Austrian Yearbook
on
International Arbitration 2017

The Editors

**Christian Klausegger, Peter Klein, Florian Kremslehner,
Alexander Petsche, Nikolaus Pitkowitz, Jenny Power,
Irene Welser, Gerold Zeiler**

The Authors

Lisa Beisteiner, Klaus Peter Berger, Tobias Birsak, Stavros Brekoulakis,
Katharina Brückner, Yuliya Chernykh, Giuditta Cordero-Moss,
Dietmar Czernich, Chloë Edworthy, Eliane Fischer, Ulrike Gantenberg,
Jonas von Goeler, Diego Brian Gosis, Wolfgang Hahnkamper,
Heidrun Halbartschlager, Christoph Hauser, Michael Hofstätter,
Emmanuel E. Kaufman, Judith Knieper, Christopher Koch, Ulrich Kopetzki,
Wolfgang Kühn, Innhwa Kwon, Michael McIlwrath, Reza Mohtashami,
Corinne Montinieri, Helmut Ortner, Vladimir Pavić, Silvia Petruzzino,
Gunnar Pickl, Sylwester Pieckowski, Jarred Pinkston, Nikolaus Pitkowitz,
Roman Prekop, Katharina Riedl, Markus Schifferl, Dorothée Schramm,
Yoanna Schuch, Alfred Siwy, Alexandra Stoffl, Selma Tirić, Ezequiel H. Vetulli,
Michael Walbert, Irene Welser, Stephan Wilske, Mathias Wittinghofer,
Venus Valentina Wong, Rabab M.K. Yasseen

Wien 2017

MANZ'sche Verlags- und Universitätsbuchhandlung
Verlag C.H. Beck, München
Stämpfli Verlag, Bern

Dr. Mathias Wittinghofer is a Partner in the dispute resolution department in Germany. Mathias is double-qualified as a Rechtsanwalt in Germany and a solicitor in England and Wales. He is also a Fellow of the Chartered Institute of Arbitrators, where he serves on the Committee of the European Branch. A member of i.a. the German Arbitration Institution, the Austrian Arbitration Institution and the Swiss Arbitration Association and listed as a panellist at the Vienna International Arbitration Centre and the Kuala Lumpur Regional Centre for Arbitration, Mathias has over 10 years' experience in handling all kinds of commercial litigations and domestic and international arbitrations, with a special focus on capital markets- and post-M&A disputes, both as counsel and as arbitrator.

Mathias has completed the training required to qualify as a Fachanwalt für Bank- und Kapitalmarktrecht (spezialized banking and finance lawyer), published several articles on banking and finance law as well as international arbitration, and has spoken extensively on both topics. Mathias is also a lecturer on International Arbitration at the Goethe University in Frankfurt.

In 2012 and again in 2015, Mathias was awarded the prestigious ILO Client Choice Award as Germany's best litigation counsel, based on a survey among more than 2,000 in-house counsels worldwide. Mathias was recently named by Global Arbitration Online and Who's Who Legal: Arbitration a *"Future Leader": "Mathias Wittinghofer impresses with his impeccable legal skills, outstanding character and great judgment".* Mathias is recommended by The Legal 500 Germany as *"fast and professional" ("schnell und professionell"),* and JUVE, the leading German legal directory, lists Mathias as a frequently recommended dispute resolution and litigation expert.

Contact: **Herbert Smith Freehills LLP**
Neue Mainzer Straße 75, D-60311 Frankfurt am Main, Germany
T: +49 69 2222 82522
E: mathias.wittinghofer@hsf.com
www.herbertsmithfreehills.com

The Race Towards Predictability

Does It Threaten The Effectiveness Of Modern Arbitration?

Mathias Wittinghofer

Much is talked about predictability in international arbitration, and the 2016 Vienna Arbitration Days made this the overarching issue of the discussions. The general view at the Vienna Arbitration Days, and globally, is: predictability is a good thing, and whatever is possible should be done to ensure the greatest degree of predictability. This is demanded not only of the substantive outcome of each arbitration, but also of the procedural course which arbitrations take.

This article sets out to contradict this notion. The thesis is: predictability in international arbitration is not inherently a virtue. In fact, the race for predictability may very well be a threat to modern arbitration – at least if strived for without reflection.

I. Users Of Arbitration Look For Flexibility

The first step to make this case is taken by pointing to the 2015 Queen Mary Survey on International Arbitration[1]). If one looks through the text of that survey and uses, on the electronic version of the document, a simple search function, one is astounded to learn this: nowhere in that survey the word "predictability" can be found. It is not mentioned once – not once! It is in particular not identified as a feature which respondents to the survey, and that is mostly the users of arbitration, look for in international arbitration.

What they do look for, however, according to the survey, is flexibility. Flexibility ranks third in what users have stated to be the most valuable characteristics of international arbitration. 38% of all respondents to the survey named "flexibility" as one of the three most valuable characteristics of international arbitration[2]). The only two features that ranked higher were "enforceability of awards" and

[1]) 2015 International Arbitration Survey: Improvements and Innovation in International Arbitration.

