Stories from the Hearing Room: Experience from Arbitral Practice

Essays in Honour of Michael E. Schneider

Edited by
BERND EHLE & DOMITILLE BAIZEAU

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Michael E. Schneider, Geneva, 2014

Preface

This *liber amicorum* celebrates the 75th birthday of Michael E. Schneider, our esteemed partner, colleague, mentor and friend.

When we spoke to Michael about our project to edit a *liber amicorum* in his honour, his first reaction was to enquire, modestly, whether he really had the calibre to deserve such a tribute. We truly believe that few people in the field of international arbitration are as deserving of this accolade as he is. His truly extraordinary career to date is acknowledged by all those who know him or of him, including those who have at times strongly disagreed with his views.

Over a period of more than thirty-five years, Michael has practised international arbitration and contributed in innumerable ways to its success in Switzerland and abroad. His outstanding legal mind, combined with his creativity, his unfailing energy, enthusiasm and dedication as counsel, as arbitrator, as academic and as leader in several arbitral institutions and associations (the ICC Commission on Arbitration, the UNCITRAL Working Group II (Arbitration), the Swiss Arbitration Association (ASA), and the Dubai International Arbitration Centre (DIAC), to name but a few) have inspired, and continue to inspire, arbitration practitioners from all around the world.

His capacity to "think outside the box" and question sweeping statements, his open-mindedness, cultural sensitivity, diplomacy and truly international view of the world, also contributed greatly to his becoming one of the leading and indeed, in our humble view, an iconic figure and a master craftsman in the field of international dispute resolution. Often a genius in his thinking, always stimulating even when "over-challenging", so well-mannered and humorous, Michael has consistently been a popular and well respected member of the international arbitration community and beyond.

At LALIVE, the law firm which he co-founded and built over the years, the partners, associates and trainees who have had the opportunity to work with him feel extraordinarily privileged. On their behalf, we would like to thank Michael for having (nearly) always been available, no matter what time of the night or day (although preferably well into the night) to brainstorm on tricky procedural issues, case strategy and complex legal theories, to offer support and solutions, to constructively criticise, to praise, to joke and, smiling across the very small space left on his desk mostly occupied by the famous one-meter high piles of papers, ... share useful war stories.

It is to celebrate Michael's passion for the wealth and diversity of international arbitration that only practice can fully bring to light, that this volume contains mostly real life tales, rather than a collection of scientific articles. The aim is to share experiences and solutions found to challenging situations in practice, in particular in the context of arbitration hearings. We have also taken the opportunity to compile in this one book, the 16 President's Messages, each thought-provoking and witty, which Michael carefully prepared for the ASA Bulletin, during his four years as President of ASA.

To all of the eminent practitioners who have each honoured Michael by contributing to this *liber amicorum*, we extend our most sincere thanks and gratitude.

It is with them, and all of our partners at LALIVE, that we wish Michael (and his wife Shadia) the very best of health, happiness and continuing success into the future.

Geneva, September 2014 Domitille Baizeau and Bernd Ehle

Table of Contents

Chapter 1

Recollections of an Englishman

Geoffrey M Beresford Hartwell[1]

As an engineer, my first foray into arbitration came as rather a surprise. I had been in private practice for a few years when I had the experience. I was sitting at my drawing board, laying out the design of a switchboard, as I remember, when my telephone rang. The caller was from the President's office of my technical Institution. He asked, "Would you be interested in doing an arbitration for us?"

I replied that I knew nothing about it. I had read the Model Form of Conditions of Contract, published jointly by some Institutions. I knew that there was a clause saying something about the President appointing an arbitrator, but I had thought of it as one of those clauses everyone ignored. I was intrigued and encouraged by the President's Officer saying, "That's alright, we have a book in the library – I'll send it to you."

It was a title by Gill[2] and rather slimmer than modern works on the subject. I enjoyed the arbitration, which was an English domestic affair – a dispute about the design drawings for a plant to manufacture ethical pharmaceuticals. One of the witnesses was the managing director of a small design company. Trying to understand who had actually drawn the designs, I had noticed the initials in the box of the drawing for the draughtsman's name – H.I.M. Naïvely, I asked the director whose initials they were. I don't think I have ever seen a man blush as deeply as the director when he explained that, as the boss, he adopted the style, "Him"!

