



Enhancing Arbitrator Selection: Using Personality Screening to Supplement Conventional Selection Criteria for Tripartite Arbitration Tribunals

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1. INTRODUCTION

I have experienced the joy and profound satisfaction of arbitration by serving on tripartite panels where the three panellists were so compatible with each other that the process proceeded extraordinarily effectively and efficiently to conclusion—and the aggravation where they were not. Personality clashes can exist within a panel. When clashes arise, internal strife may occur which causes the arbitrators to needlessly squabble with each other, often over just seemingly petty, innocuous matters.

Where these clashes intensify and repeatedly occur, the panel wastes valuable time and runs a real risk of unduly delaying the proceeding and needlessly incurring significant added costs to the parties. Should such clashes become sufficiently severe, the result can be similarly extreme: all hell breaks loose with the arbitrators clawing at each other like a bunch of cats, all the while accomplishing nothing of any real use. Gridlock becomes a distinct possibility.

Very often, arbitrators will be selected to serve on a tripartite panel because of their credentials but without any familiarity with—let alone any prior experience of serving with—their co-panellists. Three people, with little—and, more often than not, no—working knowledge of each other are basically thrown together to fully function as a cohesive unit. Aside from feeling honoured and even humbled by the opportunity, are those arbitrators then the least bit concerned that their personalities may clash with those of their co-panellists? At that point, probably not. In reality, they should.

2. ARBITRATOR SELECTION: ACQUIESCENCE THROUGH THE “ARBITRATOR ASSUMPTION”

At its crux, the quality of an arbitration is directly governed by the quality of the arbitrators.¹ If for whatever reason the wrong arbitrators are selected, the arbitral process is likely to be problematic and ultimately unsatisfying for the parties.

The ability of a party to select its arbitrator, in light of whatever qualifications it deems essential, is crucial: a key advantage that markedly distinguishes arbitration from litigation. As wisely noted by a pair of commentators²:

“Each side’s selection of ‘its’ arbitrator is perhaps the single most determinative step in the arbitration. The ability to appoint one of the decision-makers is a defining aspect of the arbitral system and provides a powerful instrument when used wisely by a party.”

¹ “It is above all the quality of the arbitral tribunal that makes or breaks the process.” Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 3rd edn (London: Sweet and Maxwell, 1999), p.190. “The arbitrator is the *sine qua non* of the arbitral process. The process cannot rise above the quality of the arbitrator.” J.D.M. Lew, L.A. Mistelis and S.M. Kroll, *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003), p.223.

² Doak Bishop and Lucy Reed, “Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration” (1998) 14 *Arbitration International* 395. Though this statement was made in the context of international arbitration, I believe it is equally applicable in domestic arbitration.

Yet, for all its obvious benefits, arbitrator selection carries considerable risk: risk that doing so will consume excess time and, of greater concern, risk that the wrong person will be chosen. The former will just delay the process, sometimes significantly, but the latter can seriously jeopardise the entire arbitration.

Arbitrators are professionals. One does not rise to the level of serving as an arbitrator—and justly command the respect, admiration and trust of disputants, colleagues in the legal field and society in general—without first attaining a high level of experience, expertise, competence and training, coupled with a comparable reputation.

Often, in selecting panels, each of two opposing parties designates one arbitrator, with those two arbitrators then choosing the chair of the tribunal³ or, as a default measure, an institution doing so.⁴ Variations include situations where the parties give discretion to an institution to choose all three panellists, including instances where more than two claimants (or respondents) are involved; an institution permits all claimants (likewise respondents) to collectively choose a panellist⁵; and where the parties themselves choose all the panellists.⁶

One recurring truism of arbitration, frequently encountered in practice, is that selecting a proper tripartite panel with the requisite experience, expertise, availability and freedom from conflicts, even with assistance of an institution, can be difficult, time-consuming and problematic. Perhaps in recognition of this, I have frequently observed a seemingly self-serving, historically-rooted and deeply-entrenched assumption that appears to be repeatedly and widely invoked by parties, counsel and institutions: once competent arbitrators are selected, no matter who they are, then, just because they are professionals, they can work together—the arbitrator assumption. In practice, when an inquiry is made regarding temperament of a candidate arbitrator, it is reflexively met by the target of the inquiry simply stating the arbitrator assumption. All those concerned with the task of selecting the arbitrators then readily accept the statement. That immediately terminates any further inquiry into temperament. The parties implicitly agree that nothing further needs to be asked on this issue, so nothing more is. To my knowledge, there is no actual, underlying causality that links an arbitrator, by virtue of merely being a “professional”, with a demonstrated ability of not experiencing sufficiently serious inter-personal clashes with any other such individual which would otherwise frustrate their collaboration. Thus, the arbitrator assumption seems misguided. Yet, it is apparently still widely used and followed. Why? Perhaps: (a) arbitration counsel inferentially draw from experiential and anecdotal evidence—both theirs and of their colleagues—that the likelihood of an arbitration panel being so dysfunctional, perhaps to the point of being stymied, is so low that, for all practical purposes, the risk can be ignored; and/or (b) accurately assessing soft-qualities of any individual candidate, while obviously

³ Commercial Arbitration Rules and Mediation Procedures, American Arbitration Association (AAA) rr.12 and 13 (<http://www.adr.org/sp.asp?id=22440> [Accessed December 4, 2009]) (AAA Rules); Judicial Arbitration and Mediation Services (JAMS) (<http://www.jamsadr.com/rules-comprehensive-arbitration/> [Accessed December 4, 2009]) (JAMS Rules) r.15(c), “Arbitrator Selection and Replacement”; International Institute for Conflict Prevention and Resolution, 2007 Rules for Non-Administered Arbitration (<http://www.cpradr.org/ClausesRules/2007CPRRulesforNonAdministeredArbitration/tabid/125/Default.aspx> [Accessed December 4, 2009]) (CPR Rules) r.5.2.

⁴ ICC Rules of Arbitration art.8(4) in effect as of January 1, 1998 (ICC Rules) (http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf [Accessed December 4, 2009]).