[2]) 2015 International Arbitration Survey: Improvements and Innovation in International Arbitration, at 6.

"avoiding specific legal systems and courts", with 65 and 64 %, respectively[3]). That is of course not surprising. Flexibility has always been up there in the canon of great advantages of arbitration, together with confidentiality, enforceability of awards, the ability to choose the decision-maker, neutrality of the process and last but not least: party autonomy.

But what does this diagnosis mean for predictability? What is this to say about predictability as an attribute of arbitration? How does it relate to the concept of flexibility?

II. Flexibility And Predictability Are Mutually Exclusive

One would think the answer is clear. Predictability and flexibility are mutually exclusive. At least to the extent that predictability is not a function of transparency or disclosure – as it can be in the context of arbitrator interviews. In that context, where an arbitrator discloses for example a view on a certain legal issue, that increases the predictability of his or her views on the case. But it does not necessarily rule out a change of that view when confronted with good arguments.

But where predictability is obtained by providing the answers to questions before they are posed, flexibility to come to a solution when the problem actually does arise is lost. To put it simply: lay down the rules in the beginning, and you will be confined by them later.

III. Users Still Also Want Predictability

So is one to conclude then that users of arbitration do not want predictability? No, of course one is not. Users want to know what is going to happen. Anyone who has ever advised a client on an arbitration has made again and again the experience that clients want to know exactly what the process is going to look like, often enough even before it has started or way before the relevant issues arise: how many rounds of briefs, when will they have to be handed in? Will we have to address all issues, or can we take it in stages? Will there be a bifurcation of merits and quantity, or will the issue of jurisdiction be addressed separately before we turn to the merits? Will there be discovery, or at least document production, will there be hearings, what will they look like and how long are they going to be? Will there be witness statements, will there be cross examinations? Will we get to hand in expert opinions, or will the tribunal appoint experts?

Most of the time lawyers will then explain to their clients that they do not know. That is because procedure is a matter of tribunal discretion. Lawyers will refer clients to the fact that there is such a thing as best practice, and that they

[3]) *See* fn 2.

would expect that the tribunal will follow such best practice. They will try to be more specific in their efforts to make predictions based on the characteristics of the case, such as applicable law, origin of the parties, seat of the arbitration, institutional rules and preferences of the arbitrators. But in the end, it all remains guesswork. And then it invariably turns out different, and the client is disappointed. Because arbitration lawyers and arbitrators do not give them predictability. If they did, there would not be as much talk about it as there is.

All this has to do with the very flexibility that – at least according to the Queen Mary Survey – users say they cherish about the arbitral process. And yet they are frustrated when they see that very flexibility put to action.

IV. Arbitrators Today Offer Neither Predictability Nor Flexibility

The flexibility that we are discussing here is of course a result of the fact that originally, there were little to no rules on procedure in arbitration. Lawmakers and courts alike have deliberately allowed for arbitral tribunals to have the greatest possible degree of flexibility. Only very few standards are prescribed – those thought to be inalienable for due process. But this has left a void, and that void created insecurity. To counter this, the arbitration community started filling that void. Arbitration practitioners have done that by establishing rules and guidelines and best practices. They have developed international standards of what they believe to be universally accepted principles of what a fair dispute resolution process should look like. And now these standards and guidelines and best practices are almost universally applied. Yet they are indiscriminate. Wherever you turn, you will find arbitrators issuing the inevitable and by now proverbial Procedural Order No 1. That Order No 1 will set out a definitive timeline for the arbitration all the way through the hearing dates to the post hearing briefs – which at this point are 24 months away. Not only that, but that same procedural order will lay out if and to which extent there will be document discovery, or if there will be witness statements, rebuttal witness and even surrebuttal witness statements and when these have to be handed in, together with any expert opinion or rebuttal expert opinion. This will often be based, or at least be inspired by, various bodies of soft law in existence nowadays, the most prominent of course being the IBA Rules on the Taking of Evidence in International Arbitration. All this leads – globally – to standardization – or if you wish to underline a less positive connotation – rigidity in the process which is reminiscent of state court litigation.

So in the end, the arbitration community gives users neither flexibility nor predictability – they simply give them indiscriminate standardization. This causes inefficiencies and increased costs, and users have long criticized this about the arbitral process.

Of course, none of the above are essentially new revelations. This development has often been deplored before, and by many others. It has been the subject

of President's Messages[4]), urges to return to a Town Elder Model[5]) or to conclude a New Contract with arbitrators[6]). And the theme common to all those calls of criticism is that this development ignores that flexibility in the process is indeed an advantage of arbitration. It is what sets it apart from state court litigation. It is what makes it attractive to parties to a cross-border dispute, or one which is overly complex, or one which requires a swift and somewhat crude solution, rather than a process which may provide for each and every remote eventuality or argument. It allows the arbitrators to shape the process to the actual needs of the parties; to tailor it so it will meet their legitimate expectations to speedy and efficient dispute determination. And it allows them to address issues when they arise, and in a way that does justice to the specific way in which they arise. This is an advantage which is in stark contrast to having to apply rules which, like codes of civil procedure, were designed not with one specific set of circumstances in mind, but to apply to a myriad of cases. While such pre-formulated rules probably increase overall predictability, they inescapably reduce the degree of justice administered in the individual case. It is almost trivial: the more general a solution is, the less it fits the individual case. And so the decision ultimately rendered on the basis of such pre-formulated rules, whether one is talking about a decision procedural in nature or ultimately on the merits, will be less just.

