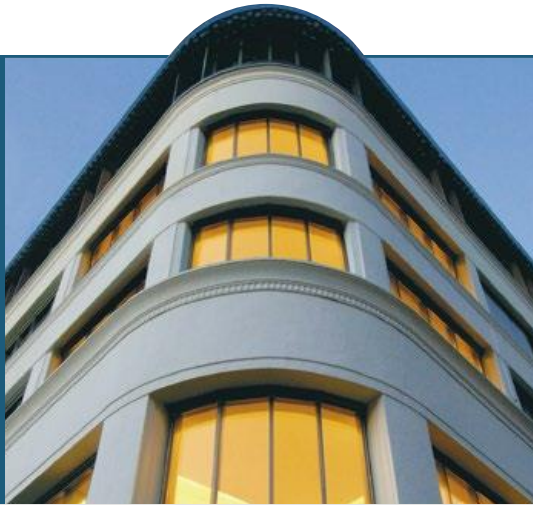


LALIVE



The road to predictability in the conduct of the proceedings in international arbitration

The role of the arbitral tribunal and counsel

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What do we mean by predictability in the conduct of the proceedings?

- Ensuring **due process**
- Ensuring a common understanding and a meeting of the **expectations** of - and by - the Tribunal, counsel/parties in the conduct of the entire proceedings in their case

How?

What do we mean by predictability in the conduct of the proceedings?

- For the **process**:
 - The Parties knowing what the rules are for their case
- For the **outcome**:
 - The Tribunal having what it needs to decide the outcome

Avoiding surprises

What do we mean by predictability in the conduct of the proceedings?

- Predictability does not exist in a vacuum
- **Predictability, flexibility, efficiency: one package**
- Tools and techniques to improve efficiency in arbitration usually involve a tailor-made approach = flexibility

But this requires....

What is required to ensure predictability in the conduct of the proceedings?

- **The engaged arbitrator**

- Does not rely on PO No 1 and SPR and wait until the hearing to develop an interest in the case
- Seeks to understand the case early and what is needed for the efficient resolution of the dispute, but without assuming that s/he understands the case/issues better than counsel
- Does not replace (bad) counsel but gives the required opportunities

What is required to ensure predictability in the conduct of the proceedings?

- But can only work with **the cooperative counsel**:
 - Prepared to accept the engaged arbitrator
- Counsel and parties are ambivalent
- Conferences/articles vs. real life
- “Hands on but not dictatorial, please”
- Arbitrators cannot and need not be dictators
- They need to engage with counsel/parties

Ensuring predictability in the case presentation

- **For the parties** it is about the process:
 - Understanding the structure of the proceedings and the rules to be able to present their case, and respond to other party's case
- **For the tribunal:** have the key issues addressed
- No one-fits-all approach
- Key: know and understand the approach fully

Ensuring predictability in case presentation

- If no agreement only way for the tribunal to steer the boat and
 - decide what the parties require to present their case/respond to each other's case
 - decide what the tribunal requires to decide
 - set the right rules at the right timeis to engage in the case and with the parties
- **Ongoing process, ongoing dialogue**

Ensuring predictability in case presentation

- **Early understanding** of the case
 - Active vs. passive role in preparation of ToR/ Constitution Order
 - In person meeting/telco vs. letter
- **Monitoring** of the proceedings
 - The “pause” button/2nd CMC/CRC
 - Ongoing review and ad hoc interventions

Ensuring predictability in the taking of evidence

- Much room for misunderstanding
 - Goal not having the same rules in every case but having the same rules for both parties and determining what they should be
- Understand the parties' expectations
- Understand what the tribunal requires

Ensuring predictability in the taking of evidence

- **Document production requests**
 - Tribunal should not assume they are required
 - Tribunal should not assume that the IBA Rules and Guidelines are the (only) answer
 - Tribunal should explain how it will reach its decisions
 - Tribunal should explain risk of adverse inferences

Ensuring predictability in the taking of evidence

■ Witness testimony

Ask not only:

- Is witness testimony likely be necessary?
- Who can provide witness testimony?
- What should be in written witness statements?
- Who can write the witness statements?

but also

Ensuring predictability in the taking of evidence

....

- Will witness be required/able to repeat their written testimony at the hearing?
- Who can ask the witnesses questions?
- On what can witnesses be questioned?
- Who will be in the hearing room when witnesses are being questioned?
- Can witnesses be coached before the hearing?

Ensuring predictability in the taking of evidence

- **Expert evidence:** who will address what ?
 - Early and ongoing discussion
 - Exchange of list of experts and points to be covered
 - Joint memoranda/joint meetings
 - Direct interaction with the tribunal before the hearing

Ensuring predictability for the hearing

- **No surprises** at the hearing: no new evidence, no new claims
- **Clearly defined purpose:** (Re)present one's case and/or present evidence
 - Predictability of the process: should be decided early
 - Predictability of the outcome: should be both

Conclusion

- 1. You cannot achieve predictability** (i.e. identify, agree on and meet the expectations of the parties and the tribunal)

without flexibility (i.e. determine and meet the needs of the case)

- 2. You cannot achieve predictability without the engaged arbitrator and the cooperative counsel**