

President's Message

A Taxonomy of Arbitrators and the New Species of *arbiter compositus*

When discussing arbitrators, we are used to considering certain qualifications and characteristics. We expect that arbitrators are independent and impartial and that they disclose circumstances that may give rise to doubts in this respect; we want to know their familiarity with the applicable law and with the industry to which the dispute relates, any technical qualifications which they may have and a variety of other attributes. In this process, we normally assume that there is a single species of arbitrators, even if individuals they hold different qualifications and attributes.

From this perspective we risk overlooking the more inherent differences in the person of the arbitrator, her educational and professional background and the manner in which she practices as an arbitrator. The assumption of the arbitrator as a single species may well be too simplistic. The work which Carl von Linné did in the 18th century with respect to animals, plants and minerals now might usefully be extended to arbitrators. In other words we may want to introduce in the study of arbitration a new branch: the taxonomy of arbitrators.

The study of arbitrators may reveal different categories; *arbiter* may have to be recognised as a *genus*, subdivided in a number of different *species*. A well-considered system, as that developed by the Swedish botanist, would require profound field studies, research in the Amazonian forests of the arbitration world, the discovery of the fauna on a Galapagos island of arbitration and similar research. In this message, merely a first sketchy outline can be presented and a message calling for greater openness to the diversity of the arbitral fauna.

It might be difficult to discover the origin of the species, which might be called *arbiter arbiter* or *arbiter sapiens*. But as far as I can see there are two historic species:

- The first one emerged from the merchant community, became respected for his¹ probity, judgment and authority to the point that other members of the community trusted his knowledge of the business and the fairness of his decisions, probably with little concern about the IBA Guidelines on Conflicts of Interest. Traces

¹ I am afraid that, although politically quite incorrect, at that time the species was purely male.

of this species can still be found in certain branches of the economy like in the commodity trade or maritime arbitration. We might call this species the *arbiter mercantilis*.

- The other early species probably was the legal scholar, familiar with practices of the trade. An incarnation of the practice of this species can be found in the *Palazzo dei giureconsulti* in Milan, right beside the old Milan Fair where, since the Middle Ages, the merchants, when they had a dispute, could cross the street to find advice and decision from a *giureconsulto*. This species, which we might call *arbiter scholasticus*, probably is extinct; but two new species emerged from it.
- One of these more modern species of arbitrators, descendants of the *arbiter scholasticus*, is the professor arbitrator. This species, I suggest to call it *arbiter academicus*, was particularly prominent in the early phase of the development of international arbitration during the last century. It survives today mainly in the field of investment arbitration, but has become less frequent in the field of commercial arbitration where thick undergrowth of fact heavy work might be a cause for its limited expansion.
- This species should not be confused with another species which developed more recently from different origins, that of the *arbiter neo-academicus*. It consists primarily of lawyers who, at a late stage of their career, are invited to lecture at some academic institution and thus are called professors.
- The other species of arbitrator which may be related to, if not a descendant of, the *arbiter scholasticus* is the lawyer specialised in the law of a certain trade or industry, and who serves this trade as adviser and for the settlement of disputes. Areas in which this species can be found include insurance and maritime law. Let us call them *arbiter scholasticus specialis*.
- A species related to the one just mentioned is that of the practicing lawyer who also sits as arbitrator. She² or he may have some preferred field of activity but normally does not restrict the arbitration practice to it. This species, which may be called *arbiter advocans*,³ from the perspective of counsel appearing before her, has the attractive feature that she has some understanding of the

² Women are more frequent in this species.

³ I have not found in my Latin dictionary an adjective related to *advocatus* and made up the new term *advocans*, inviting the reader to find a better one.

stress and suffering (not least from clients) to which counsel preparing and arguing a case are exposed.

- The *arbiter advocans* has the capacity of transformation and, in a later stage of her career, often sheds her advocacy practice and restricts her activity to that of more or less occasional arbitrator practice. The characteristics of this species are probably not clearly defined; one may perhaps have to distinguish several subspecies, which may be described as *arbiter amatoris*, *arbiter temporalis* or *arbiter requiescans*.
- A very different species is the arbitrator whose main profession is or was that of a judge, *arbiter judicialis* or *arbiter post-judicialis*. One of its particularities is often the practical approach, reflecting judicial economy (at the opposite side of the *arbiter academicus* who uses the award to lecture his – or her audience or to “develop the law”). This species often tends as arbitrator to continue relying on the authority which he or she had as a judge.
- While international arbitration is largely dominated by lawyers, mention must be made of arbitrators qualified in different fields of knowledge. Apart from the occasional accountant or scientist, this species has primarily an engineering background and we may call it *arbiter technicus*.

Finally a species must be mentioned which is probably of a very recent origin: arbitrators working in a team. Arbitrators of this species operate not just in the form of a loosely assembled flocks of arbitrators, like those assembled in the barrister chambers, especially in London with their door tenants from all over the world (*arbiter conglomerans*). Instead they form integrated teams which include well-trained support staff, sometimes appearing as secretaries to the tribunal. But these “secretaries” are not junior lawyers or trainees which are given an opportunity to gain first experience with real life arbitration. Rather they are qualified arbitration specialists well familiar with the arbitrators for whom they work in an almost symbiotic manner and in a form of cooperation similar to that between lead counsel and his or her team. This species, operating under the leadership, the name and the responsibility of one of several renowned arbitrators, and composed of the arbitrator and his or her support staff may be called *arbiter compositus*.

While for counsel such team work is expected and well accepted, for arbitrators, the teaming remains perceived as a problematic feature. The lack of understanding of this mode of operation and the failure to recognise it as that of a new species of arbitrators probably explains the antagonistic

position adopted in some circles, including by some arbitration institutions who seek to regulate the use of “secretaries” by restricting them to purely administrative functions.

The practise of the *arbiter compositus* has distinct attractions, in particular a high degree of professionalism, good organisation and predictable practices, moving perhaps in the direction of branding. The standardisation which goes along with it, reflected in particular in the standard one-size-fits-all Procedural Order N° 1, has also its draw-backs and is not to the liking of everyone, especially not to those who expect from their arbitrator an open mind to the specificity of their case and a personal work product. However, no matter what one thinks of it, this new species of arbitrator represents a valid business model which responds to the requirements of modern commercial and investment disputes. It is about time that the arbitration world, including arbitral institutions, recognises the existence of this development and considers the strength and weaknesses of the contribution which it makes to modern arbitration practice.

Recognising the specificity of this newest species as well as that of all the other species of the *genus* arbitrator may assist in developing the study of taxonomy of arbitrators. Beyond a refinement in the nomenclature, the study may lead to a better understanding of the particularities of each species and may allow us to learn to trace them in each arbitrator's ways of conducting the proceedings, organising his or her work and writing the award. A wide field of research ahead of us!

Geneva, May 2013

MICHAEL E. SCHNEIDER

SAVE THE DATES

Dreiländer-Konferenz

13 September 2013 – *Schiedsverfahren in Österreich – Schweiz –
Liechtenstein*, Innsbruck

ASA Conference & General Meeting

4 October 2013 – *Confidentiality in Arbitration*, Berne

ASA Below 40 Conference

8 November 2013 – Dolder Grand Hotel, Zurich

ASA Annual Conference

31 January 2014 – 10 Years of Swiss Rules of International Arbitration,
Basel

For more information see www.arbitration-ch.org