How to never get an(other) arbitral appointment

Eighteen months ago, the late Edmund King QC penned a missive to the profession entitled "How to Lose a Case". I regret that I never had the privilege of meeting Mr King. The outpouring of sadness at his untimely death and the general recognition that he was one of the greatest lawyers of his generation bear testament to him. For me, he was a silk who nailed what really works in litigation (and arbitration) and encapsulated it all in his missive. Seriously, if you ever act as counsel, take a moment right now to read it.

What follows is intended as a tribute to Mr King and to his originality of thought.

Just as Mr King couldn't give a homily on how to win a case, I can't tell you how to get an arbitral appointment. Yet, in his words *"it can be helpful to set out ways to do things badly. Both so you don't do them yourself, and so you can give your ~~opponent~~ learned friends the chance to screw it up royally. It's surprising how often people do."* It is in this spirit that I set out how, in my view, you can make sure you never get an(other) arbitral appointment.

1. **Act as a lone wolf**

Being a member of a tribunal requires an arbitrator to shelve the ego and work as a team player. Publicly contradicting your co-arbitrators unsettles counsel – and your co-arbitrators. Scoring points in emails to your tribunal members breeds discontent. Throwaway comments become less throwaway if uttered in zoom meetings rather than in person, where your body language may soften them. Think before you speak. Monopolizing cross examination may make you feel skilled, but it is the quickest route to dissatisfaction on both sides of the table. Stage whispers during hearings are unhelpful and distracting for all. The same goes for huffing, sighing and even the writing of notes to your co-arbitrators accompanied by dramatic gestures. (Work on your poker face). Be tactful when raising issues in the tribunal break-out room. Take and give constructive feedback with a smile and an appreciation that everyone has their own challenges and issues. It is your job as an arbitrator (and particularly as a chair) to navigate them smoothly, courteously, and efficiently.

2. **Ignore technology**

The absolute minimum that parties should be able to expect is that their tribunal is technologically competent, cost conscious and efficient. Make sure you have covered the basics before every virtual hearing: do you have sufficient bandwidth? Is your camera set to

the right height? Do you have the correct background? (Backgrounds can enhance or detract, make sure you know what you are hoping to achieve). Have you got a sufficient number of screens? Have you set up a robust e-filing system, can you navigate documents easily? Take time to familiarize yourself with the various hearing platforms and get training in areas where you need it. Be on top of cyber security with regular health checks on your IT system and learn to mark up documents on screen. Be robust in your document destruction policy. Be fastidious about your conflict database.

3. Leave the award until the end of the arbitration

I am not going to trot out the trite phrase *"justice delayed is justice denied"* (although I just did) but I will point out that it isn't going to get easier the longer you leave it. Get into the habit of establishing a structure to your award early on as the case evolves, set aside a week after the hearing while it is still fresh in your mind, while the transcript is still relatively easy to navigate (I note down specific phrases used by witnesses during the hearing which helps me get quickly to their evidence), above all, just get on and write the award. Procrastination is not your friend. Be available promptly for deliberations after the hearing and establish short periods of time for submission of any post-hearing briefing.

4. Assume that you know as much about the case as counsel

Never second guess why counsel is running an argument, why they are making an application, why they are putting a witness on. You only know the story that counsel have seen fit to share with you. There will be at least two other novels going on in parallel in the background. Respect the fact that you will never fully know or understand the plot line or characters that appear in them.

5. Pay lip service to diversity

There is a risk that we are becoming weary of the efforts to address diversity in our profession. We mustn't be. Research shows that diversity leads to better decision-making. Being exposed to others who are socially different (outside our affinity groups) causes us, as individuals, to work harder cognitively, thereby making better, more accurate decisions.

There have been multiple studies documenting this effect. One study looked at the value of cognitive diversity on solving problems. Teams were given the task of solving a murder mystery. They were given plenty of complex material to assimilate, including alibis, witness

statements, list of suspects, forensics and so on. In half the cases the groups were composed of four friends, the other half were composed of three friends and a stranger. The teams with an outsider performed much better than the other teams. They got the right answer 75% of the time compared with 54% from those in the other group and 44% for individuals working alone. But note one thing – the participants in the two groups had very different experiences of the task. Those in diverse teams found the discussion cognitively demanding. There was plenty of debate and disagreement because different perspectives were aired; they got to the right decisions, but they were not wholly certain about the decision they reached. Yet the homogeneous teams' experiences were very different. They found the session more agreeable because they spent most of the time agreeing with each other. They mirrored each other's perspectives and although they were more likely to be wrong, they were far more confident about being right. They were not challenged on their blind spots so didn't get a chance to see them. They were not exposed to other perspectives so became more certain of their own. This is the danger with homogenous groups: they are more likely to form judgments that, in the words of the study *"combine excessive confidence with grave error."* Sound familiar? Actively seek out diverse candidates to sit with and to interact with, your decision making will improve as a result.

