President's Message

It's the People, Stupid…

Recently, I was one of the panellists at a conference on experts in international arbitration. One of the co-panellists began her presentation – on the challenges faced by counsel when selecting an expert witness – by stating that the choice of a party-appointed expert can be the single most important decision that one can make in arbitral proceedings. I must admit that her introductory remark piqued my curiosity and the eloquence with which she then proceeded to make her case[1] produced a doubly felicitous result: not only was the audience (yours truly included) duly impressed; unbeknownst to my co-panellist, she had given me the topic of this President's Message.

My colleague explained *inter alia* that a truly efficient party-appointed expert needed to master a set of skills rarely found in a sole individual. Apart from the rather obvious *a minima* requirement of actually possessing the requisite expertise in the relevant discipline, the expert must have an independent and critical mind, and also an open mind. She or he must be a good listener. She or he must be a hard worker and be willing to delve into the intricacies of each individual case. She or he must be aware of cultural sensitivities and be capable of adapting her or his demeanour accordingly. She or he must be a good communicator – in particular she or he must be able to boil complicated matters down to their essentials. She or he must be brave, sometimes tough, when faced with pressure (be it the pressure that the client may sometimes exert when the expert does not uncritically espouse the client's case or the pressure that comes with defending an honestly held professional opinion under cross-examination). She or he must have a necessary degree of modesty, even humility, and be ready to make concessions when needed.

How did this lead to a President's Message?

The answer is that there are other instances where, in arbitration, choosing someone for a given role is "the single most important decision" one must make.

Let us begin with *counsel*: how often does one hear that the choice of counsel is "the single most important decision" one can make going into arbitration? Of course, counsel must be an experienced and knowledgeable

[1] In the spirit of transparency prevailing in these times, perhaps I should disclose that the speaker in question is an ASA Board member, which was in and by itself sufficient in terms of *captatio benevolentiae*.

practitioner – that is the starting point. What really matters are other skills. For example, counsel must be willing to fight hard for the client. For this, counsel needs to be willing to spend the necessary time to understand the client's case from all angles, in all of its individual particularities, and not treat each case like the previous one. Counsel needs to possess exceptional communication skills, in her or his dealings with the client, with the client's experts, with opposing counsel and, obviously, with the arbitral tribunal. Counsel must be able to make the highly complicated actually appear very simple (sound familiar?). Counsel must be aware of cultural sensitivities (note the copy-paste from the paragraph on experts). Counsel must be able to tell the client things that the client does not necessarily wish to hear (again, this rings a bell, doesn't it?). And counsel needs to possess a certain degree of modesty, to be able to recognise unfortunate strategic choices and to re-assess and, if necessary, adapt case strategy where needed (where have I heard that before?).

Turning to the choice of the *party-appointed arbitrator*, this is also a frequently-cited "single most important decision" that can be made. Again, there are the rock-bottom requirements of experience and legal knowledge. To those, one adds – the reader will have guessed – independence of mind; awareness of cultural sensitivities; strong communication skills (within the arbitral tribunal and in dealings with all other participants in the process); a willingness and an ability to listen carefully; a certain degree of courage to resist inappropriate tactics to which some parties resort; an ability to break often complicated information down into manageable and intellectually digestible units; a willingness and an ability to understand the individual needs of each case; and last but far from least, when the final is being drafted, a talent for ensuring that the losing party will understand not only why it lost, but also see that its position was duly considered and understood (especially if the final award is adverse to the party having appointed that arbitrator, in which case an awareness of cultural sensitivities becomes crucial). Again, this sounds vaguely familiar, does it not?

Finally, one hears no less frequently that the selection of the *chairperson* or *sole arbitrator* is "the single most important decision" a party and its counsel will need to make in arbitration. The reasons are… well, why bore the reader with repetition when the reader has already got the message?

So, how can there be multiple "single most important decisions"? The oxymoron is obvious, and the natural conclusion is that, if any one of these positions can be defended, they cannot all be correct. That however, misses the point. What all of these choices have in common is that they are based on an assessment of *human* qualities – not just any human qualities, but the difficult-to-measure-objectively, "touchy-feely" variety. And this leads yours

truly to the *École des fans*-like[2] conclusion that, paradoxically, *all* of these different choices are indeed "the single most important decision" one can make in arbitration.

How, the reader may legitimately ask, is that possible?

It is possible because arbitration, like many other walks of life, is an eminently *human* process. However self-serving this may sound (and in a few years it may even sound troglodytic, but who cares?), the process cannot function properly without the "touchy-feely" human skills listed above. To make the point, let us proceed by a set of *démonstrations par l'absurde*. How, for example, can a party-appointed expert be efficient if he or she is impermeable to the cultural sensitivities of his or her client and/or of the other party and/or the arbitral tribunal? How, for example, can even the most brilliant legal mind defend a case forcefully if he or she lacks the communication skills needed to "bond" with the arbitral tribunal and make the arbitrators truly understand not only the facts and the law, but the equities of his or her client's case? How, for example, can arbitrators do justice to the advantages of arbitration if they lack the basic degree of modesty required to consider each case taking into account its own particularities, instead of approaching it in the "usual" or "traditional" or "time-tried" way?[3] In practice, all of us have experienced what we will always remember (not fondly at all) as our "case from hell." Looking back, was the hellishness not invariably brought about by one or several of the participants lacking in some key *human* skills, even if the delinquent counsel, arbitrator or expert possessed, from a purely technical standpoint, impeccable credentials?

This brings me to my conclusion, which circles back to the title of this President's Message: arbitration is not just about cold knowledge, or about technical mastery of facts and law and processes. It's the people, stupid.

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2 For the reader not raised in front of French (or French-language) television, l'*École des fans* is a hugely popular television programme created in 1973 and still aired today, to which a celebrity singer (of French-language *variété* music) in invited and during which young schoolchildren each sing a song by that celebrity. All of the contestants give each singer a grade. At the end, with a degree of regularity that would make any saint envious, a miracle inevitably occurs: the aggregate grade of *all* contestants is *identical* and they therefore *all* win the prize.

3 The very idea that there could be a "usual" or "traditional" or (this one really makes me groan) "time-tried" way of handling any individual case is abhorrent to the writer of these lines; to use any of these truly atrocious expressions is the most time-efficient method of raising his hackles.

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