⁵ ICC Rules art.10(1).

⁶ AAA Rules r.11(c) CPR Rules r.5.1. See also, rr.7 and 8, LCIA Arbitration Rules, January 1, 1998 (http://www.lcia-arbitration.com/ARB_folder/arb_english_main.htm [Accessed December 4, 2009]). For a succinct summary of approaches in selecting three-person tribunals, see Lew, Mistelis and Kroll, *Comparative International Commercial Arbitration*, 2003, para.4.2, pp.248–252.



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useful and desirable,⁷ is nevertheless difficult in practice. Consequently, whatever “soft” information can be obtained for a candidate tends to be anecdotal perceptions of someone who previously appeared before that arbitrator. In light of a current growing pool of candidates who can hear a matter, as well as counsel having little or no prior arbitration experience in a given substantive and/or geographic area, counsel making inquiry about an arbitrator often has no personal experience of that arbitrator and consequently solicits the perceptions of another counsel who has. Not only is the resulting evidence rather subjective but also it becomes progressively more unreliable as the connection between the two counsel becomes increasingly distant. By eliminating any need for the parties or their counsel to consider personality and inter-personal compatibility issues, the arbitrator assumption simplifies and expedites selecting and constituting the panel, so that the arbitration can move forward to the next phase.

Yet, just because arbitrators are human, can we really work effectively and efficiently with every one of our peers no matter who that person is? Each of us has his or her own unique set of foibles, personality traits, temperament and character flaws, some readily apparent, others latent, that collectively define us: we are individuals. And yet it is just that individuality which—during the course of a relationship—can lead to unexpected interpersonal conflict and tension, possibly to the point of destroying the relationship. Society sees this across the entire spectrum of multi-person activity. Are arbitrators somehow shielded simply because they are “professionals”? Hardly. We are no more or less human than anyone else and thus subject to the same psychological characteristics and consequences. Thus—in light of human nature—should the risk of a dysfunctional panel be ignored, particularly in a high-stakes dispute where any appreciable delay—let alone that occasioned by totally re-starting the arbitration with a replacement panel—is met with additional cost and disruption and delay?

But, how can parties and counsel ameliorate the risk? Not through institutional selection rules. They appear to implicitly accept, on face value, that the risk of a dysfunctional panel is negligible and go no further. This reinforces and perpetuates the validity and reliability of the arbitrator assumption to both counsel and parties alike. And that is where the problem lies.



3. INSTITUTIONS—OUTWARDLY OBLIVIOUS

In conjunction with its “Enhanced Neutral Selection Process for Large, Complex Cases”, the American Arbitration Association (AAA) currently offers the following interview-based service for use in selecting arbitrators⁸:

“The AAA case manager will work with the parties to develop an interview protocol in order for the parties to have an opportunity to present questions to potential arbitrator candidates, either through a telephone conference or in writing. Examples of interview question topics might include: industry expertise, relative experience in similar disputes, the arbitrator’s procedural handling practices, and any other questions that the parties would find helpful to the selection process.”

⁷ R.G. Bender Jr, “Critical First Steps in Complex Commercial Arbitration” (2009) *Dispute Resolution Journal* 28, 32: “their demeanor should be professional at all times. Arbitrators, like judges, should possess a ‘judicial temperament’” defined, by the AAA (citing *ABA Standing Committee on the Federal Judiciary: What it is and How it Works* (ABA, 2007), p.4), as “compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias and commitment to equal justice under the law”. Arbitration providers are emphasising the need for case management skills and organisational and diplomatic skills, a calm demeanour and understanding of human behaviour and the ability to be creative and flexible, *ABA Standing Committee on the Federal Judiciary: What it is and How it Works*, 2007, p.33.

⁸ American Arbitration Association, “Fact Sheet for Enhanced Neutral Selection Process for Large Complex Cases”, current as of June 2009.

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Once the parties—in conjunction with the case manager—determine a set of appropriate arbitrator qualifications, an AAA case manager will then select candidates from AAA panels, for those matching the set and then screen all of them for conflicts, availability or both,⁹ with presumably the panel ultimately being chosen from those candidates who pass the screening process.

There is no mention of personality types, issues of interpersonal compatibility, or generally any salient psychological characteristic reflective of whether a candidate is likely to be able to work with any other candidate. Certainly, parties have leeway under the enhanced neutral selection process to make such inquiries but—since no suggestion along those lines expressly appears—it is unlikely that any party will do so. Hence, neither the resulting panel nor the parties will benefit from any responses which candidates would have made to any such inquiry.

While the CIArb approves interviewing prospective arbitrators, its recently issued guidelines—which contain express references to discussing arbitrator experience and expertise and other permitted topics during an interview—do not mention psychological selection factors.¹⁰

JAMS r.15(b) for default arbitrator selection is more succinct than the AAA¹¹:

“If the Parties do not agree on an Arbitrator, JAMS shall send the Parties a list of . . . ten Arbitrator candidates in the case of a tripartite panel. JAMS shall also provide each Party with a brief description of the background and experience of each Arbitrator candidate.”

As is CPR in its r.6.4(b) of its non-administered arbitration rules¹²:

“CPR shall submit to the parties a list, from the CPR Panels, . . . of not less than seven candidates if two or three arbitrators are to be selected. Each list shall include a brief statement of each candidate’s qualifications.”

WIPO art.19(b)(i) utilises a similar list-based selection process to JAMS and CPR and—somewhat similar to the CIArb—invites parties to specify desired candidate qualifications but provides no guidance as to the nature of those qualifications, let alone whether they involve use of any psychological factor¹³:

“The Center shall send to each party an identical list of candidates. . . The list shall include or be accompanied by a brief statement of each candidate’s qualifications. If the parties have agreed on any particular qualifications, the list shall contain only the names of candidates that satisfy those qualifications.”

Simpler yet, both the LCIA and ICC leave the default method of selection to the discretion of the parties, though, where appropriate, party nationality, language and other salient factors are taken into account¹⁴:

⁹ American Arbitration Association, “Fact Sheet for Enhanced Neutral Selection Process for Large Complex Cases”, current as of June 2009.