I wrote an Award and heard no more about it for a few months. I was wondering whether to take a course in Law when the solicitor for the losing

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1. Consulting Chartered Engineer in private practice; Europa Ingénieur and Chartered Arbitrator. Visiting Professor of Arbitration Law, University of South Wales.
2. Dr Enid A Marshall *Gill: The Law of Arbitration*, now 4th Edition, (ISBN: 9780421681309), Published by: Sweet & Maxwell, 29 Mar 2001.

party telephoned. He asked me whether I would care to be another client's appointee in an arbitration to take place in Berne. When he said it would be in English, I agreed. The other Party appointed a distinguished Law Professor from Budapest. He and I tried but couldn't agree upon a Chairman so the ICC appointed a renowned Law Professor from Basle.

As a mere technician, I found daunting the thought of working with such lions of the Law. In the few weeks available to me after reading the materials sent by the two Parties, I obtained a copy of the Payot *Code Civil* and *Code des Obligations*. I read it as best I could, with the aid of my *Robert*;[3] like most Englishman of my generation I have a poor French vocabulary and little facility for reading the language. Nevertheless, Swiss Law was my first serious introduction to Law – a fact that has coloured my approach ever since.

One of the complications about being an Engineer in arbitration is that one may understand what witnesses and Parties are talking about. In this Swiss arbitration another Engineer appeared as an expert witness. One issue concerned the corrosion of steel by salt and whether certain parts of a machine should be in plain or stainless steel. The witness had expatiated upon the scientific mechanism of pitting corrosion of steels. Unfortunately – or fortunately – I once was apprenticed as a ship's Engineer and later studied corrosion for a guided weapon project. I knew that the witness had made a mistake and neither Counsel had appreciated it.

I didn't know what to do, so I wrote an aide-memoire overnight. I gave copies to the Chairman and my co-arbitrator and then asked the Chairman if he would care to give it to Counsel for the parties. At the hearing, he did that. I offered to answer any questions either Counsel, or the other arbitrators, wished to ask. There were no questions, but nothing further was said of the witness on that topic.

Swiss Law had been my introduction to Law and a strong influence when I learned English Law. It stayed with me when an Engineer friend, the distinguished Civil Engineer Ian Menzies, alas no longer with us, asked me to help with mechanical issues on behalf of a Party in an arbitration in Switzerland. We were to be led by Michael E. Schneider and the case was to last in brief hearings over, as it turned out, a number of years. The case concerned the manufacture and construction of high performance boilers for a power station.

It was a pleasure and a privilege to work with Michael even if it became necessary to have one's wits about one at four in the morning – eight bells of the morning watch, the dawning of a new day!

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3. *Collins Complete and Unabridged – Collins Robert French Dictionary* [now Ninth edition] (ISBN: 9780007331550).

I was an Expert Witness for the Party represented by Michael; I wrote my report and gave oral evidence in the usual way. I thought nothing of it when Michael asked me to put questions to technical witnesses of the other side – there were issues about working practices on site, as I recall. One was the technique of mirror welding: nothing to do with the boudoir but the welding of inaccessible boiler tube by reference to a close-up reflection of the working area.

Michael took me by surprise, however when the hearing drew to a close. He told me that he would introduce the closing address and I would then argue some technological points; then he would finish. I had never thought to be an advocate before. I hope I made it clear to the three arbitrators that I understood the difference between advocacy and evidence. One of the opposing lawyers, commenting on the short morning coat I always wore for formal occasions in those days, said he had thought I looked like an English lawyer. I didn't know if that was intended as a compliment.

Michael Schneider was making use – good use – of the inherent flexibility of arbitration. That flexibility of arbitration is the subject of this chapter. It has become usual for practitioners to discuss arbitration as if it were a creature of law but I argue that it is nothing of the kind. I'll argue that it's plain common-sense.

It's plain common-sense for two people, when they can't agree, to turn to a third person for an answer. That person may be a friend, a colleague, or they may be a priest or a community leader someone they admire; they may be an expert in the field, or they may be a lawyer or a judge if it's a matter of law.

That is all that is implied by the classic English definition of arbitration: "The settlement of a dispute or question at issue by one to whom the conflicting parties agree to refer their claims in order to obtain an equitable decision." There's nothing about a binding decision in that definition. The conflicting parties may decide to agree to be bound by that decision. Indeed, they often do; that is why we think of arbitration as binding. In days gone by lawyers spoke of an Arbitration Bond,[4] which is what we have come to know as an Arbitration Agreement. Such a bond was what was called, in French, a *compromis d'arbitrage*.

