richer! And you know what? Do you know the best thing? Make no mistake – all those investors will be re-locating to other BIT countries, and our friends the solicitors will also be getting big business out of this! And then, there will be*

further room for further disputes about whether investors can do this, and we get to argue about it forever! Splendid, no?

Confus: *Well, I actually hadn't thought of that. But what of commercial arbitration? What of sports arbitration?*

Muddle: *Well, for commercial matters, this arbitration nonsense is suffocating our courts! Just think: cheeky foreigners choosing English law – yes! ENGLISH LAW! – in their contracts and then agreeing to arbitrate in cuckoo-clock-land, or wherever. And even when they arbitrate in London, it's still not in the courts! Dreadful, simply dreadful! As for sports, just imagine: four independent minds actually disagreeing with popular wisdom! Disgusting! I say we do away with the whole thing. Yes, mark my words; we're on to something here! No more arbitration-this, no more arbitration-that. No more arbitration-here, no more arbitration-there. Just take it all to the courts and, you'll see, it will go down a treat!*

Confus: *So we have only English law in all of our commercial contracts and we all go only to the courts in London?*

Muddle: *That hasn't worked too badly for us English, has it? But if you must, fine: choose French law and have French judges, chaps who really know what they're doing, apply French law. Or Swiss law and Swiss courts, or whatever. And published decisions! So at least we'll know the law.*

Confus: *But what of commercial secrets? What about confidentiality?*

Muddle: *Secrets? Confidentiality? In our connected world? You must be joking...*

Confus: *Point taken. But then, sports! You can't have decisions made by judges all over the world at the same time! You can't have a legal cacophony! And the decisions have to come quickly. On the spot! By people who know sports, by real athletes!*

Muddle: *I could name, off the top of my head, at least two dozen perfectly able judges who would be delighted to receive invitations to the Olympic Games and to mete out swift justice there. And too bad if they're not pole-vaulters or hammer-throwers.*

Confus: *My dear friend, once again, my hat is off to you. (Lifting his glass) A toast to your typical British perspicacy and pragmatism.*

Muddle and Confus, together (to the sound of wineglasses clinking):
Yes... LET'S GET RID OF ARBITRATION!

(Incidentally, Muddle, QC and Confus, Avocat à la Cour, are front-line contenders to fill the next vacancies at the ECJ.)²

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14 September 2018

Bern

Blockchain, Smart Contracts, and Arbitration

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² This President's Message brings – it is hoped – levity to an otherwise very serious subject. ASA will soon provide its views in a more serious and sober style.