¹⁰ “Practice Guideline 16: The Interviewing of Prospective Arbitrators” (June 19, 2006) available at [http://www.ciarb.org/information-and-resources/16 The Interviewing of Prospective Arbitrators.pdf](http://www.ciarb.org/information-and-resources/16%20The%20Interviewing%20of%20Prospective%20Arbitrators.pdf) [Accessed December 4, 2009]; discussed in H.R. Dundas, “Guidelines for Interviewing Prospective Arbitrators” (2009) 2 *NYSBA New York Dispute Resolution Lawyer* 33 but which similarly omits mention of any such factors.

¹¹ JAMS r.15(b).

¹² CPR r.6.4(b).

¹³ WIPO Arbitration Rules art.19(b)(i).

¹⁴ LCIA r.5.5.

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“The LCIA Court will appoint arbitrators with due regard for any particular method or criteria of selection agreed in writing by the parties. In selecting arbitrators consideration will be given to the nature of the transaction, the nature and circumstances of the dispute, the nationality, location and languages of the parties and (if more than two) the number of parties.”

ICC Rules art.9:

1. In confirming or appointing arbitrators, the Court shall consider the prospective arbitrator’s nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals and the prospective arbitrator’s availability and ability to conduct the arbitration in accordance with these Rules. . . .
2. The Secretary General may confirm as co-arbitrators, sole arbitrators and chairmen of Arbitral Tribunals persons nominated by the parties or pursuant to their particular agreements, provided they have filed a statement of independence without qualification or a qualified statement of independence has not given rise to objections.”

Hence, to the extent various institutions specify specific selection processes, such as the AAA, CPR and WIPO, or guidelines, such as the Chartered Institute, those focus on substantive expertise and arbitration experience; while others, such as the LCIA and ICC, basically delegate the entire process to the parties.

The former approach is deficient in that it fails to expressly mention any issue of consideration of interpersonal compatibility, leaving the parties to raise the issue during discussions with the institution. The latter approach, similarly deficient, leaves the entire process to the parties. Regardless of which approach is followed—even if the issue were to be raised by either of the parties or its counsel—doing so is likely to be met by the arbitrator assumption and dropped.

What is missing is consideration of any psychological characteristic reflective of whether a candidate is likely to be able to work with any other candidate arbitrator under consideration. So, what to do?

4. RECOGNITION OF THE PROBLEM BUT NOT THE SOLUTION

The problem has undoubtedly existed for millennia: probably for as long as arbitration itself has been practised. In 1994, one commentator recognised it, though rather superficially¹⁵:

“All arbitrators of course should be intelligent, experienced in resolving disputes and fair minded. However, there are other important attributes. When selecting a party appointee who will serve with two other arbitrators. . . the appointee should be a person with an ego and temperament compatible with the task of working effectively with other arbitrators.”

The commentator posed one solution by simply excluding from selection those with temperaments he viewed as “dangerous”:¹⁶

“[T]he ‘Ego-Tripper’ likely to treat the office as an opportunity to ‘flex some muscle’ in support of his or her own pet views; the ‘Superbarrister’ who may be unable to resist the temptation to take over the advocacy role for one side (or even both); the ‘Superjudge’ who was a bully on the bench and has learned to like the taste of it, often causing counsel to jump through unnecessary hoops of the arbitrator’s creation; the ‘White Knight’ on a

¹⁵ LCIA r.5.5.

¹⁶ J.H. Carter, “The Selection of Arbitrators” at the WIPO Worldwide Forum on the Arbitration of Intellectual Property Disputes (Geneva: WIPO, March 3–4, 1994), available at <http://www.wipo.int/amc/en/events/conferences/1994/carter.html> [Accessed December 4, 2009].

quest for justice and truth, whether or not it is to be found within the applicable procedural framework, who may inject issues the parties have intentionally excluded or decide on the basis of matters not discussed with the parties; the ‘Whimp’ who is unwilling or unable to keep a sufficiently firm hand on the proceedings to make them run smoothly; and the ‘Unemployed Timeserver’ who may have the ability but lacks the inclination to bring matters to a close; after all, he or she may have nothing else as interesting or remunerative to return to doing.”

Having delineated those individuals to exclude from the entire universe of prospective arbitrators, how does counsel then select proper candidates from those who remain? Ultimately, that commentator advocated nothing more than relying on anecdotal evidence from others in practice, nothing more than what has traditionally occurred in practice:

“With these many dangerous types to avoid, how can parties find the right arbitrators?... Consult widely and think carefully about what is said by those who know the candidate and have seen him or her in action lately.”

Anecdotal evidence can be rather problematic; it may not exist and, when it does, depending on its ultimate source it may be suspect.

In late 2008, another author acknowledged the general need to include “soft qualities and skills” of candidates and extended this to selecting international mediators¹⁷:

“Unfortunately for parties, the identification of suitable candidates and agreement on the appointment of mediators (and arbitrators for that matter) remains firmly embedded in pre-20th century technology: imperfect information transmitted by word of mouth, and what can be gleaned from a curriculum vitae or an initial discussion with the candidate... As with the appointment of arbitrators, what parties really hope to identify in candidates are the soft qualities and skills that are not readily apparent from a curriculum vitae or public listing of the mediator’s name and general qualifications.”

However, an analogy with arbitration has limits. In providing a checklist of what the author proposed as desirable qualities and skills, classified into “The Mediator’s credentials”, “The Mediator’s preferred procedural approaches” and “The Mediator’s cultural preferences”, he omits mention of individual temperament, personality, interpersonal compatibility and other pertinent psychological characteristics. That omission may be warranted since—for the most part—mediation is conducted before sole mediators, with co-mediation rare, particularly in an international context. Psychological characteristics, indicative of whether members of a tribunal can effectively work together and which should influence selection of the arbitrators who will constitute that tribunal are irrelevant to selection of a sole mediator.

So how can the risk associated with relying on anecdotal evidence of such psychological characteristics be reduced?

