President's Message

Arbitration Profiling

Recently, during a moment of summertime indolence, the author indulged in an online quiz test to determine whether he was a likely Democrat or Republican voter[1] (not that he needed the test to know the answer, which he will keep to himself). Perhaps predictably, and notwithstanding the fact that the quiz was on the website of a highly respected newspaper, the end result was wildly wrong as far as the author was concerned. Why "perhaps predictably"? Most likely because the questions related to gender, religion (including a question whether religion was an important part of one's life), skin colour, educational level and sexual orientation. *None* of the questions related to policy issues, such as, to take a few obvious sorters, whether the reader believed that governments should take climate change seriously or whether some form of gun control was desirable.

In other words, this online test was an exercise in profiling, in which one's skin colour, one's religion and the place of religion in one's life, one's college degree (or lack thereof) and one's sexual orientation combine to determine one's likely political affiliation. Of course, taken on a large scale, profiling does paint a picture that may not be entirely inaccurate – it is after all at the very heart of gerrymandering in today's politics. But it uses a very broad brush that may be highly unreliable in individual cases.[2]

The same is true of profiling in arbitration, be it the profiling of arbitrators or the profiling of counsel.

Let us start with arbitrators.

When selecting arbitrators, several factors are taken into account. For example, where candidates have expressed views publicly on substantive issues, this is a good indicator of their likely individual opinions if those same issues arise in any given individual case. Similarly, where a party or its counsel has had previous experience with a candidate, such experience is generally a reliable indication of that candidate's approach to procedural issues that may arise in a given individual case. The reader will have noted the repetition of the word "individual": the kind of factor described here relates to the candidate as an *individual*. These factors could thus be taken

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1 Readers who consult profiles on ASA's website already know that the author holds both US and Swiss citizenship.

2 Interestingly, the intermediate results of the online test, which appear as each question is answered, correctly identified the author's political tendencies – but the answers on gender and religion transformed a +43 in the "correct" camp into a +19 in the "wrong" camp.

as the equivalent of questions that would sought to determine the reader's agreement or disagreement with policy issues, had there been any in the online quiz referred to above, and are probably the most reliable and relevant for the choice of an arbitrator, whether co-arbitrator, chairperson or sole arbitrator.

However, there are other factors that are frequently taken into account, which consist in placing candidates in a given category and extrapolating, on the basis merely of their belonging to this category, their likely views on substantive issues or their likely approach to procedural matters. Although these factors may be (more or less) accurate predictors on a broad scale, they can (and often are, in the author's experience) highly unreliable in the individual case. The most obvious example of pre-determined categories in which arbitrator candidates are placed is, the reader will have guessed already, whether the candidate harks from a Common Law or a Civil Law jurisdiction.

This old chestnut is frequently used and misused when attempting to predict a candidate's likely views on and approach to contract interpretation. In this tired old cliché, a Common Lawyer will adhere strictly to the words of the contract and a Civil Lawyer is more likely to go beyond the black-letter terms of the agreement and seek to achieve fairness (or whatever). Thus, a party that is relying on a strict application of the contract terms is supposedly well-advised to nominate a Common Lawyer, while a party that might find itself arguing fairness as opposed to the blackletter meaning of the agreement would do well to nominate a Civil Lawyer.

This, with (moderate) respect, is utter poppycock. The author is still awaiting the deliberation in which a Common Lawyer arbitrator says something to the effect that "*the terms of the contract lead to a manifestly unfair (or unreasonable, or absurd) result, but if the parties had wanted something better, they should have drafted their contract better*". To the contrary, and regardless of the applicable law, the author's experience with Common Lawyers when it comes to interpreting contracts – including applying contract terms strictly – has never been fundamentally different, at least as far as the outcome is concerned, from those with Civil Lawyers. One good example comes to mind: when faced with clear contract terms in an agreement governed by English law, the Presiding Arbitrator – an English QC – said flatly that, although under English law the parties' conduct after the entering into of the contract should not be relevant, the arbitral tribunal simply could not ignore the fact that the parties were doing something *different* from the contract terms for 18 months. Likewise, where the contract terms are clear and where the agreement, although perhaps

tough on one party, is a clear business deal, the author still has to witness a Civil Lawyer saying that the tribunal should depart from the parties' agreement and rewrite the contract to say it should have meant in the tribunal's view. This is especially true where the contract terms were negotiated, spelled out and explained before the contract was made and the party relying on the contract terms at issue clearly intimated from the outset that it would insist on strict compliance.

Coming back to factors that relate to a candidate as an *individual*, publications and – better still – past experience are far superior predictors. For example, the author can name off the top of his head a host of Civil Lawyers who are hard-nosed and unsentimental enforcers of contract terms – based on direct experience, not generalities.

Another example of wrong-headed Common Law or Civil Law arbitrator profiling is a candidate's anticipated approach to document production. Again, let us begin with the cliché: A Common Lawyer, especially a US litigator, would be the right person to nominate for the party that has an interest in extensive document production, whereas the opposite interest would dictate the nomination of a Civil Lawyer.

And again, this might be true as a general statement but is often total nonsense in an individual case. Examples abound of Common Lawyers taking a very conservative approach to document production. For that matter, it could even be said that, the more a Common Lawyer is familiar with the boundaries of document production in court litigation, the more likely she or he will be have no qualms in rejecting document production requests that a Civil Lawyer might be more minded to grant on the basis of a "just in case" approach.

By contrast, and at the risk of repetition, a potential nominee's past performance in similar matters is a far better guide. And it is respectfully submitted that the best predictor of a candidate's approach to document production is the candidate's track record of *courage*. All too often, arbitrators grant extensive (excessive?) document production not because they truly believe that the requested documents are likely to shed light and serve usefully as evidence on relevant and determinative issues, but because they are loath to appear to pre-judge or, more simply, because they fear that they may alienate one or more party by being firm. This has nothing to do with their legal background. To put it bluntly: neither Common Lawyers nor Civil Lawyers have a monopoly on limp-wristedness.

Moving to counsel, the Common-Law versus Civil Law cliché also "teaches" us that only Common Lawyers having experience in Common Law courts know how to examine and cross-examine witnesses.

Again, and with (very little) respect, this is generalisation at its worst. While the author has seen brilliant cross-examination by Common Lawyers, he has also been subjected to tedious and wasteful bouts of replication, by Common Lawyers, of Common-Law court processes and reliance on procedural rules of evidence that have no place in international arbitration[3]; more generally he has also witnessed clueless and bungled examination and cross-examination by Common Lawyers (yes, even by professionals allegedly trained and specialised in the "art of advocacy"). Obviously, the same applies to Civil Lawyers. Thus, what matters is not the legal tradition of the advocate, since hacks are to be found everywhere. What matters most of all is the ability of an advocate to "read" the arbitral tribunal, to "feel" the witness or the expert, to know where to focus and what to skip, to know when to break all conventions and rules (yes, the dreaded and allegedly proscribed "open" question or even the question beginning with the "W" word – why? – can be lethal). As with limp-wristedness, there are no monopolies on talent.

To conclude, the author needs to make a belated disclosure, namely that he has always had a problem with determinist philosophy. His distrust of social, cultural and geographical determinism is especially pronounced; in the online quiz described at the beginning of this President's Message, a deterministic approach led to a woefully wrong result. The reader can thus imagine what the author thinks of "legal-background" determinism. So, when it comes to profiling arbitrators based on generalities, the author recommends a strong dose of Σκέψις – *skepsis* in the Latin alphabet.

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[3] "*I put it to you, sir / madam…*" is high on the author's personal list of groan-provokers.