

President's Message

Let's Get Rid of the Presiding Arbitrator

Users of arbitration are often asked in various surveys why they agree to arbitrate their disputes. The two reasons most commonly cited by real users are (1) the ability to select arbitrators in whom you have special trust and (2) the fact that the arbitral process is not public.

At an arbitration conference that I attended a few months ago, I heard one speaker weighing, in all earnestness, the pros and cons of a recent proposal to do away with party-appointed arbitrators. The next speaker advocated “transparency” in commercial arbitration. I left the conference with a depressing “*What about the users?*” ringing in my mind. This thought has been nagging me ever since and has prompted me to consider an altogether new approach: instead of eliminating party-appointed arbitrators, *why not get rid of the Presiding Arbitrator?*

The idea, when one thinks about it, has considerable appeal, as illustrated by this Art-Buchwaldian conversation between two seasoned arbitration specialists, Me Paul Philibert Confus, Avocat à la Cour, and Sir Reginald Muddle, QC:

Confus: *Ah you English! You are so lucky not to have to bother with the gender of words. An arbitrator is an arbitrator, whether it is a “he” or a “she”. We francophones always have to mind the “il” and the “elle” and end up getting it wrong and offending someone whatever we do.*

Muddle: *Yes, well, I'm not quite sure that I got that, but we do have some issues of our own.*

Confus: *Like what?*

Muddle: *That vexed question of “Chairman” or “Chairwoman” and all that, you know.*

Confus: *Ah yes... that's easier for us. We simply say “la Présidente” instead of “le Président” and voilà.*

Muddle: *If only it could be so easy for us.*

Confus: *You'll certainly find a way.*

Muddle: *Well, have been giving this some thought, you know, and I may well have come up with a cracker of an idea.*

Confus: *What's that?*

Muddle: *Well, I think we should simply get rid of all Chairmen, or Chairwomen or whatever you call them. Nothing but trouble, terrible trouble.*

And the potential for embarrassment... awful. Now, I know that "Presiding Arbitrator" is getting popular, but it is such an ugly expression, the type of thing you'd have expected to hear the last of with the fall of the Iron Curtain. "Chairperson" sounds like Newspeak, or whatever that communist Orwell called it. "Chair"... well that is just as offensive to men as it is to women. "Mr President" and "Ms President" are for Barack Obama and for Hillary. And "Umpire" reminds me of crouching Americans wearing menacing-looking face-masks and chest-pads at baseball games. I tell you: remove the Presiding Arbitrator, or whatever you want to call him... I mean him or her... and the whole problem simply goes away.

Confus: Mais vous êtes fou! What about the essential function of a neutral and completely independent person who will ensure the fairness of the process and the balance in the decision?

Muddle: Bah! For centuries we in England were doing perfectly well with our system of party-appointed referees, with an umpire only if the two chaps – they really were only chaps back then, you know – couldn't agree. Just like rugby, back in the good old days. All great stuff, really.

Confus: But that was in the nineteenth century! Today, well, look at our affaire Tapie, I'm not so sure that your idea would work.

Muddle: Why not?

Confus: You still need someone in the middle, who has the equal trust of all parties.

Muddle: Nonsense! Why let someone do all the work while the party-appointed arbitrators doze at hearings and sneak looks at their blasted iPhones during deliberations? Or why force someone to listen to them defending "their" party's case no matter what? That's wasting money on two out of three. With my solution, you get more punch for your pound, mark my words!

Confus: But...

Muddle: Listen: all you need is to get the parties to choose two people and let them know that their two arbitrators will just have to get on with it and be reasonable. So the parties will know they'll have to appoint people who'll decide the case on its merits instead of squabbling endlessly or doing nothing. And the two arbitrators will be sharing the fees in equal parts. None of this 40/30/30 rubbish. And, for that matter, just imagine the savings: for each hearing, one less airfare, one less hotel suite, each evening one less bottle of claret...

Confus: But if I were a bad-faith respondent, I'd appoint someone who would make agreement impossible. That way, I'd be sure to make things even more complicated. And then one would have to bring in the Presiding

Arbitrator at a late stage and that would delay everything even more. And pity the poor Presiding Arbitrator in that case!

Muddle: I've thought of that. No problem at all, really. It's all about money, you know. Let the co-arbitrators know that if there's a need for a Presiding Arbitrator, they won't be sharing the advance 50/50 anymore. No, no... in that case it will be 50% for the Presiding Arbitrator and 25% each for the co-arbitrators. And from then on, with each month of additional delay, it's 5% off the share of each co-arbitrator. Believe me, you wouldn't be seeing much disagreement then.

Confus: Ah, you anglo-saxons, so pragmatic! And so good with money!

Muddle: I told you: nothing new here. Just good old-fashioned common sense.

Confus: But there still is a problem, my dear friend.

Muddle: Really, what is that?

Confus: Well, it sounds like it works in practice...

Muddle: And?

Confus: But would it work in theory?

At the ASA Conference in Bern on 5 September 2014, ASA will be looking into the future of arbitration. Perhaps Sir Reginald's revolutionary idea will be on the menu.

Geneva, April 2014

ELLIOTT GEISINGER

SAVE THE DATE

ASA General Meeting and Conference
5 September 2014, Kulturkasino, Bern

Dreiländer-Schiedskonferenz
Österreich – Liechtenstein – Schweiz
19 September 2014, Zurich

ASA Below 40 Conference
7 November 2014, Dolder, Zurich

For more information see www.arbitration-ch.org