5. TWO POSSIBLE SOLUTIONS

Two approaches come to mind: first, change the source of the information to one that is sufficiently reliable; secondly, rely on prior successes; the first through personality-type screening and compatibility matching, the second through selection of proven panels.

¹⁷ Michael McIlwrath, “Finding an International Mediator: Identifying Suitable Candidates to Mediate an International Commercial Dispute—a knol by Michael McIlwrath”, December 9, 2008, at <http://knol.google.com/k/michael-mcilwrath/finding-an-international-mediator/3enbsc25u4ay/2#> [Accessed June 4, 2009].

Personality-type screening and compatibility matching

Fortunately, a number of personality screens have been developed to discern general personality-type and to group individuals with compatible types. Once a sufficient pool of candidates has been determined using traditional arbitrator selection criteria, then—through use of a suitable screen—that pool can be further refined down to three individuals with seemingly compatible personalities and temperaments. By so supplementing traditional selection-criteria, the parties may significantly reduce the risk of constituting a panel that may experience interpersonal conflict and tension which might thwart collaboration and effectively frustrate its operation.

A rather simplistic, but nevertheless instructive, classification based on three distinct conflict-handling modes (negotiating styles) is often used to describe behaviour of negotiators faced with conflict: a person competes, accommodates or avoids.¹⁸ Some degree of interpersonal conflict is required for two individuals to fully engage with each other and, by doing so, sufficiently advocate their respective positions and create and capture sufficient value through suitable compromises from whatever is then at stake, so that their respective interests are sufficiently satisfied. Individual negotiating styles can adversely interfere with this process.

To appreciate this, first consider how each of these three modes manifests itself.

Competitors want to win and enjoy feeling purposeful and in control. Competitive negotiators exude eagerness, enthusiasm and impatience. Typically they seek to control an agenda and frame the issues. They stake out an ambitious position and stick to it, and fight back when they are bullied or intimidated in order to get “the biggest slice of the pie”.¹⁹

Accommodators value good relationships and want to feel appreciated. They exude concern, compassion and understanding. Worried that conflict will disrupt relationships, they negotiate—in a smooth fashion—to quickly resolve whatever differences arise. They listen well but may be too quick to give up on their own interests when they fear their relationship may be damaged.²⁰

Avoiders believe that conflict is unproductive. They feel uncomfortable with explicit—especially emotional—disagreement. Whenever they are faced with conflict, avoiders do not compete or accommodate: they disengage. They tend not to seek control of an agenda or to frame issues. They deflect efforts to focus on solutions, appearing detached, unenthusiastic, or uninterested. Though avoidance behaviour has advantages at times—such as commanding attention of others when an avoider finally does speak up—nevertheless, they often shun opportunities to use conflict to solve problems and thus refrain from asserting and advocating their own interests or forcing out those of another side. Like competitors, avoiders may have problems in sustaining strong interpersonal working relationships with others.²¹

These modes interact, sometimes with disastrous results. Two competitors will produce an energetic negotiation, making offers and counteroffers, arguments and counterarguments, and enjoy bargaining just for its sheer fun. But, since both are primarily focused on winning, they are likely to reach a stalemate—or an outright blow-up—because neither is listening to the other. Two competitors need to find ways of framing acceptable compromises.²²

A far different dynamic occurs when a competitor negotiates with an avoider: they infuriate each other. By refusing to engage, an avoider thwarts the competitor’s need for control and totally frustrates the competitor. A competitor, when frustrated, may offer an avoider a concession just to get the latter to negotiate at all.²³

¹⁸ R.H. Mnookin, S.R. Peppet and A.S. Tulumello, *Beyond Winning—Negotiating to Create Value in Deals and Disputes* (Boston: Harvard University Press, 2000), p.51.

¹⁹ Mnookin, Peppet and Tulumello, *Beyond Winning*, 2000, p.51.

²⁰ Mnookin, Peppet and Tulumello, *Beyond Winning*, 2000, p.52.

²¹ Mnookin, Peppet and Tulumello, *Beyond Winning*, 2000, pp.52–53.

²² Mnookin, Peppet and Tulumello, *Beyond Winning*, 2000, p.53.

²³ Mnookin, Peppet and Tulumello, *Beyond Winning*, 2000, p.54.

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The situation is not any better when a competitor negotiates with an accommodator. Accommodators may make significant concessions if only to preserve a relationship and minimise interpersonal disagreements, tension and strife, thus opening themselves to significant exploitation by a competitor.²⁴

When two accommodators negotiate, each will be precisely attuned to the other's need to protect their relationship. But, in doing so, each may fail to sufficiently assert his or her own interests and thus avoid value-creating opportunities that arise out of conflict.²⁵

When an accommodator and an avoider negotiate, little, if anything, results. Should the accommodator accommodate the avoider, both will simply avoid the problem. A negotiation might still succeed if the accommodator could sufficiently restrain his or her emotions to engage the avoider.²⁶

Lastly, if two avoiders attempt to negotiate, both will tend to avoid any interpersonal conflict, thus reducing the possibility of achieving a creative integration of ideas and outcomes.

Why are negotiating styles pertinent to tripartite arbitral tribunals? A panel of three engages in joint problem-solving by negotiating with each other in closed-door deliberations to reach a consensus decision on a procedural or substantive issue. Parties choose tripartite tribunals and incur the substantial added expense because—given the finality of arbitration—they want results that survive a process of intellectual distillation, brought about by vigorous internal debate and testing amongst the panellists, as a sufficient safeguard against an aberrant decision of an arbitrator acting alone. While three-person panels are far from perfect, strength lies in numbers. Panellists negotiate to either persuade their fellow panellists of the correctness of their own views and thus bring either or both of the latter to their side, or allow themselves to be persuaded by their peers. In my experience, at times and just due to human nature, these negotiations can get heated and generate interpersonal conflict and tension, depending on how deeply seated an arbitrator's views and those of the others. Ideally, a skilled arbitrator should focus on the issue, negotiate strongly but remain open to persuasion and, once a consensus is ultimately reached, immediately let the tension and inter-personal conflict dissipate and move on as a united panel to consider the next issue. But, in reality, different negotiating styles can complicate the deliberative process, possibly even frustrate it.