V. Arbitrators Curtail Party Autonomy

But trying to fill this void that allows for flexibility with rules, standards and guidelines will not only increase costs, stretch timeline and result in a less just result. It also challenges party autonomy. This is an aspect that is often overlooked in this discussion, and it as far as the author is aware, it has been pronounced clearly only in a 2015 article by Professor Dalma Demeter of the University of Canberra[7]). The argument goes like this: the more hastily arbitrators turn to pre-formulated rules and standards – either of their own or derived from soft law – they will be seen to effectively impose these rules and standards on the parties. That is because once the tribunal puts a proposal out there as to how things should be done, there is in practice often enough no real debate about that proposal. Any discussion that does arise is often timid at best. And that is understandable: neither parties nor party representatives wish to alienate the tribunal with lengthy arguments about

[4]) Michael E. Schneider, *President's Message: The Problem with Predictability,* 29 ASA Bulletin 1/2011, at 1 *et seq.*

[5]) David W. Rifkin, *Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited,* Arbitration International, Vol. 23 (2008), No. 3, at 375 *et seq.*

[6]) David W. Rivkin, *A New Contract Between Arbitrators and Parties,* Asian Dispute Review, 2016, Vol 1. at 4 *et seq.*

[7]) Dalma Demeter, *Freedom versus security in regulating ADR and international arbitration, in* Trade Development through Harmonization of Commercial Law, Comparative Law Journal of the Pacific 164 *et seq.* (Ramaswamy & Riberiro eds., 2015).

procedural rules. This is all the more so if the rules have so far been formulated only in the abstract, with no real issue yet on the horizon that would justify picking a fight. Nobody wants to be seen as the one being difficult. And where the proposal is allegedly based on "standard best practice", nobody wants to look inexperienced in the ways of international arbitration. The result is: party autonomy exists on paper only. Now, when in the position of the arbitrator, one might wholeheartedly reject such notion as completely unjustified. When in the position of counsel, on the other hand, the author has often been in situations where it felt that way.

The effect of this phenomenon is that the parties' influence on the arbitral process is greatly diminished. And with that, party autonomy. Because party autonomy of course does not only manifest itself in the arbitration agreement as the basis for arbitration in the first place. It also extends to the shaping of the arbitral process itself. Art V (d) of the New York Convention is undeniable evidence for that when it prescribes that recognition of an award may be refused if the arbitral procedure was not in accordance with the agreement of the parties.

So imposing more or less rigid preconceptions of what process and procedure ought to look like is an infringement of party autonomy. It may be an indirect one, it may be an unconscious one, it may be one which does not cross the threshold of jusiticiability. But it is one nonetheless, and the arbitration community ought to be aware of that.

In summation, it is fair to say that predictability comes at a cost. And that is a dear cost. Because what the constant pursuit of predictability requires the arbitrators to do is to almost forfeit two of the true advantages and strengths of arbitration – strengths and advantages that, as we have seen, users value highly: those are flexibility and party autonomy. And since arbitration today gives the users neither the flexibility nor the autonomy they say they want nor the predictability they ask of it, it is no wonder that users are frustrated with the process.

VI. How To Solve The Dilemma: Concentrate On The Strengths Of Arbitration – Flexibility, Not Predictability

So how then how does one reconcile flexibility and predictability? This author says: we do not, and we should not even try – at least no too much, or at all costs. Instead, the arbitration community should begin educating users that they should choose arbitration for its particular and specific merits – which are flexibility and party autonomy. And at the same time, and that is the actual essence of this article, arbitration practitioners should tell them what they should not expect from it – the same degree of density of regulation, the same degree of specification, the same degree of predictability that users may want from state court litigation. Arbitration lawyers should tell users that they cannot have it both: you cannot have your cake and eat it. And they should tell them that users should embrace the lack of predictability and instead seize the opportunities that an open, not preformulated process of dispute resolution offers to any party that is willing to make

the most of it. At the same time, the arbitration community should educate itself not to expect that either, whether when acting as counsel or as arbitrators.

This will allow to much better reconcile what users expect from arbitration with what arbitration actually can offer. This should help avoid the constant disappointment that users seem to experience with the arbitral process. And it may be a way to again underscore why users should choose arbitration – and why and when they should not. This will help distinguish arbitration from other forms of dispute resolution, and thus help justify the special rank that arbitration deserves in the echelons of dispute resolution. Otherwise, that special rank may be lost.