6. Ignore the facts

Mr King said *"Every single case is only ever won on the facts, even the ones that supposedly aren't. If the facts were worse, the judges would bend the law to do justice and sleep at night."* As an arbitrator, I am not sure I would agree that I would bend the law to do justice, but in fact, that is what a study by Professor Joshua Karton into arbitral decision making effectively concluded.[1] He reviewed published international arbitral awards and interviewed leading commercial arbitrators about their practices and found that the practice of interpreting contracts without reference to the governing law is widespread. When the governing law did not fit the arbitrators' preferred method of interpretation, he found that a tribunal would *"depart from the law"* or *"creatively interpret it"* to make it fit. His findings were supported by patterns of decisions in published awards and the consistency of responses given by the arbitrators he interviewed. Professor Karton acknowledged that *"robust generalization"* about international commercial arbitration could not be made; but his research showed that arbitrators' *"preferred*

[1] Joshua Karton, 'The Arbitral Role in Contractual Interpretation' (2015) Journal of International Dispute Settlement.

interpretative method" was *"subjective interpretation supported by liberal consideration of extrinsic evidence"*: essentially, proving Mr King's point. As an arbitrator, and quoting Mr King again, you need to *"see the case through the factual lens",* you can only do that by truly understanding and familiarizing yourself with the record and by recognizing and addressing any unconscious sympathy you may have towards one party or the other.

7. Delegate and never say no

Mr King was short and to the point on using other people's chronologies: *"If you prepare your own, you know what happened. If you don't, you don't."* I feel the same way about delegating parts of the award and relying on summaries of evidence. It may be daunting and occasionally grueling, but nothing prepares you better for a hearing than wading through exhibit bundles and preparing your own notes and chronologies. In terms of managing appointments, you owe a duty to the parties to be available to them. Meryl Streep famously worried that she would never get another acting role and I suspect arbitrators have this worry too, but you simply can't accept appointments if it means you will not be available for a hearing until 2024. Say no. Occasionally.

8. Ignore the real world

For too long international arbitration has seemed to float above commercial realities, adopting anachronistic and wasteful practices (paper bundles? in 2022? flying across the world to interview a witness?) without any understanding of the broader financial and environmental cost of our choices. Those days are over. The modern arbitrator cannot get away with ignoring climate change and other social issues both at the practice level and how they impact global commerce. Nor can they ignore the costs of an inefficient process. An arbitrator must have a good understanding of the likely costs of phases of an arbitration and running an efficient arbitration is key to keeping costs under control.

9. Be too grand to worry about bundles

As Mr King said *"bundles are not glamorous"* but they can transform the way a case is run. Get involved at the preliminary hearing by specifying how documents are to be submitted. If you can establish good bundle behaviour early on the case you will be glad you did when it comes to the hearing and award. Ensure you file the submissions and evidence in a sensible way as they are submitted. Insist that the famous core bundle really is a core bundle. Then

dive in to the bundles to prepare for the hearing. Just like time spent in reconnaissance time spent with the bundles in advance of the hearing is seldom wasted.

10. Follow, don't lead

In a recent speech at the IBA Arbitration Day 2022 arbitrator Juliet Blanch likened an arbitrator to the conductor of an orchestra. As she noted, the *"conductor directs the process and unifies the sections of the orchestra. The tribunal should do the same in the arbitral process."* The arbitrators should be, in Juliet's words *"masters of the process and not the servants"*. Mastering the process requires leadership. Juliet considered *"There are a number of elements of leadership and management and different studies identify different characteristics but the elements that I think are relevant to arbitrators are the following: personal responsibility and integrity, motivation, commitment, knowledge, communication, judgement, dependability, confidence, focus, vision, resilience, decisiveness, humility and empathy."* (no pressure then!). We don't place enough emphasis on emotional intelligence, cultural awareness, communication and case management skills when considering arbitral candidates. It is said that a good leader is *"one who knows the way, goes the way, and shows the way"*.[2] Being able to show the way (and not impose the route) in an arbitration requires an arbitrator to possess a myriad of soft skills, diplomacy and tact.

[2] John C Maxwell