Consider what may result if a tribunal were composed of a competitor, an accommodator and an avoider. The competitor would seek to take command, force his or her agenda on the others, rapidly analyse the issues, decide them all and single-mindedly fight for his or her decisions. The avoider would probably wait, in spite of whatever protestations the competitor might raise, hoping that, through the passage of time, the issues would disappear and thus he or she could avoid deciding the issues altogether. The accommodator, seeking to find agreement with the competitor and/or the avoider, if only to reduce the interpersonal conflict between the other two, would be frustrated by the split between them and, by being forced to take sides with one or the other and at the expense of increasing rather than decreasing conflict, would probably elect to side with neither and do nothing or spend time and energy trying to reconcile the disparate positions—perhaps to the point of jeopardising a productive outcome in order to salvage the relationship. The tribunal would not be able to reach consensus and would be totally stymied.

Would these clashing negotiating styles be revealed through curricula vitae? No. Through candidate interviews centring on substantive and arbitral experience and expertise? No. Through anecdotal assessments of those who have appeared before a candidate arbitrator? No. Why? For the most part, these styles would manifest themselves only during panel deliberations. Deliberations are highly confidential without either counsel or the parties having access. Outside the deliberations, a tribunal—being a master of disguise—takes on

²⁴ Mnookin, Peppet and Tulumello, *Beyond Winning*, 2000, p.54.

²⁵ Mnookin, Peppet and Tulumello, *Beyond Winning*, 2000, p.54.

²⁶ Mnookin, Peppet and Tulumello, *Beyond Winning*, 2000, p.54.

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a stoic and cohesive appearance to hide any indications of internal strife, lest they alarm counsel who appointed them. Would these clashing styles be revealed through a suitable personality screen and then avoided by seeking arbitrators with compatible temperaments and negotiating styles? Quite possibly.

Psychology literature teaches a rich variety of personality assessment techniques (sometimes referred to as “personality tests”) aimed at discerning personality type. This article reflects on four instruments (tools) which appear relatively benign in their approach and application, and thus suited for use in screening candidate arbitrators. These screens, while not completely free of professional controversy,²⁷ are the Myers-Briggs Type Indicator (MBTI), Keirsey Temperament Sorter, Thomas-Kilman Conflict Mode Instrument (TKI) and DiSC Classic.

In essence, theories of personality type describe various ways people differ in their preferred approaches to acquiring information, using that information to make decisions and interacting with their external environments.²⁸ People are not monolithic—not entirely consistent or predictable in their responses. Every individual exhibits different character traits at different times depending on the situation. During a negotiation, each of us can exhibit traits of a competitor, an accommodator or an avoider depending on our perceptions, moods and social context. Hence, personality type cannot be accurately determined merely by assessing an individual’s response to one situation. However, over an extended period, general tendencies in personality type tend to predominate over others and may be well revealed by a carefully designed and properly interpreted screen.

Myers-Briggs Type Indicator (MBTI)

The MBTI was developed in the 1940s by Katharine Cook Briggs and her daughter Isabel Briggs Myers. This assessment is predicated on a theory devised by psychologist Carl G. Jung which posits that seemingly random variation in human behaviour is actually quite orderly and consistent due to variations in the way individuals perceive and judge the world around them. Perception involves all the ways of becoming aware of things, people, happenings or ideas. Judgment involves all the ways of reaching conclusions about what has been perceived. If people differ systematically in what they perceive and in how they reach conclusions, then it is only reasonable for them to differ considerably in their interests, reactions, values and skills.²⁹

The MBTI contains four bi-polar indices which reflect the extent to which four basic human preferences affect a person’s use of perception and judgment. These indices indicate what people prefer to do in given situations and how they prefer to draw conclusions from what they perceive. The four scales are:

- (a) Sensing-Intuition (SN), whether in acquiring information a person prefers to rely primarily on sensing or a process of intuition. A sensing preference signals primary reliance on observable facts or happenings. An intuitive preference focuses on patterns, possibilities and multiple meanings when attending to or gathering information.

²⁷ See, e.g. Mnookin, Peppet and Tulumello, *Beyond Winning*, 2000, pp.327–328 and “Personality Assessment” in *New World Encyclopedia* particularly its extensive reference section (last modified April 3, 2008) at http://www.newworldencyclopedia.org/entry/Personality_assessment?oldid=687307 [Accessed September 13, 2009].

²⁸ Don Peters and M.M. Peters, “Maybe That’s Why I Do That: Psychological Type Theory, the Myers-Briggs Type Indicator, and Learning Legal Interviewing” (1990) 35 N. Y. L. Sch. L. Rev. 169, 173.

²⁹ Isabel Briggs Myers, *Introduction to Type*, 6th edn (New York: Consulting Psychologists P., 1998), p.15; see also The Myers & Briggs Foundation, “MBTI Basics” at <http://www.myersbriggs.org/my-mbti-personality-type/mbti-basics> [Accessed August 15, 2009].

- (b) Thinking-Feeling (TF), whether in making judgments a person prefers to rely on impersonal logical consequences, or personal or social values.
- (c) Extroversion-Introversion (EI), whether a person focuses attention and derives energy from external objects and people or prefers to focus on internal processes. Extroverted people tend to prefer active involvement with others, think best when talking, tend to be action-oriented and prone to leap into tasks with little preparation or planning. Introverted people enjoy solitude, introspection, and engage in careful planning before acting and focus inward on their own thoughts and ideas.
- (d) Judging-Perceiving (JP), whether a person, in making decisions affecting his or her external world, prefers a process of structured decision making, seeking closure, planning and goal-setting (collectively judging), or an unstructured, flexible, possibly spontaneous approach including postponing decisions to continue observing and receiving information.³⁰

The primary purpose of the MBTI is to measure a person's aggregate preferences along the SN, TF, EI and JP indices. These preferences merely reflect habitual choices between rival alternatives. At various times and depending on given situations, individuals can display opposite personality traits as measured by each scale. However, over time an individual's overall habitual preferences—much like left-handedness or right-handedness in a non-handicapped individual—will predominate.³¹

