

# Kluwer Arbitration Blog

## Get Rid of the Presiding Arbitrator?

Duarte Gorjão Henriques (BCH Advogados) · Friday, July 25th, 2014

In his President's Message (ASA Bulletin, Vol. 32, no. 2, 2014), Elliott Geisinger proposes a real challenge to the arbitration community. In a simple but rather persuasive rhetorical style, Geisinger places in confrontation Me. Paul Philibert Confus, Avocat à la Cour and Sir Reginald Muddle, QC, giving life to a debate that seems to be overlooked nowadays.

Is it really necessary to have a “presiding arbitrator”? This is the crux of the discussion.

Sir Muddle advocates that the theatre of arbitration should get rid of that character, while Me. Confus contends that fundamental principles of arbitration, like having a chairman – or chairwoman, for that matter – should be kept alive. There should always be someone neutral, in the middle, he argues.

Why not have just two party-appointed arbitrators that are bound to reach consensus between themselves, on penalty of have an “umpire” appointed, that will force them to split and reduce their fees?, Sir Muddle challenges. Why should the existence of a presiding arbitrator guarantee stronger independence and impartiality if the parties had provided for arbitrators that are independent and impartial in the first place? insists Reginald Muddle.

Get rid of that 40/30/30 fees split, plus hotel and travel expenses, and alike. Opt for a 50/50 split instead. Warn arbitrators and parties that failing to reach a consensus between the party-appointed arbitrators will imply a different percentage of fees (50% for the “Presiding Arbitrator” and 25% for each of the co-arbitrators) and threaten them with a delay penalty clause of – let's say – 5% for each month of delay in rendering the award.

By the end of the dialogue, Me. Confus was compelled to agree that this proposal might work in practice. But would it work in theory?

This perspective is a quite interesting.

The conceptual and theoretical idea may seem to be reasonable enough. Indeed, why not have just two arbitrators appointed, mandate them to reach a consensus, and decide the case in the best interests of an expeditious, fair and equitable solution? At the end of the day, if the party-appointed arbitrators are not able to reach a consensus as to what their decision should be, the final adjudication should be referred to an umpire.

However, one might ask, are things that simple?

I can think of some practical and theoretical objections. Other solutions might also appear in this scenario.

On the one hand, in respect to practical aspects, resorting to an umpire will most likely entail the need of a full and thorough revision of the case by the appointed umpire. Time and costs will be lost. Secondly, admitting party appointed arbitrators may lead to admitting this kind of appointment in its entirety, that is, one may have to admit the appointment of real representatives of the parties. In fact, the line of impartiality and independence, sometimes still hard to draw, may be thinner and less clear than before. We might as well admit straightforward pure representatives of the parties and, therefore, dispense with either the counsels or the arbitrators.

On the other hand, this practical consideration may lead to theoretical concerns. In my opinion, the impartiality and independence of the arbitrators are corner stones of arbitration and without them we do not have arbitration, but rather another form of dispute resolution. The legal framework and the conceptual layout of arbitration may never dispense with, or even jeopardise, those fundamental principles of independence and impartiality of the arbitrators and Sir Reginald Muddle's proposal might put those principles at risk.

Finally, there seem to be alternative solutions for this proposal. Indeed, one may think of resorting to a sole arbitrator, or having a mediation proceeding or even mandate counsels to settle the differences between the parties.

Besides all of that, one should note that this scheme is not new at all. In fact, a simple historical research will show us that this is an old mechanism in the common law arbitration setting. The English Arbitration Act 1950, the Irish Arbitration Act 1950 and the New Zealand Arbitration Act 1908 provided for the mechanism of resorting to an umpire in case of the party-appointed arbitrators were not able to reach a decision, just to mention a few historical examples. This experience was progressively abandoned in favour of a tripartite or of a single solution, as we may observe in arbitration nowadays. It would be interesting to study the reasons why this solution is not so common and why was abandoned.

Yet, in my opinion, all those objections, alternative solutions and historical observations do not detract the merits of recovering ancient traditions and solutions, if that is the way things should be put, specially if they aim a time and cost effective proceeding. Costs and time are most likely saved. Independence and impartiality concerns will always exist irrespective of the composition of the arbitral tribunal and the tools we now use to assess challenges of arbitrators will remain as much valid and effective as they are now today.

It is true that the appointment of an umpire will imply the need of another full and thorough revision of the case. However, this risk will most likely be compensated with the likelihood of having the two party-appointed arbitrators reaching a consensus on account of a different fees split.

Indeed, why not dispense with the presiding arbitrator?


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The graphic features a black background with white text and a circular icon. The icon depicts a magnifying glass over a group of stylized human figures, representing a search or investigation process. The text is arranged in a clean, modern layout with a horizontal line above the main title.

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