President's Message

The Problem with Predictability

Flexibility and responsiveness to the needs of a specific case are among the principal advantages of arbitration. While they continue to be widely recognised, there seems to be a strong trend in arbitration practice steadily eroding these principles in the name of predictability. The motto of this trend is that "Flexibility cannot override predictability"[1] or that "predictability trumps flexibility".[2]

Predictability in the law is an important feature and has become a marketing tool in the increasing competition between legal service providers and the legal systems they sell. However, to the litigants, such predictability is of little comfort: they each make their own predictions which differ widely from each other. One of them at least is fully or partly wrong; but the parties do not know which one is wrong. So they spend much time and money to find out, paying lawyers, arbitrators, experts and all the other costly luxury which thrive on international arbitration.

The outcome of the dispute normally depends on many variables and on their interaction. Arbitrators may assist the parties in their analysis of the dispute and, by an interactive conduct of the case, increase to some extent the predictability of its outcome. Depending on their cultural background, arbitrators may be more or less comfortable with sharing with the parties their understanding of the dispute, thus increasing the predictability of its outcome.

With respect to the substance of the dispute and the predictability of its outcome, the balance that must be struck is that between assisting the parties in the analysis of their case and avoiding prejudgement. In matters of procedure the balance is quite different: It is between the need of the parties to know the parameters in which to present their case, so as to ensure equality of treatment in an adversarial procedure, on the one hand, and the flexibility in responding to the needs of each case as it evolves during the course of the procedure, on the other.

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1 TAWIL and LIMA, "Privilege-Related Issues in International Arbitration", in: GIOVANNINI and MOURRE: Written Evidence and Discovery in International Arbitration, Dossiers of the ICC Institute of World Business Law, Paris 2009, 29, 46; the statement follows the general affirmation that "Flexibility is one of the core advantages of arbitration".

2 UFF in his article on "Predictability in International Arbitration" (2001), whom PARK quotes with sympathy in "Arbitration's Protean Nature: the Value of Rules and the Risk of Discretion", in Arbitration in International Business Disputes, 2006, 457, 461, FN14.

Traditionally flexibility was trump in matters of arbitration procedure; it is the absence of detailed procedural rules that made arbitration particularly responsive to the needs of each case. Hence, in Switzerland, Article 182 of the PIL Act wisely limits itself to requiring compliance with the basic principles of due process, leaving the rest to the parties and the arbitral tribunal. While many other arbitration laws and widely used arbitration rules prescribe more details about the procedure, they also leave much room for flexibility and responsiveness.

The threat comes to some extent from theoretical considerations about the "Risk of [the arbitrators'] Discretion"[3] and from the flood of "guidelines". However, it also comes, and this is a rather new phenomenon, from the arbitrators themselves who, by their own practice, negate the powers which the law and arbitration rules place on them. A manifestation of this trend can be seen in the increasing rigidity and standardisation introduced in arbitral proceedings through initial procedural rules and timetables for the entire proceedings. Some years ago the ICC Arbitration Rules introduced the requirement that the arbitral tribunal establish a provisional timetable at the start of the proceedings; other arbitration rules have followed suit. One of the critical features of such timetable, and often the one that drives the entire programme, is the evidentiary hearing and the dates which must be fixed a long time in advance so as to ensure the availability of all protagonists most of whom have their own busy schedules.

It is, of course, desirable and indeed necessary for an efficient conduct of the proceedings that the parties and the arbitral tribunal at a very early stage examine how the proceedings should be organised and make a programme. The problem is, however, that this programme becomes a strait jacket in which the arbitral tribunal has little room for adapting to the evolution of the case for fear of losing the hearing dates. Ironically, the well-intended instrument of the procedural calendar, a useful tool as such, has turned into a source of new constraints which reduce the efficiency in the organisation of the proceedings.

The situation is made worse by two other developments: on the one hand, few arbitral tribunals are available for meetings with the parties during the time between the initial procedural meeting (often in the form of a mere telephone conference) and the main evidentiary hearing; at best another telephone conference is scheduled after the completion of the exchange of written submissions and the hearing. On the other hand, and perhaps not unrelated to the previous observation, there is a tendency by

[3] See PARK, above FN 2.

many arbitration tribunals to regulate, at the time when the procedural timetable is settled, many aspects of the procedure. Yet at that time, the arbitrators, and indeed the parties, have no clear idea about the true issues.

A leading textbook describes the practice as follows: "Many international arbitrators have their own checklists and model forms of procedural orders, and send them to the parties' counsel as a first step towards discussing with them the terms of Procedural Order No 1 designed to establish an overall procedural scheme for the arbitration in question."4 The problem with such draft procedural orders is that normally they are "boilerplate", collected from previous arbitrations. As a result, they not only regulate the concrete issues of the specific case but also seek to regulate possible future problems and, in doing so, provoke many of them.

A striking example can be seen in the regulation of document production: before even asking whether any of the parties contemplates the need for requesting documents in the possession of the other party, arbitrators provide in their draft Procedural Order No 1 a special phase in the arbitration lasting weeks or months during which nothing happens except exchanges about document production. This has now become a widely practiced feature even in arbitrations between parties which some years ago would not have thought of making such requests.

Apart from provoking problems by regulating their solution before the problem is known, early procedural regulations and the predictability which they are intended to promote create a dilemma for counsel. Faced with detailed rules about hypothetical situations, counsel may accept them without much discussion, hoping that the situations which they seek to regulate will not arise and, if the situation does arise, the rule will not cause too much mischief; or counsel takes the task seriously and spends time scrutinising the proposed rules, engaging in argument with opposing counsel and the tribunal with the objective of bringing the arbitrator's boilerplate into a shape that is fair and equitable and suits the specific circumstances of the case. This latter approach generally meets with little sympathy from the tribunal or even from opposing counsel, who, understandably, do not wish to waste time by discussing how to regulate situations that are not very likely to arise.

Some years ago a reputed arbitration practitioner warned about a situation where a "standard pattern is proposed – sometimes imposed – on the

4 REDFERN and HUNTER on International Arbitration, 5th ed., 2009, paragraph 6.39.

parties without knowing anything about the subject matter of the dispute and without any attempt to adapt it to the specificities of the case."[5] The warning has not been heeded and the trend seems to be increasing.

The law and most arbitration rules grant to the arbitrators a high degree of flexibility in the organisation of the procedure. This is a privilege and a responsibility which arbitrators must use in a responsive manner rather than abandoning it to rigid planning and excessive concerns for predictability.

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[5] DERAINS, « How Proceedings are Managed up to the Hearing », in Fordham Papers 2007, 87, 91.