4. 1768 W. Blackstone *Comm. Laws Eng.* iii. i, Arbitration-bond: A bond entered into by two or more parties to abide by the decision of an arbitrator.

The word "equitable" is a legal term of art but it also has an ordinary meaning of "fair". Indeed, the English Arbitration Act[5] uses that ordinary word "fair" and nothing more pretentious, to describe the purpose of arbitration.

The essence of arbitration laws world-wide is to be found in that one word. Fairness is what legislators have sought to achieve, not a mere weak simulacrum of processes of the court, in private hands. It is at once less than that and more than that. Less than that in that arbitrators have none of the coercive authority of a court; more than that because the arbitrator's decision is untrammelled by national boundaries. I'll return to that last assertion later. For now this part of my thesis has to do with the implications of fairness.

When those two people agree to ask another to decide for them, common-sense suggests that he or she should not have a private interest in their own decision. There are said to be two essential rules of Natural Justice, of which the first is usually expressed as *nemo judex in causa sua* – nobody should be judge in their own cause. It's an obvious rule in the context of criminal or administrative law where there is no equality between an individual and the state – or for that matter an employer or organisation. It is a rule that may perhaps be set aside when the disputed issue is between equals.

There will be circumstances in which a third person is connected with one of the parties or with the very subject of the dispute such that no reasonable person would believe that their decision would be unaffected by the connection. One would hope that in such circumstances no-one would accept an invitation to act.

There will be other circumstances where the connection is so tenuous that no reasonable person would doubt the arbitrator's independence for a moment. Between the two sets of possibilities there is a whole spectrum of degrees of connection and it becomes impractical to draw a hard and fast line between what is acceptable and what not.[6]

At the end of the day, an arbitration is the creature of the parties. If they agree to accept the decision of an interested party, that may be a matter

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5. *Arbitration Act* 1996 c. 23 Part I Section 1 General principles.
   The provisions of this Part are founded on the following principles, and shall be construed accordingly –
   (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense; ...

6. Although a gallant attempt has been made by the International Bar Association (IBA) in their *IBA Guidelines on Conflicts of Interest in International Arbitration* (May 2004). These Guidelines distinguish between red, orange, and green categories, with a non-exclusive list for each. The implication is that appointments should not be accepted where the Red List applies but should give no concern where the relationship is on the Green List. The subjectivity of the topic is demonstrated by the extensive Orange List and more particularly by the existence of waivable and non-waivable Red Lists.

for them but a National Court cannot be guaranteed to lend its coercive authority to their pact. For many years, indeed since the colonial days of the British Raj, it was usual for the Indian Government to provide for the Government's own Chief Engineer to be sole Arbitrator of supplier's contracts. The trust that the suppliers of those days had in the integrity of the colonial civil service led them to accept the arrangement without question.

There is a circumstance which may cast doubt on an arbitrator even though the connection is not one that normally would result in suspicion. It arises when some link exists but it has not been disclosed to both parties. If that link is discovered later a question may be asked as to why it was not disclosed. Non-disclosure may seem deceitful. Deceit is an attribute that a bystander would think unbecoming an arbitrator.

The second Rule of Natural Justice is one which, when I was younger, I took for granted, so obvious did it seem. It is summed up in the pithy Latin instruction, perhaps commandment would be a better word, *audi alterem partem*, hear the other party.

Isn't that obvious? There's a dispute between two people. Why would one not hear what each had to say? But in one celebrated English case[7] a distinguished barrister, who was also a surveyor, decided a case after seeing the evidence (a building project) for himself and without letting the parties know what he had seen. Flexibility can't stretch that far; he was removed by the Court and his Award overturned.

Arbitration is flexible where the Court cannot be. The Arbitration Laws in most jurisdictions are based upon that premise although they may, of course, impose additional requirements. This freedom has its own burden – freedoms always do. Long before he or she goes into Court, the lawyer knows how to prepare, how the opponent will behave and what to expect of the Judge or Judges. With that knowledge, the lawyer can advise the Client. The flexibility of Arbitration denies the lawyer that certainty.

