Kluwer Arbitration Blog

The Professionalism of Arbitrator

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After introduction by the French Arbitration Committee's (*Comité Français de l'Arbitrage* or "CFA") President, Mr. Laurent Jaeger, Mr. Yves Derains started his speech on "The Professionalism of the Arbitrator" by saying that arbitration has become the natural way to resolve international disputes.[1)] According to him, this is because of arbitrators' neutrality and because of the efficacy of arbitral awards, which are often easier to enforce than State court judgments. He agreed with Professor Jan Paulsson that the time of arbitration's innocence has ended with counsel's and arbitrators' increasing professionalism.

Mr. Derains explained that the purpose of his speech was to discuss whether a profession as an arbitrator exists and, if so, what are the qualities expected from arbitrators. He would first consider the expected qualities of arbitrators and then examine whether the profession of arbitrators exists in view of the functions they perform and the community they belong to.

He gave the example of Article 14 of the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 1965, which provides that arbitrators "*shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment.*" Article 14 does not require arbitration experience, let alone qualification to practice as a lawyer; rather, an arbitrator should be an "*amateur éclairé*", a knowledgeable and enlightened decision-making person. In his view, an arbitrator's decision is an act of justice and thus a jurisdictional act, which explains the requirement that arbitrators be independent. An arbitrator is expected to determine the arbitral procedure and to propose procedural solutions when the rules are not always pre-determined, acting efficiently within the limits of his or her mandate.

Mr. Derains went on to discuss the qualities that arbitrators need to fulfil their duties.

According to him, there are at least four needed qualities: (1) the capacity to decide; (2) the capacity to inspire trust from the parties and from his or her colleagues; (3) the capacity not to have a need for approval from the parties; (4) the capacity to manage the proceedings and to work well.

First, the Parties do not want an arbitrator that hesitates and does not decide. An arbitrator does not decide only in the award; rather, an arbitrator must be capable of deciding procedural matters at all times. For example, the president and the sole arbitrator cannot afford to lose control of the proceedings during the examination of factual and expert witnesses. This requires the capacity to decide and to decide quickly.

Second, an arbitrator must be able to inspire trust from the parties and from his or her colleagues. This means having the capacity to decide with no brutality, with diplomacy and some pedagogy. Inspiring trust requires some cultural neutrality, which enables an arbitrator to appreciate better the legitimate expectations of the parties. If an arbitrator only knows his or her own legal system, he or she may take decisions to the detriment of a party from a different legal system. Trust from the colleagues is also important although co-arbitrators will not always be truly independent. An efficient technique to measure the independence of co-arbitrators is finding a very weak argument and commenting on this argument with them; if a co-arbitrator defends the party putting forward this weak argument, one should rather be cautious.

Third, an arbitrator must not have a need for approval from the parties and should not be worried to please them no matter what. According to Mr. Derains, it is inherent to an arbitrator's function not to please. To please at all times means taking unjust decisions. An arbitrator should not fear being challenged or having its decision annulled, and should not condescend to a parties' dictatorship threatening annulment. Rather, an arbitrator should decide what is right and should not fear the future.

Fourth, an arbitrator must know how to organize and manage the proceedings. This is true in international arbitration enshrining a myriad of legal traditions, and is especially true in large arbitrations. An arbitrator has to know the file and has to prepare for the hearings. For example, deciding on document production requests requires knowing the file to make good decisions. And all this means working hard.

Mr. Derains then moved to the next topic: Is there a profession of arbitrators? According to him, an arbitrator is "*un être de passage*" a fleeting, non-permanent

being. And arbitrators act within what has now become a market. He recalled that Professor Pierre Lalive found it risky when arbitrators become sellers. Mr. Derains then noted that a profession of arbitrators exists in two senses: (1) the functions an arbitrator performs ("*le métier d'arbitre*"); and (2) the group of individuals that perform these functions. He then recalled Professor Jean Robert's statement that arbitration was conceived as a profession of gentlemen made for gentlemen. And this persists today when we think of arbitration values and its underlying values of justice. In Mr. Derains' view, this has lost, however, much importance today.

He also told the audience that it was true that many people make a living with arbitration. So, the profession of arbitrators exists, and it is quite competitive. The arbitrators show themselves to counsel, for example, in arbitration conferences. In this respect, he recalled a statement from Professor Bruno Opetit that arbitration conferences sometimes serve as marketing places for self-promotion and publicity. Mr. Derains did not find, however, that competition is necessarily a bad thing. Fierce competition existed between the great artists Michelangelo and Raphael during Renaissance times without affecting the quality of their work. Moreover, while one of the premises of a liberal profession is having clients, arbitrators cannot have clients as this would result in lack of independence. In his view, the profession of arbitrators is therefore a liberal profession without clients.

Mr. Derains also noted that a profession of arbitrators exists in the sense of an organized community, but which is not homogeneous. The community of arbitrators is a combination of professional and occasional arbitrators, with the secretaries of arbitral tribunals playing a role as well. This leads to numerous conflicts of interests. There is no control to enter the profession. There are certifications to acquire the qualities of an arbitrator, but this does not make anyone an arbitrator. Some say that this is an elitist club, but Mr. Derains disagreed because the parties are the ones choosing the arbitrators. He shared with the audience the example of ICC arbitration whose 80% of cases have the parties choosing the arbitrators. Direct appointments by the ICC Court and ICC Court appointments upon national committees' nomination are thus much less frequent. Although sometimes the parties hesitate to nominate new arbitrators, new arbitrators have been nominated. He argues that the circle is continuously renewed. The profession of arbitrators auto-regulates itself with codes of ethics, which limit abuse.

Mr. Derains concluded that one can refer to the professionalism of arbitrators. He noted that sometimes this comes with the arbitral procedure being standardized, when arbitrators systematically reproduce procedural rules like including document production rules when the parties have requested none. But he added that this can be easily fixed if arbitrators adopt made-to-measure procedural rules.

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References

↑1 This note was based on Mr. Yves Derains' speech at the 10 October 2018 Conference of the French Arbitration Committee (CFA), held at the *Palais de justice, Salle des criées*, in Paris.

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