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A Second (Quasi-Perfect?) Storm also in Arbitration?

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Many users of international arbitration, particularly in-house counsel, have repeatedly expressed concern about the lack of adequate information on arbitrators, resulting in arbitrator selection based on a vague and general reputation often informed by word of mouth or anecdotal information. Arbitral institutions and arbitration circles cannot remain indifferent to this need. A first step to deal with this issue is the disclosure by arbitrators of the information contained in the arbitrator's pledge launched by the European Court of Arbitration; another step is the issuance of an official acknowledgement as a 'certified arbitrator' by arbitral institutions, and eventually the requirement that certified arbitrators abide by a universal code of ethics.

An important article on *A Perfect Storm* written by a good team of authors,¹ in the course of its analysis of the significant changes which are occurring and which affect litigation, and in particular General Counsel and their Corporate Law Departments, has turned to mediation, stressing, on the one hand, that in-house counsel are more demanding in order to better manage legal risks, and on the other hand, the lack of 'transparency and greater control'. They suggest that 'resolvers will replace litigators' and add 'and here comes the rub'. How may corporate counsel select the 'right horse for the course' without the right information 'about the available riders'? They add 'That is why the Perfect Storm heralds change for mediators and provider entities accustomed to operate behind a privacy screen', and further 'what worked for a few mediators and providers in the past in terms of vague and general reputation will not sustain them for the future', and then 'Corporate counsel's growing appetite for transparency and authenticity will drive demand for access to prior user feedback before making a choice of an individual mediator or provider institution.'

These authors suggest that mediators should show 'the world's users how very good they are'. They conclude that 'becoming an IMI certified mediator fits the bill'. In fact, the International Mediation Institute (IMI) and the recognition of the

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¹ J. Eisbouts, H. Peter Frick, Bergst Gustavson, Marina Kaldina, Wolf von Kumberg, Erik B. Pfeiffer & Deborah Masucci et al., *A Perfect Storm is Gathering* (Feb. 2009).

status of IMI Certified Mediator have become a decisive element in helping to select the right mediator.

This is a part of the so described Perfect Storm.

It is suggested that exactly the same problem exists for the users and in particular for in-house counsel as to the selection of arbitrators. This has induced me to propose the title of this article, 'A Second (Quasi-Perfect?) Storm Also in Arbitration?'

The selection of arbitrators is very frequently based on a 'vague and general reputation' which in turn is quite often based on 'word of mouth' or on anecdotes. The arbitration community has (it is suggested) a duty to follow the path so well shown by the IMI. I propose that this target be achieved through three steps.

A first step may consist in the invitation to arbitrators to issue an Arbitrator's Pledge, i.e. to make known the general statement of that arbitrator, addressed to whom it may concern, by which he/she states, as per attached form, his/her position on various issues. The European Court of Arbitration has adopted such a Pledge.² Amongst the matters addressed are the acknowledgement of the right of the parties to prove their case, without the arbitrators limiting the number of witnesses and/or the questions (unless they are not relevant or inappropriate); the commitment to ask the parties immediately after being appointed as to various issues concerning what each of them expects from the arbitrators and from the arbitral proceedings; to invite the parties to enter early on into a stipulation concerning time, procedure and costs; to undertake to act with diligence and expeditiously and to devote to the proceedings all the time which they require. The Pledge of the arbitrator to the parties may have as an enclosure a questionnaire in which he/she informs as to his/her general attitude in the conduct of the proceedings.

It is suggested that, while the Pledge and the related documents may substantially help the users to understand what arbitrators they would get, this step needs to be completed by two other ones.

In line with the IMI's role, it seems that a procedure is to be worked out which provides that a universally accepted body certifies the arbitrary. This is already the practice of the Chartered Institute of Arbitration which certifies arbitrators and grants the seniority status of Fellow of the Institute, the last step being the right to describe himself/herself as a Chartered Arbitrator. In my opinion, either the Chartered Institute of Arbitration or (if it is not available) an equally highly and universally accepted body should, like the IMI, issue an acknowledgement which, after due control, entitles someone to be described as a Certified Arbitrator. There is a message easier than a reference to fellowship.

² M. Rubino-Sammartano, *The Arbitrator's Pledge Launched by the European Court of Arbitration*, 26(4) Am. Rev. Int'l. Arb. 599 et seq. (2015).

This will be a further assurance for users as to the level of the arbitrator, when he/she is considered for appointment. If a user (even an in-house counsel) discovers that the person which he/she has in mind is not a Certified Arbitrator, and nevertheless decides to appoint him/her, he/she will not be entitled to complain later as to his/her possible lack of the qualities which such a certificate acknowledges. The certification and the Pledge together will allow appointments to be made not based just on 'passe parole' or on vague impressions, and on the CVs or even ART presentation of arbitrators.

This structure will be completed by the acceptance by the arbitrator of a Code of Ethics. Catherine Rogers³ has advocated that arbitration circles auto-regulate themselves in ensuring that an ethical standard is identified and generally accepted. In turn, Vidack, Greenwood and McIlwrath, together with Deborah Masucci,⁴ have been advocates of the need for in-house counsel to be able to be much more informed as to the arbitrator when they envisage appointing one.