The MBTI screening-process involves presenting a series of questions of which there is no right or wrong answer, each requiring a choice between two seemingly inconsequential, normal events. Through appropriate scoring of the responses, the resulting MBTI indicator yields a combination of four letters—e.g. ESTP or ISTJ—which indicates a person's preference along each of the four indices, yielding 16 possible different outcomes, i.e. personality type preferences³²: ISTJ, ISFJ, INFJ, INTJ, ISTP, ISFP, INFP, INTP, ESTP, ESFP, ENFP, ENTP, ESTJ, ESFJ, ENFJ and ENTJ. All these types are equal; no one type is better than any other.³³

Individuals exhibiting certain MBTI types are likely to be more compatible with and complement each other.³⁴ Correlatively, those exhibiting other types are not. I surmise that MBTI-type information can be used in selecting appropriate arbitrators. Consider the following process. Once the pool of qualified candidates is identified through use of conventional selection metrics, a first arbitrator is selected. Then, a second arbitrator is identified not only through the same metrics but also through MBTI-type determination and selection. The second arbitrator would be one of the candidates whose MBTI personality-type indicates that their personality is likely to be compatible with and/or appropriately complement that of the first arbitrator. Similarly, the third arbitrator would be selected from amongst the remaining candidates in the pool as one whose MBTI-type indicates a compatible and/or complementary personality with the two previously selected arbitrators. If no one is found to be compatible with or complementary to the first and/or second arbitrators, then another candidate(s) can be substituted for either or both of those arbitrators, and so forth, until an appropriate panel all having suitable personalities has been selected.

³⁰ Peters et al., "Maybe That's Why I Do That" (1990) 35 N. Y. L. Sch. L. Rev. 169, 175–177, Briggs, *Introduction to Type*, 1998, pp.9–29.

³¹ Peters et al., "Maybe That's Why I Do That" (1990) 35 N. Y. L. Sch. L. Rev. 169, 178.

³² Peters et al., "Maybe That's Why I Do That" (1990) 35 N. Y. L. Sch. L. Rev. 169, 178.

³³ The Myers & Briggs Foundation, "MBTI Basics" at <http://www.myersbriggs.org/my-mbti-personality-type/mbti-basics> [Accessed August 15, 2009].

³⁴ Briggs *Introduction to Type*, 1998, pp.38–39.

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Keirsey Temperament Sorter

In 1978, David Keirsey and Marilyn Bates, building on the MBTI, found that correlations resulting from combining the Myers-Briggs “intuition” with “judging” functions, NT and NF, and “sensing” with “perceiving” functions, SJ and SP, lead to four temperaments: artisan, guardian, rational and idealist.³⁵ Keirsey defines temperament as a configuration of observable personality traits, such as habits of communication, patterns of action, and sets of characteristic attitudes, values and talents. A temperament encompasses personal needs, kinds of contributions an individual makes in a workplace and roles which that individual plays in society.³⁶ More generally, temperament is “that which places a signature or thumbprint on each of one’s actions, making it recognizably one’s own”³⁷ in essence a “configuration of inclinations”, pre-disposition, or simply “the inborn form of human nature”.³⁸

Individuals can determine which one of the four temperaments they tend to exhibit—and more specifically one of four underlying character types for each temperament—by taking a multi-question test, the “Keirsey Temperament Sorter”, which, similar to the MBTI, sorts through four pairs of bi-polar personality preferences: extroversion/introversion, sensing/intuiting, thinking/feeling and judging/perceiving.³⁹

Thomas-Kilman Conflict Mode Instrument (TKI)

Kenneth W. Thomas and Ralph H. Kilman developed the TKI in the early 1970s. It is based on theoretical refinements made by Thomas of a model of management conflict styles dating back to the 1960s.⁴⁰ It broadens the rather simplistic though generalised three-style model of conflict-handling in negotiation from one involving just competitors, avoiders and accommodators to one encompassing two additional styles: collaborator and compromiser. The five modes, for any individual, are measured along two orthogonal dimensions: assertiveness and cooperativeness. A competitor takes, is assertive and uncooperative, and tries to satisfy his or her own concerns at the expense of someone else. A collaborator is both assertive and co-operative and tries to find a win-win solution that completely satisfies the concerns of those involved. A compromiser, being somewhat assertive and somewhat co-operative, attempts, by both “giving and taking”, to find an acceptable solution that only partially satisfies those concerns. An avoider is both unassertive and uncooperative, preferring to avoid conflict without satisfying anyone’s concern. An accommodator is unassertive but co-operative, and attempts “by giving” to satisfy the other people’s concerns at his or her own expense.⁴¹

This model accommodates the extent of joint satisfaction, i.e. the “pie”. When competing, compromising or accommodating, the pie is generally large enough to satisfy the interest of one side or partially that of both. Hence, one side claims value at the expense of the other:

³⁵ David Keirsey and Marilyn Bates, *Please Understand Me: Character and Temperament Types*, 5th edn (Gnosology Books, 1984), p.28 and in more detail pp.30–66; and David Keirsey, *Please Understand Me II: Temperament, Character, Intelligence* (Prometheus Nemesis, 1998), pp.18–20 and 26.

³⁶ “About 4 Temperaments” available at <http://www.keirsey.com/handler.aspx?s=keirsey&f=fourtemps&tab=1&c=overview> [Accessed September 13, 2009]. See also, Keirsey and Bates, *Please Understand Me*, 1984, pp.27–28 and Briggs *Introduction to Type*, 1998, p.34.

³⁷ Keirsey and Bates, *Please Understand Me*, 1984, p.27.

³⁸ Keirsey, *Please Understand Me II*, 1998, p.20.

³⁹ “The Keirsey Temperament Sorter (KTS-II)” available at <http://www.keirsey.com/aboutkts2.aspx> [Accessed September 13, 2009]. See also, Keirsey, *Please Understand Me II*, 1998, pp.4–12 and Keirsey and Bates, *Please Understand Me*, 1984, pp.5–13.

