Arbitrators: Umpires or Epistemic Fact-Checkers?

Manuel Conthe (Independent Arbitrator)

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The long debates about the pros and cons of party-appointed arbitrators, as opposed to the institutions appointing all three arbitrators, have missed a far more important distinction which bears on a tribunal's effectiveness to decide a case in a fair manner: how arbitrators see their role in determining the facts of the case.

In this post I will start by explaining the key distinction between "umpire arbitrators" (those who sit passively like mere umpires in a legal fight) and "epistemic fact-checkers" (those who make a deliberate effort to understand the facts of the case, as a precondition for determining the applicable contractual clauses and norms). I will argue that most arbitration rules empower arbitrators to act proactively in determining accurately the facts of the case. However, even if criticisms of the epistemic approach are wrong, several practical factors (including the fear of big law firms of "losing control of the case") drive a Darwinian selection process among arbitrators which makes umpires the dominant type. My conclusion is that an epistemic

attitude in arbitrators is nevertheless necessary to increase public confidence in arbitration as a means to solve disputes while achieving substantive justice.

Umpires vs Epistemic Fact-checkers: The Distinction

The concept of umpire arbitrators draws on the "sporting theory of justice" which Roscoe Pound described in his 1906 speech on "The Causes of Popular Dissatisfaction with the Administration of Justice":

> "In America we take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference".

The alternative approach was described by Italian law professor Michel Taruffo in "*La prova dei fatti giuridici*" in 1992. For Taruffo "the truthfulness of the facts is a necessary condition for justice, under any legal definition of a fair decision". He quotes approvingly US legal realist Jerome Frank's saying: "A legal decision cannot be fair if it is based in a wrong determination of the facts".

Many arbitration rules empower arbitrators to act in an epistemic manner. For instance, Article 25.1 of the ICC Rules provides: "The arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means". In a similar vein, Article 3.10 of the IBA Rules on the Taking of Evidence states that "at any time before the arbitration is concluded, the Arbitral Tribunal may (...) itself take any step that it considers appropriate to obtain Documents from any person or organisation".

In spite of such institutional support, the epistemic approach is not the dominant one, because (i) it is seen with suspicion on theoretical grounds and (ii) there are practical factors driving arbitrators to act as umpires.

Criticisms of the Epistemic Approach

Critics of the epistemic approach frequently label it as "inquisitorial". But

this is an unfair characterization: in civil proceedings judges (and arbitrators) do not enjoy the autonomous investigative powers typical of criminal proceedings; and they are strictly bound by the parties' prayers for relief.

Critics also argue that the epistemic approach does not respect the principle of the "burden of proof". In their view, arbitrators should not substitute for, nor assist, the party bearing that burden: they should just assess "the evidence", as provided by the parties.

In my experience, this view is unrealistic: the job of the arbitrator when assessing the "evidence" is almost always to make sense of a set of facts which has been provided by the parties in a disjoint, partial and biased manner, as part of "stories" which do not reflect the full truth. It is indeed not unusual for the parties to engage in "paltering", i.e., creating a misimpression by means other than uttering literal falsehoods (for instance, by presenting the facts of a case in a selective manner and omitting key ones).

Thus, in order to figure out what facts have been established and whether the burden of proof has been successfully met, the arbitrator has normally to piece together the fragments of evidence supplied by the parties and arrive at a comprehensive view of the facts of the case. This is far from an "inquisitorial" approach: the right parable is the Hindu-Buddhist tale of "the elephant and the five blind men", in which five blind men provide true but partial and often misleading evidence on the object or animal they have being groping and it is for the impartial observer -the arbitrator- to infer that the blind men have met in fact an elephant.

Most of the time epistemic fact-checkers need not ask, on their own, for additional evidence (something which, incidentally, as already indicated, most of the arbitration rules allow): it is enough for them to study carefully the evidence supplied by the parties; consider facts which the parties may have deliberately glossed over or inadvertently overlooked; fight off cognitive biases that the parties may have, either inadvertently or deliberately, instilled in their minds; and come to a logical conclusion about the legally and contractually relevant facts. This requires a deliberate, pro-active effort from the arbitrator, who cannot sit passively as a pure "umpire".

The crucial point is that, to give parties a chance to challenge any tentative results of an arbitrator's epistemic efforts, protect their right of defense

and avoid “surprises” in the award, arbitrators should:

1. Raise the relevant issues when addressing witnesses, experts or counsel during the hearing;
2. Make available to the parties a list of issues which, even if not discussed by the parties, may be relevant to the tribunal, and invite them to address them in a specific round of submissions or in their post-hearing briefs.

Subject to that, arbitrators can make use of any piece of evidence supplied by the parties, even if it was not mentioned by any. The fact that any preliminary finding benefits one of the parties is not a valid reason not to bring it to their attention. Arbitrators are indeed entitled to study all the evidence filed or heard during the proceedings, not only the paragraphs or arguments mentioned by the parties in their pleadings. The arbitrators’ duty to establish the relevant facts before deciding the case should trump any qualms about the appearance of favoring any of the parties.

Factors Favoring Umpire Arbitrators

In my experience, there are at least three practical factors which drive arbitrators to act as umpires and explain why umpires are over-represented in the arbitrators’ pool.

1. Counsel seldom like epistemic arbitrators

This is so because if the arbitrators’ epistemic fact-checking runs counter to their party’s interests, counsel will consider partisan the arbitrators’ behavior; but even if it favors their case, counsel will be loath (particularly if representatives of the party are present at the hearing!) to hear from the Tribunal good arguments that they should have made themselves.

My hunch is that counsel, and particularly big law firms, have a distinct preference for umpire arbitrators, as they do not pose the risk that counsel “lose control” of their case, always their worst nightmare.

2. In tribunals, umpire arbitrators dislike epistemic arbitrators

Typical expressions of such dislike are:

> “It is not our job to do the counsel’s work”

> "Your argument may be right, but the Party [which it favors] did not make it"

Epistemic arbitrators have often a hard time in tribunals chaired by umpire arbitrators, as they may end up in a minority position, particularly when the chair does attempt to integrate the different views within the tribunal, has not studied in detail the evidence, or, even worse, refuses to mention in the award facts which undercut the "story" embraced by the majority. Tribunals work more effectively when chaired by epistemic arbitrators.

3. Additional reasons may drive arbitrators to act as umpires

First, the umpire approach may be ingrained in the arbitrators' legal culture and their view of the rules on the "burden of proof", even if this passive approach is hardly consistent with arbitration rules such as Article 25(1) of the ICC Rules.

Second, arbitrators may not want to antagonize counsel, particularly big law firms (which have a natural edge over opposing counsel of lesser quality). Arbitrators know that acting in an epistemic manner (e.g. asking too many questions during the hearing) may cast a shadow on their professional future.

Finally, the umpire attitude may be the result of sheer laziness or an excessive workload: it may serve as an alibi for arbitrators who, not having the time or inclination to study thoroughly the arbitral file, hide that limitation under the fig-leaf of "prudence" or "impartiality".

My Conclusion

Pound and Taruffo saw the administration of justice not just as a mechanism to solve disputes, but of achieving also substantive justice. In my view, those twin objectives apply to arbitration as well: thus, promoting an epistemic attitude among arbitrators will increase the confidence in arbitration as a mechanism to both resolve disputes and render justice.