Kluwer Arbitration Blog

Is Arbitration by Men Legal?

Geoffrey Beresford Hartwell · Tuesday, May 3rd, 2016

The headline is there as a trap. The writer will argue that arbitration by women is not legal either. Legitimate, of course, but not legal in the strict sense, the senses of "[r]equired or appointed by law; founded on or deriving authority from law" or "[r]ecognized by law as distinguished from equity" or "[b]elonging to or characteristic of the profession of the law."

Those definitions are chosen from the OED (Oxford English Dictionary). The writer has chosen the more precise meanings those of the fourth group of meanings as "[p]ermitted, or not forbidden, by law" are more colloquial, less precise.

Although arbitration law has existed for years, in England and Wales since time immemorial, but first in the modern context with John Locke's Arbitration Act 1696, it was never the law that created arbitration, it was the private agreement of individuals. It is the writer's contention that Arbitral legislation codifies the logical implications of the agreement. For example, it is logical that the rules of Natural Law should apply. Hardly any of us would expect to decide between two Parties without knowing what each wanted or what they had to say. Common-sense suggests that it is efficient and fair for them to say it in the presence of one another – or that each should see what the other has written.

The word "fair" is at the heart of the working of arbitration. The English Arbitration Act 1996 starts (section 1.a) by stating that "[t]he object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;" – as clear an object as one could wish. The drafters could have said "in accordance with law" but they chose "fair".

Now, that there is a distinction between Law and Justice is trite. Harvard philosopher John Rawls (1921-2002) developed a concept of justice as fairness in his now classic work "A Theory of Justice". Fitting that it should have been Harvard, one of whose great jurists, Oliver Wendell Holmes jr. is remembered for the saying:

> "This is a Court of Law, young man, not a Court of Justice."

One may also cite the Master of the Rolls (no, not Lady Penelope's driver, "Nosey" Parker!), Sir George Jessel (13 February 1824 – 21 March 1883) as saying:

> "It must not be forgotten that the rules of Courts of equity are not like the rules of the common law" [In re Hallett's Estate (1880) 13 Ch.D. 696, 710].

Oddly, that was after Equity (as a separate concept) had been abolished by the Judicature Acts 1873 and 1875 – however, it is not for a layman like the writer to question the mystery of the Law.

To arbitrators the distinction is important and practical. Sir Michael Kerr who had been a distinguished Judge before he was President of the LCIA once said, in one of his Keating Lectures, that as an international arbitrator, he could decide a matter in a way that had not been available to him when sitting as a Judge.

Arbitration is infinitely flexible within the confines of fairness. In very few jurisdictions is there any regulation of who may be an arbitrator. It is solely a matter of free choice for the Parties although some arbitral institutions fetter that freedom for various reasons. An arbitrator need not be a Judge nor yet a lawyer at all. She may be butcher, baker, or candlestick–maker, milliner, dressmaker, or welder.

It is exactly this flexibility that enables and limits the diversity of arbitration – more particularly the writer is concerned with the diversity of arbitration appointments. Parties, commonly advised by their lawyers, tend to stick with what they know. That may mean that they will select a retired male Judge in preference to a lady welder – even when the dispute is one, as the writer remembers, concerning the failure of what should have been a deep-welded seam but was filled with loose rods and merely welded over, to look right.

Arguably, the untrammelled nature of arbitration allows the diversity of gender, nationality, religion, and occupation. Women are making strides in the legal profession and there are many distinguished practitioners in arbitration – but not enough. This writer knows of at least one lady architect – who is a lawyer of note also – and a lady electrical engineer who practices as arbitrator and adjudicator internationally.

Lay arbitrators have lost much ground in commercial arbitration. In closed communities such as the London and New York specialised markets they hold their ground but the writer believes they are dominated by men – even the cocoa trade. Are there no women in Chocolate? It seems that there is no-one to develop this aspect of diversity unless it be ArbitralWomen ("AW"). Looking at the membership of AW the element of diversity of race and religion seems to be well covered within the profession of Law – very necessary of course – but has the time come for the standing, the authority, of AW to be deployed in encouraging women in other professions to study arbitration as well.

Diversity has an inherent merit in a political context – for the benefit of the immediate individual. It has merit also in arbitration, in creating a pool of potential candidates whom parties may trust with their disputes, whether those candidates are lawyers, architects, engineers, mariners or, indeed, milliners. Who it is that they choose is up to them – that is Party Autonomy.

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