# President's Message

## Managing Uncertainty

In order to plan our activities we need to know what will happen, or at least have some "visibility" into the future. But the future remains uncertain, despite all theories and models, including models about uncertainty, which scholars in economics and other social sciences continue to develop. And, depending on the perspective, this uncertainty can have value, driving change and progress. When conflicting positions and interests confront each other, as in disputes and procedures for their resolution, uncertainty is practically inevitable.

Uncertainty in dispute resolution can relate to the outcome of the dispute and to the manner in which the protagonists proceed in resolving it. Until recently, international arbitration proceedings were more often than not allowed to evolve with the case, directions being limited to the essentials. Problems were addressed as and when they arose and in response to the circumstances that had to be faced. The guiding principle and the proclaimed advantage was "flexibility"; the resulting uncertainty did not seem to cause major concern.

Now the paradigm seems to have shifted; the emphasis is on planning and on reducing or even eliminating uncertainty. The planners of international arbitration have replaced flexibility by predictability. What seems to be overlooked is that too much planning reduces the options which might otherwise deal more adequately with an unforeseen situation. In doing so, it does not even really eliminate uncertainty; it merely shifts the areas of uncertainty from more general issues to the details of the proceedings. And, most importantly, the final uncertainty about the outcome of the dispute is not removed or even reduced by such detailed planning of the proceedings.

Whilst the uncertainty about the outcome of the dispute cannot be avoided altogether, it can be reduced and managed. Perhaps the most promising approach in this respect lies in an interactive conduct of the proceedings where the parties do not only confront each other but are given an insight into the evolving understanding and views of the arbitrators and are allowed to participate in this process. In Switzerland this interactive route has a long tradition; it can be found in the duty of the judge to provide guidance (*richterliche Hinweis- und Fragepflicht*) and, in its most advanced form, can be seen in the *Referentenaudienz* as it was developed in court proceedings in Zurich. The new Code of Civil Procedure provides for them in the form of discussions about the case ("Instruktionsverhandlung" or "débats d'instruction", Article 226).

Of course, when applied in international arbitration this method must be adapted. Directions for such adaptation have been indicated by Peter Hafter in his seminal article about discussions between the arbitral tribunal and the parties.[1] Occasionally, such interactive conduct of the proceedings, in varying degrees, can be found elsewhere, too.

However, as a result of the current shift in paradigm, our arbitral community, instead of developing and adapting this method of progressing the case in interaction between the parties and the arbitrators, seems to be more and more focused on procedural certainty. Arbitrators strive to eliminate even the smallest element of doubt about the manner in which the parties confront each other in their submissions and at the hearing; but they show little interest in reducing uncertainty about the outcome of the dispute and the decision which eventually they have to render.

There is, of course, some advantage in knowing at the beginning of the arbitration process how the procedure will unfold; and some features of an arbitration can be planned in advance. To the extent that this can be done without a serious loss of efficiency and responsiveness, aspects of the procedure which can be expected to arise should be planned. But reducing uncertainty by planning the procedure should be only one of the considerations taken into account when addressing the organisation of an arbitration. The parties and the arbitrators should preserve the possibility of responding in a fair and efficient manner to procedural incidents as they arise; and it should be accepted that an interactive conduct of the proceedings increases procedural uncertainty, precisely because the procedure must remain open to respond to new developments.

Recently a distinguished Finnish arbitration practitioner called for "efforts to penetrate the human interactivity dimensions" and the importance of communication "in order to organise proceedings more easily accessible to players with diverse backgrounds". She praised the "Nordic model" of arbitration practice which is "less regulated in every detail based upon a common understanding that in this region you should not regulate in advance for all hypotheticals or pathology but rely on some level of consensual approach and trust among the participants".[2]

This Nordic model echoes very much of what is or used to be characteristic of Swiss arbitration practice and the manner in which

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1 Peter HAFTER, Gespräche zwischen Schiedsgericht und Parteien, ein Beitrag zur Technik der Führung von Schiedsgerichten, in Claude REYMOND and Eugène BUCHER (ed.) Swiss Essays on International Arbitration, published at the occasion of the ICCA Congress in Lausanne 1984.

2 Carita WALLGREN-LINDHOLM, Predictability of Proceedings in International Commercial Arbitration – And is there a Nordic Way? In: Festkrift till Gustaf Möller, Juridiska Föreningen I Finland, 2011, 700, 703.

arbitration was handled by many of our great arbitration practitioners. Indeed, Article 182 of the PIL Act enshrines this approach. It leaves the organisation of the procedure to the parties and calls on the intervention of the arbitral tribunal only where necessary ("*soweit nötig*" or "*au besoin*").

With this approach, the procedural uncertainty is not eliminated by anticipating regulation but is managed in view of the issues as and when they arise. The parties have the assurance that this management and any procedural decisions that remain to be made by the arbitral tribunal take place within the general framework of two fundamental principles, equal treatment of the parties and adversarial proceedings. They must have trust and confidence that the arbitrators apply these principles in a fair manner; but since the parties placed the resolution of the substance of their dispute in the hands of the arbitrators, one should expect that they also trust them for their procedural fairness.

In conclusion an observation based on personal experience: discussing procedural differences as and when they arise and resolving them by reference to principles of fairness and "due process", generally leads to more satisfactory solutions and a higher degree of acceptance than addressing them in the narrow framework of predetermined regulations. I take this experience as another reason for managing procedural uncertainty rather than seeking to eliminate it by regulating every single detail in advance.

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