Even when the arbitral hearing is subject to the rules of Institutions, such as the ICC (the International Chamber of Commerce's International Court of Arbitration), there remains a high degree of choice in the hands of the arbitrator or arbitrators. There is also a high degree of freedom in the hands of the Parties but, to exercise their choice, the Parties have to agree between them. That agreement is not often available once the Parties have fallen out so the choices usually are left to the arbitrator or arbitrators.

That is why every arbitration begins with a conundrum that must be resolved before anyone involved can even think about what to do. Each person

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7. *Annie Fox and Others v P.G. Wellfair Ltd (In Liquidation)* [1981] 2 Lloyd's Rep 514, CA.

faces the question "what is required of me?". There is no-one but the arbitrator to answer that question (or the presiding arbitrator if there is more than one).

The consequence is that the arbitrator's duty includes making sure, at the outset, that each participant knows what is required. In the Court, the moves are known – and how they will play out. In arbitration all that must be set out before any moves can be made. The way that is done is by way of a preliminary meeting at which, or shortly after which, the arbitrator will decide how to go about the arbitration and will set out the necessary steps in a letter or other document, sometimes called an "Order for Directions".

Often, a physical meeting will not be required. However, any decision to dispense with a meeting should not be taken lightly. An opportunity for warring Parties (and their lawyers) to meet with the aim of explaining their differences to the Arbitrator(s) – and to one another – is one of the advantageous features of arbitration. It may result in a resolution on the spot. It may result in a narrowing of the apparent issues and a simplification of the evidence required.

However that preliminary stage takes place, I argue that it is a necessary consequence of the flexibility of arbitration that the arbitrator or arbitrators master from the very outset the matters in the Arbitration. Clearly, if that is to be done, the contending Parties must make their contentions clear, preferably in the Request for Arbitration and in the Reply. There can be no scope for forensic "ambush" – the production, late in the process, of new claims or evidence not presaged at the beginning of the reference. Indeed, the word "reference" implies that existing matters are referred for arbitration.

If, to use the words of the English Arbitration Act 1996 at s.33 (1)(b), it is the duty of an arbitrator "to adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.", it seems self-evident that he or she must ascertain, *before adopting any procedures*, a) what are the matters to be determined and b) what are the circumstances of the particular case. In England, if the words of the Act are to be believed, it would be improper for an arbitrator to do anything else.

The days when an arbitrator, or a Judge for that matter, could arrive without reading his or her case materials and open the day be saying, to Counsel, "Now Mr. Jones, what's the case all about?" are long gone. And good riddance to them. But the flexibility of Arbitration imposes a burden which needs to be respected. And I learned that at the elbow of Michael E. Schneider.

Chapter 2

The In-House Counsel Who Went Astray: Ex-Parte Communications with Party-Appointed Arbitrators

Klaus Peter Berger

§2.01 Introduction

The relationship between the parties and the party-appointed arbitrators on a three-member tribunal has always been the subject of attention and debate. In some parts of the world, the partisan party-appointed arbitrator has been, and in part still is, part of arbitral reality. In international arbitration practice, however, it is generally acknowledged that party-appointed arbitrators are neither lap dogs nor 'hired guns.' Rather, arbitrators in international arbitration are private judges. Like state court judges, they must remain impartial and independent, and thus willing and able to exercise independent judgment in deciding the case before them.[1] In combination with the parties' essential due process rights to be heard and to be treated equally, the position of each arbitrator as a private judge affects the way in which the parties are allowed to communicate with the arbitrator. The 'Golden Rule' is that case-related *ex parte* communications with arbitrators – regardless of who appointed them – should be avoided. This Golden Rule is recorded in one of the first soft law instruments, or 'para-regulatory texts',[2] of international arbitration, the 1987 IBA Rules of Ethics for International Arbitrators:

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1. Alan Redfern, J. Martin Hunter, Nigel Blackaby & Constantine Partasides, *Redfern/Hunter on International Arbitration*, para. 4-73 (5th ed., Oxford University Press 2009); Gary B. Born, *International Commercial Arbitration*, Vol. I, pp. 1492 et seq. (Kluwer 2009); Emmanuel Gaillard & John Savage (eds.), *Fouchard/Gaillard/Goldman on International Commercial Arbitration*, para. 1047 (Kluwer 1999).
2. Pierre A. Karrer, *Law, Para-Regulatory Texts and People in International Arbitration*, in: Stefan Kröll, Loukas A. Mistelis, Pilar Perales Viscasillas & Vikki Rogers (eds.), *Liber Amicorum*