⁴⁰ K.W. Thomas, *Introduction to Conflict Management: Improving Performance Using the TKI* (Consulting Psychologists P., 2002), p.1.

⁴¹ Thomas, *Introduction to Conflict Management*, 2002, pp.7–8 and 11.

a classic distributive “zero sum”, “win-lose”, situation. Collaboration often expands the size of the pie so that more value can be claimed by each side, thus affording “win-win”.⁴² Here too, individuals, through their behaviour, exhibit characteristics, either consciously (when it is perceived to be advantageous to do so⁴³) or unconsciously, of each of the five modes as a given situation warrants. Nevertheless, over an extended time a person’s behaviour will indicate a preference for one of these modes. Personality clashes can arise between people exhibiting markedly different TKI preferences.

Since the way arbitrators handle conflict and divergent opinions to resolve an issue might well be the most critical aspect of their own interaction, the TKI may be the most efficacious of the four tools. An extreme competitor would probably impede resolution, while a compromiser might facilitate positive outcomes.⁴⁴

DiSC Classic

This is a further personality assessment tool, based on the work of psychologist William Moulton Marston in the late 1920s and early 1930s. It measures characteristic ways people behave in particular environments, i.e. “surface traits”. By contrast, the MBTI describes how people approach their environment intellectually and attitudinally and how they process information.⁴⁵

The DiSC Classic test attempts to classify individuals in a four-dimensional model of human behaviour as exhibiting: dominance (D) which produces activity in an antagonistic environment; inducement or influence (I) which produces activity in a favourable environment; steadiness (S) which produces passivity in a favourable environment; or compliance or conscientiousness (C) which produces passivity in an antagonistic environment.⁴⁶ The dimensions are grouped in a grid, with D and I sharing the top row and representing extroverted aspects of personality and C and S below representing introverted aspects. D and C then share the left column and represent task-focused aspects; I and S share the right column and represent social aspects. Through this scheme, an individual can exhibit a combination of these types, e.g. a predominant D trait with a strong I trait, and so forth. The test instrument, similar to the MBTI and Keirsey Temperament Sorter, requires a participant to select an answer from a series of questions.⁴⁷

Each of the four assessment tools is administered through a test consisting of a series of multiple-choice questions followed by a report interpreting the results. An on-line self-administered version of each test is available through which one can take the test and receive a corresponding report at a modest cost,⁴⁸ typically less than US \$200 and often much less,

⁴² Thomas, *Introduction to Conflict Management*, 2002, p.9.

⁴³ Thomas, *Introduction to Conflict Management*, 2002, pp.12–16.

⁴⁴ Private email with Dr Yona Shulman.

⁴⁵ *A Comparison of DiSC Classic and the Myers-Briggs Type Indicator—Research Report* (Inscape, 1996), pp.1–2, at http://www.inspiringsolutions.com/content/assocmat/Disc_vs._Myers_Brigs.pdf [Accessed September 22, 2009].

⁴⁶ *DiSC Classic and Models of Personality—Research Report* (Inscape, 1996), p.5 at <http://www.intelitechgroup.com/assets/pdf%20download%20files/white%20papers/PPSMOPO-232.pdf> [Accessed September 22, 2009].

⁴⁷ *New World Encyclopedia* (last modified April 3, 2008).

⁴⁸ As of September 16, 2009, a personal on-line assessment, including taking the tool and receiving an associated report using the MBTI can be accessed via The Consulting Psychologists Press (CPP) website (approximately US \$55), at <https://www.cpp.com/en/mbti/products.aspx?pc=157> [Accessed December 4, 2009], the Center for Application of Psychological Type (US \$150 or \$175 depending on applicant’s location), at <http://www.capt.org/take-mbti-assessment/mbti.htm> [Accessed December 4, 2009] and The Resource Connection (TRC) (approximately US \$60), at <http://www.resourceconnection.com/mbti-complete.html> [Accessed December 4, 2009]; the Keirsey Temperament Sorter (approximately US \$30) via

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though the comprehensiveness of the report will obviously vary from one provider to the next.

A major drawback of these tools is that they rely on candid self-reporting, i.e. they require the test-taker to candidly provide answers to the questions so that the results are valid and truly descriptive of the personality style and preferences of that individual. However, if the test-taker believes that certain responses would be more “socially desirable” than others—i.e. to reflect one personality type over others and hence permit that person to be matched with certain individuals of given personality types over others than would otherwise occur—then that person may provide false answers to deliberately skew the results. To reduce this concern, these tools include a so-called “lie scale” which detects inconsistencies in the responses which might reflect their deliberate manipulation.⁴⁹ Though obviously a candidate arbitrator could attempt such manipulation, the likelihood is quite low. Since arbitrators closely work together and often for a considerable time, they should realise that it is in their best interest to be candid and thereby matched with someone with whom they are more likely to be compatible.

Personality type should never be the sole or even predominant metric for arbitrator selection. Yet screening and compatibility matching based on type, though not foolproof, may provide insights and reduce the risk of inadvertently selecting incompatible panellists. Having a qualified industrial psychologist administer the test to a modestly-sized pool, interpret the resulting scores and provide assistance in screening the candidates may cost several thousand dollars.⁵⁰ Alternatively, a face-to-face interview of a candidate by such a professional will yield more person-specific data and at a greater depth and sophistication than any of the personality assessment tools.⁵¹ However, that would incur time and professional fees. The nature of a dispute, including the ramifications of its resolution, will determine whether they are warranted. Where a large amount is in dispute or the issues are sufficiently important to the parties (and possibly to non-party public constituencies in investment treaty arbitrations involving a government entity), then the additional information provided by personal interviews may well lead to increased confidence in selecting compatible panellists that justifies the increased cost.

With claims, particularly in international and increasingly in domestic disputes, now routinely running in the hundreds of millions of dollars and sometimes billions, the consequences of selecting what ultimately becomes a dysfunctional panel can be devastating. Consequently, the need to employ personality screening—whether through these tools or personal assessment interviews—has never been more critical and will become more so in the future. Yet, in the overall cost structure of a major commercial arbitration, their cost is miniscule. Personality screening just makes good sense. But how to best proceed?