Various codes of ethics already exist, such as:

- Code of Ethics approved by the Court of Justice of the European Union for its judges;
- Code of Ethics of the European Court of Arbitration;
- IBA's Guidelines on Party Representation in International Arbitration;
- CI Arb's Practice Guideline;
- Guidelines on Conflict of Interest in International Arbitration (International Bar Association);
- Law Society of Upper Canada Adjudicators Code of Conduct;
- London Court of International Arbitration Notes for Arbitrators;
- ICC Arbitrator Statement Acceptance, Availability, Impartiality and Independence (International Court of Arbitration);
- Code of Conduct for Arbitrators (National Arbitration Forum);
- Hong Kong International Arbitration Centre Code of Ethical Conduct;
- Code of Professional Conduct for Counsel (International Criminal Court);
- Code of Ethics of the Saudi Center for Commercial Arbitration;
- Code of Ethics for an Arbitrator (Singapore International Arbitration Center)
- Code of Conduct for Arbitrators (China International Economic and Trade Arbitration);
- Commission Rules of Conduct for the Understanding on Rules and Procedures (World Trade Organization);
- AAA Code of Ethics Canon III.

³ C. Rogers, *Ethics in International Arbitration* (Oxford University Press 2014).

⁴ E. Vidak Gojkovic, L. Greenwood & M. McIlwrath, *Puppies or Kittens? How to Better Match Arbitrators to Party Expectations?*, Austrian Y.B. Int'l Arb. 61 (2016).

The arbitral institution which would provide a certification to arbitrators could work out a universal code of ethics. Its acceptance by a candidate should be a requirement in order that he/she be certified.

If IMI's certification of mediators may be considered (or included in) a Perfect Storm, it is suggested that the above steps may perhaps be described as preparing a Second (quasi- or only partial) Perfect Storm in arbitration.

Those who provide arbitration services and those who care about a better selection mechanism are invited to consider the above proposals and to discuss them, contributing to their improvement and implementation.

APPENDIX

European Court of Arbitration Arbitrator's Pledge to the Parties

I _____, _____ [profession], born in _____, resident at _____, _____ citizen, HEREBY UNDERTAKE towards any party which will appoint me as an arbitrator that, when acting as an arbitrator, I shall:

- disclose any past, present or potential future professional or personal link of which I am aware with any of the parties, its stakeholders, managers, staff, any of its associated company and counsel and with my co-arbitrators;
- remain fully independent, impartial and neutral during such proceedings and for two years after the award;
- bear in mind at any time that my fundamental task is to render justice, in compliance with the applicable law and/or rules;
- request the parties not to raise useless or totally ungrounded oppositions and motions, and not to behave in a delaying or obstructive way and I shall sanction such possible behaviour, such as in the costs award;
- send to the parties the attached list of questions in order that they express their expectations as to the conduct of the proceedings;
- invite the parties to enter into a stipulation covering procedure, time and costs;
- conduct the proceedings very diligently and with all due expedition and deliver the award (except in very extraordinary situations, which I will state and certify), within nine months after my appointment;
- ensure that the right of the parties:
 - to present their case,
 - to call the relevant oral evidence,
 - to examine and cross-examine the witnesses,

◦ as well as in respect of all relevant documentary evidence (the production of useless documents being subject to sanctions in terms of costs), be fully respected;

- devote to the proceedings all the time which is necessary;
- tax fees of counsel for the victorious party (or of each party, if each of them will be ordered to bear its costs), up to a maximum of ___ times (and, in very special circumstances to be stated and certified by myself, up to ___ times), the fees which the parties have agreed or are due as to such proceedings to myself as sole arbitrator or as a member of the Arbitral Tribunal;
- discharge personally my task as arbitrator;
- treat in strict confidence the proceedings and anything which is said or produced in such proceedings, as well as the award;
- respond to the Questionnaire as per attachment.

Date and place

by _____

Encl: Questionnaire

QUESTIONNAIRE TO THE ARBITRATOR

1. Priority of truth funding

Do you agree that truth funding is a priority in any proceedings? Yes No

2. Right of the parties to present and to prove their case

Do you agree that the parties are entitled to present and prove their case? Yes No

3. Case management

Do you agree that a calendar of the proceedings shall be prepared at the beginning of the proceedings and regularly reviewed and updated? Yes No

4. Duration of the proceedings

Do you agree that the proceedings must be dealt with expeditiously and that unless there are special reasons (to be stated) their ideal duration is 9 (maximum 15) months? Yes No

5. Raising all possible evidentiary material

Do you believe that truth funding requires that all possible evidentiary material be considered, even if this takes some more time? Yes No

6. Is there a priority of documents over oral testimony?

Do you believe that oral testimony is always less important than documentary evidence? Yes No

7. Short time period between one step of the proceedings and the following one

Do you believe that there should be a short time period between one step and the next in the proceedings? Yes No

