
[PREFACE]



SOME LIKE IT HOT...

By José Miguel Júdice

Arbitral Tribunals are different animals as compared with Judicial Courts. This does not intend to mean that Tribunals are more qualified technically, specialized, efficient, fact specific, pragmatic, open minded and business oriented, let alone less prone to formal decision that don't bring peace to the parties conflict once and for all. This is often true, albeit the experience of judges, their independence and impartiality, the honesty, of the very large majority, create at least in Portugal a high pattern that arbitrators should use for inspiration.

The point here is clearly another and is actually related to counsel behavior in front of Judges or Arbitrators. As a rule of thumb, if counsel thinks that Judges and Arbitrators (at least in the international arena) are the same species of professionals with similar or equivalent reactions, probably they are missing the point and making mistakes that might jeopardize or complicate even a strong case.

A Judge is a professional that begins his/her career very young, quite often without any experience of different ways of practicing law, insulated from lawyers, and they don't want to face appeal court decisions that would be avoided if they accepted all the lawyers behavior albeit time consuming, irrelevant or confrontational. They are normally prepared to accept waste of time, tricks and fight on peripheral aspects of the case as for them this is lawyers' way and when made in a sophisticated mood even brings good moments to enjoy and remember, as if it was theatre and therefore the show requested acting. They have a fixed salary and see no advantage to an entrepreneurial approach to decisions and are proud of it. When faced with an imbalance of quality and preparation between each side of the bench they instinctively protect the weaker party and tend to disregard good advocacy as a litmus test for each party's case.

Arbitrators have diversified past experiences, quite often

work or have worked as advocates, are business oriented, are horrified with waste of time, have an agenda full of commitments, are neither paid by fixed salary (as judges) nor by the hour (as lawyers). They have a vested interest in being efficient, prefer to solve the case once and for all, and are not willing to find a formal way out that provides for an award but keeps the conflict alive and unsolved. And they are older and quite often with an ego big enough to be unprepared to accept confrontation, without sound reasons, with younger lawyers.

They know by heart the usual counsel's tricks, are familiar with dilatory maneuvers, expect that well remunerated professionals will be very well prepared and don't consider his/her duty to protect the possible weaker party or the one that has been crazy enough not to appoint qualified and experimented lawyers. They are trained to separate what is really nuclear for the decisions from the paraphernalia of details and peripheral issues, that clients press counsel to consider, that have been from a personal point of view outrageous but have almost nothing to do with what is at stake.

However, counsels in arbitration - as men, so the novel says - come from Mars. The *cursus honorum* as a rule begins with litigation in national courts, where the name of the game is fighting, protesting, objecting, wasting time, defending the indefensible, pressing the judges, appealing against his/her decisions until they manage to have the judge paralyzed and prepared to accept anything that the lawyers pretends, working for the gallery or for the pleasure of the unprepared client. As if this was not enough, Judges know that they risk having their decisions annulled by appeal courts, and therefore take all the care to avoid any small mistake that will bring a black ball to his/her career.

When these lawyers come to the arbitration arena, they tend to think of arbitrators the same that they use to think of judges, forgetting all the differences mentioned above, let alone the fact that arbitral awards are not appealable and setting aside is almost impossible unless due process has not been respected. And quite often these lawyers begin making the usual mistakes, jeopardizing the case, creating bad will, confusing the arbitrators about strong points they could have evidenced for the case by mixing them with irrelevant ones, and letting the other side to make all the possible points by being just tough, professional and focused, and not histrionic, aggressive and plainly out of touch.

Yes, some like it hot. And normally Clients love it, as they look to lawyers as gladiators or mercenaries (well) paid to fight and are not prepared to understand restraint, coolness, efficiency. Client enjoy the smell of blood when confronted and lawyers are normally more than happy to deliver. If in the end it turns wrong, the judge was, inevitably, incompetent (but arbitrators have been in a way or another nominated by lawyers...).

So, my good Colleagues, do as you like it. Have it hot. Work for the audience. Provide fresh blood and adrenaline to your Client. And you may finally receive what you deserve...

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