Institutions could collect personality data of all arbitrators on their respective rosters and appropriately supplement each arbitrator’s biographical information. During the selection process, they could supply that information to counsel, who in turn should use all the information, including personality type data, in selecting arbitrators. First, institutions could ask all the panellists on their rosters for their type data. Alternatively, they could query each candidate panellist, on its roster, as that person is being considered for a given proceeding and during the associated selection process, with either the institution administering the

the Keirse.com website, <http://www.keirse.com/sorter/register.aspx> [Accessed December 4, 2009]; the TKI can be accessed (approximately \$15) via the CCP website, <https://www.cpp.com/en/kiproducts.aspx?pc=142> [Accessed December 4, 2009] and at the TRC website (approximately \$30), <http://www.resourceconnection.com/tki.html> [Accessed December 4, 2009]; the DiSC Classic can be accessed (approximately US \$20) at the TRC website, specifically at <http://www.resourceconnection.com/disc-classic.html> [Accessed December 4, 2009], and at the Corexcel website (approximately \$30), <http://www.corexcel.com/html/disc-profile.htm> [Accessed December 4, 2009].

⁴⁹ Private email with Dr Yona Shulman.

⁵⁰ Private email with Dr Yona Shulman.

⁵¹ Private email with Dr Yona Shulman.

screening tool or through a suitable professional hired by counsel, to obtain the candidate's type information and then supplement that candidate's profile accordingly. For those seeking entry to a roster, an institution could supplement its panellist questionnaire to include a response field for each applicant. If the MBTI data is being used, then soliciting type data can entail nothing more than providing a grid or list of the 16 MBTI types with a check box next to each one and a request to the applicant to check off the box, or simply providing an appropriate line on the questionnaire on which applicants fill in their type.

Since type data is based on personality preferences over time, this data is not likely to change appreciably. Since it is in their own interest to work with others with whom they are likely to be compatible or complementary, then little if any incentive exists for candidates to lie about or modify type information from the original assessment. As to timing, an institution can collect type information on its existing panellists: by querying en masse, whether by email or post, all members of its roster; through testing at a suitable conference sponsored by the institution which members of its roster are likely to attend; or during a selection process.

The advantage in using type data accrues not only to the parties and counsel in reducing the potential for incompatibility, but also to the tribunal itself in constituting it with arbitrators able to work effectively with each other. Moreover, the advantages are not confined to tripartite panels. Benefits flow from incorporating that data into the selection of sole arbitrators and even mediators by increasing the likelihood that, selected in part on such data, they will exhibit a suitable personality and temperament compatible with the parties, counsel and their needs.

To adequately safeguard each arbitrator's privacy, obtaining and disseminating personality type data (or the results of any other suitable personality assessment tool which provides insight to that person's psychological nature) for any candidate or an existing panellist, must be consensual and not a mandatory requirement for admission to or continued inclusion on any roster.

Collecting and using such data to match candidates should not to provide another excuse for parties and counsel to use to their own advantage but rather should improve the entire arbitral process by enhancing the likelihood that compatible arbitrators will be selected.

Selection of Proven Panels

Once a tribunal has demonstrated its ability to meet the expectations of counsel, parties and an institution, that institution should not only recommend each panellist on the tribunal for reappointment but also reappointment of the panel. Nominations should not just be of individual panellists but of entire tripartite panels which, by their prior actions, have established their own competence and the ability of members to work together. They have shown the desirable psychological traits of open-mindedness, intellectual flexibility, good listening and a sustained ability to constructively and effectively channel discrete episodes of inter-personal conflict—resulting from candid and often intense debate of different issues which arise over the course of an arbitration—into corresponding instances of problem-solving and ultimately resolution.

Traditionally, institutions appear to have focused on appointing individual arbitrators regardless of whether they have served together or not, but apparently have paid little attention, if any, to reappointing proven panels. Selecting an entire panel might initially be thought to entail added obstacles, inasmuch as the panel as an entity needs to address its ability to serve whether as a result of conflicts in time, subject matter, prior relationships or other. However, since these tasks need to be independently performed by each of the panel members, which is what occurs with conventional selection of three individual arbitrators, there should be no additional burden or delay. Personality assessment tools have inherent errors and do not completely remove the risk of incompatibilities inherent in selecting



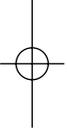
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individual panellists who have no experience in having worked together but that risk may be reduced by reappointing a proven panel.

In the mid-2000s, I served on a tripartite panel convened by CPR to handle a large domestic patent dispute concerning coronary stents. It lasted 18 months and necessitated substantial interaction amongst the panellists. On several occasions, we exhibited considerable differences of opinion, some strongly held. Nevertheless, all of us efficiently, diligently and thoughtfully worked through each of those differences to arrive at a unanimous decision, supported by rigorous logic, analysis and mental testing. Right after closing arguments, leading counsel for both sides approached us and complimented us. Moreover, not only did we work well together, the three of us emerged as friends. A couple of years later, I had a chance encounter at a CPR Annual Meeting with in-house counsel for one of the parties. I recounted my experience and asked whether the parties employed some type of psychological screening, though none had been apparent to me during the interview. Counsel replied: "Yes, we did." I was not surprised.

6. CONCLUSION

Many businesses use personality testing as part of their hiring processes. People use personality testing to evaluate business partners. Even lawyers use personality testing to analyse criminal behaviour, undertake litigation profiling, witness examination and jury selection.⁵² Why not do so of candidate arbitrators? Selecting tripartite tribunal members, using traditional criteria supplemented by personality screening, should increase the likelihood of appointing a panel of compatible arbitrators that ultimately contributes to an efficient, high-quality arbitral process which completely satisfies the needs of the parties. The time to do so has clearly arrived.



⁵² Irene Leonard, "Personality Assessment: What About Them?" (King County Bar Association, April 2008), <http://www.kcba.org/newsevents/barbulletin/archive/2008/08-04/article14.aspx> [Accessed September 13, 2009].