8. Short time period between the closing of the proceedings and publishing the award

Do you agree that, in the absence of very important reasons (to be promptly stated), the award should be published not later than 60 days after the closing of the proceedings? Yes No

9. Early decision on preliminary issues or on a part of the claim which is manifestly well grounded

Do you agree that preliminary matters and issues which are manifestly well-grounded should be decided as early as possible? Yes No

10. Settlement facilitation

Do you believe that the arbitrators should go beyond inviting the parties to settle? Yes No

11. Witnesses

Do you agree that the selection and the examination of witnesses, and the cross-examination of the witnesses of the other parties, is a right of each party and that the role of the Arbitral Tribunal is to ensure that this takes place properly? Yes No

12. Witness preparation/coaching witness statements

Do you believe that preparation/coaching of witnesses and witness statements should be authorized even if one of the parties object to it? Yes No

13. Limiting witnesses' evidence

Do you agree that the list of witnesses should not be reduced *a priori*, but rather by reserving the option to hear further witnesses on an issue if this has not been sufficiently dealt with by prior witnesses? Yes No

14. Documents full disclosure

Do you believe it is appropriate to order unlimited disclosure of documents or very wide disclosure of entire classes of

documents? Yes No

15. Experts nominations

Do you believe that the Arbitral Tribunal should consult with the parties before appointing experts and putting questions to them? Yes No

16. Adjournment of evidentiary hearing

Do you agree that an evidentiary hearing should be adjourned (if the term for filing the award allows it) if a witness is not available (unless he/she is not necessary)? Yes No

17. Parties' depositions

Do you agree that the parties should be heard as witnesses (subject to taking account of their interest in the dispute)? Yes No

18. Delegation

Do you agree that no decision and no material research on a decisive issue and no drafting of a part of the award should be delegated to the secretary to the Arbitral Tribunal or to any assistants? Yes No

19. Deliberations

Do you agree that the case must be decided after a full exchange of views amongst arbitrators, without any prior conclusion or drafting by any of them? Yes No

20. Dissenting opinion

Would you be disturbed by a dissenting opinion? Yes No

21. Costs

Do you believe it is appropriate for a party to recover all its (reasonable) costs, even if it has succeeded only on a part of its claim or only on some of its claims? Yes No

22. Costs

Do you believe that a party is entitled to receive, in case of success, the fees of various law firms which have been involved, even if their work was not absolutely necessary, or of a number of professionals beyond what was necessary for presenting and proving its case? Yes No

23. Costs

Do you believe that a party is entitled to be paid the contingent fees, which it has undertaken to pay in favour of its counsel, even when they exceed reasonable fees computed on another basis? Yes No

24. Questions to the parties

I enclose a questionnaire to the parties

(date and place)

(name)

QUESTIONNAIRE

to the parties to arbitral proceedings administered by the European Court
of Arbitration enclosed to the CEA Arbitrator's Pledge

between _____ Claimant

and _____ Respondent

1. Do you agree not to contact, and to cause your counsel not to contact, your nominated arbitrator in person or in writing, except officially during the proceedings with copy to the other arbitrators and to opposing counsel? Yes No
2. Do you agree to limit the number of pleadings to the Statement of the Case, the Answer and to a simultaneous After Evidentiary Pleading followed by a simultaneous Rebuttal? Yes No
3. Would you prefer to address the Arbitral Tribunal orally, rather than exchanging a Rebuttal subsequent to the After Evidentiary Pleading? Yes No
4. Do you agree to limit the number of pages of your first pleading to 30 pages and subsequently to refer very succinctly to your previous pleadings without repeating your arguments? Yes No
5. Do you agree that some hearings be held in a place and country different from the venue of the arbitral proceedings and more convenient? Yes No
6. Do you agree to hear by videoconference those witnesses who cannot travel to attend the hearing? Yes No
7. Do you accept that witnesses be contacted and prepared for their testimony? Yes No
8. Do you agree to keep strictly confidential (and to cause your counsel, advisors, managers, employees and agents to do so) the file, the facts, the documents, the evidence of these arbitral

proceedings and the reasons of the award? Yes No

9. Do you agree to conduct, and to cause your counsel to conduct, these proceedings in a manner which limits the duration of the proceedings to 9 months, maximum 15 months and to avoid the production of documents and the calling of witnesses who are unnecessary or irrelevant, restraining motion practices, delays, vexatious or repetitive conduct, and in general any overlawyering; and do you accept to pay to the other parties all legal costs caused by a breach of such commitment, even in the case of final success in the dispute? Yes No

10. Do you undertake to promptly reimburse any other party which should itself pay, in the absence of your own payment, your share of any advance requested by the European Court of Arbitration or its local competent chapter (if any) for the proceedings; and to recognize that the other party shall be entitled to an *ex parte* summary judgment, or other summary proceedings, for such repayment? Yes No

11. Do you agree that the arbitrator shall issue as soon as possible an award for the part of a claim or of a cross-claim which is undisputed or manifestly well grounded? Yes No

12. Do you agree that the award be signed by the last arbitrator in the place which is the venue of the proceedings ? If not, where would you like the award to be made? Yes No

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