President's Message

Burdensome Unpredictability

Reading a recent publication on complaints about arbitration and ways to improve the process, I was not surprised to find greater predictability taking a prominent place in users' wish-lists. What *was* surprising was to read that users appear to expect greater predictability not only of the arbitral process but also of the *outcome on the merits*.[1] This is puzzling. Litigation is inherently unpredictable. Lack of certainty of the outcome on merits is the very essence of "*litigation risk*" and constitutes a powerful incentive to avoid disputes altogether, or to resolve them in ways that afford the parties at least a modicum of control over the substantive outcome. Why would arbitration – or for that matter any form of dispute resolution in which a third party dictates a binding resolution of the dispute – be different from litigation in this respect? The answer is that arbitration is, unfortunately, that it is not.

Or is it?

I once heard a lawyer joking that the difference between court litigation and arbitration is that arbitrators go to great lengths to get to the very bottom of the case whilst judges "merely" investigate what they need to and no more. Thus, whereas a judge will consider the evidence to determine whether a given piece of equipment is defective due to a design flaw (and answer that question negatively or positively but always pithily), an arbitrator will want to know the name and ancestry of the designer of the equipment, whether he/she has a cat and, if so, whether he/she fed the cat before leaving for work on the fateful day the equipment was designed (evidence of the cat's name and pedigree is optional, but highly appreciated). This is the type of joke that arbitration practitioners endure outwardly with feigned good humour and inwardly with a weary sigh.[2]

The reader may wonder what this has to do with predictability of the substantive outcome of a dispute. It is time for me to get to the point: this President's Messages concerns lack of predictability of how arbitrators apply the rules on burden of proof in relation to quantum. Let me cite two examples taken from my practice.

In the first example, the claimant was claiming damages on the basis, *inter alia*, of lost future revenues. The arbitral tribunal found the claimant's evidence of the allegedly lost revenues to be unpersuasive and seriously

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1 Inka Hanefeld / Jorn Hombeck, *International arbitration between standardization and flexibility – Predictability and flexibility seen from a client's perspective*, 2015 SchiedsVZ 1, pp. 20 et seq.

2 Just like lawyers will (more or less politely) pretend to agree that lawyer jokes are the pinnacle of wit.

flawed in many respects. The tribunal thus concluded that it could not rely on the claimant's evidence to quantify any award of damages. One might think that the claim was in deepest trouble and that, in the next sentence, the tribunal dismissed the claim because the claimant had failed to prove a necessary component of its damages calculation. This was not the case: after having faulted the claimant's case on quantum, the arbitral tribunal noted that the respondent had merely criticised the claimant's evidence instead of providing an alternative calculation of its own. The tribunal then took this as a ground for exercising its broad discretion to assess damages on the basis of the applicable law, which it proceeded to do. The end result was a nine-digit award of damages to the claimant.

In the second example, the respondent argued that the claimant had failed to prove quantum and severely took to task the claimant's evidence on that issue. However, in addition, the respondent also filed evidence of its own to establish that the claimant's computation was wrong; the respondent did this because it did not want to take the risk of "only" discrediting the claimant's evidence. In turn, the claimant stated that the respondent's counter-evidence was irrelevant and could not guide the arbitral tribunal for its findings on quantum. The arbitral tribunal found that the claimant's evidence of its quantum was deeply flawed and unpersuasive. Notwithstanding this finding, the tribunal did not dismiss the claim on the ground that the respondent had failed to prove quantum. Instead, it made a calculation of its own based on the evidence that the respondent had filed to establish the errors in the claimant's computation. This resulted in an award of damages of about 33 % of the amount claimed.

These two examples have several common features. First, they both concern quantum – i.e. the very "beef" of nearly all arbitral proceedings. Except where the claimant is seeking non-monetary relief, the whole point of bringing arbitration from the claimant's point of view is to get money in the end; what matters to the respondent is its financial exposure. Second, they both concern the issue of burden of proof. Third, in both of them the applicable law squarely placed the burden of proving quantum on the claimant. Fourth, in both cases, the tribunal found the claimant's evidence of its quantum to be insufficient or unreliable. Fifth, in both cases the tribunal nevertheless awarded damage on the basis of something that the respondent had clearly not anticipated and arguably had no ground to anticipate.

This brings us back to user complaints about lack of predictability of the substantive outcome.

In the first example, the tribunal faulted the respondent for not having made any calculations of its own of the future revenues that the claimant may

or may not have lost. This begs the question: if, as was the case in this example, the burden of proving quantum lies on the claimant, *why on earth would a respondent file its own quantum calculations in the first place?* To put it colloquially, why would a respondent put in evidence an alternative noose for the tribunal to slip around its neck if the claimant's noose were found to be wanting? This question is compounded by what happened to the respondent in the second example: if the respondent had simply poked holes in the claimant's evidence (which it did successfully) and stopped there, in all likelihood the claim would have been dismissed. By seeking to convince the tribunal not only that the claimant's evidence was full of holes but also that the claimant's computation was wrong, the respondent unwittingly supplied the rope with which it was hanged.

These examples illustrate a kind of arbitral Catch-22: whichever way the respondent turns, it is taking a significant risk. If the respondent merely disputes the claimant's evidence on quantum, even successfully, it runs the risk of having an unsatisfied arbitral tribunal make a (more or less educated) guess of what the amount of damages might be. If the respondent seeks to educate the arbitrators, its evidence can be taken as a minimum level of damages upon which the tribunal can rely if it is satisfied that the respondent is liable in principle. For counsel, both scenarios are a nightmare. In the first scenario the client will be likely to blame the lawyer for having run an all-or-nothing defence. In the second scenario, counsel is cast in the unenviable role of Wile E. Coyote.[3] This lack of predictability is all the more frustrating as it goes to the very heart of case strategy for a respondent party.

Of course, each case has its own specificities. There can be cases where the respondent must bring forth evidence of quantum due to provisions of the contract or the applicable law.[4] Also, it is frequent that quantum cannot be proven with complete certainty due to the very nature of the claim, so that arbitrators or judges are perfectly justified in making use of whatever discretion the applicable law grants to make an informed assessment.[5] Finally, and this is far less understandable, it can be that arbitrators are reluctant to dismiss a damages claim for lack of proof of quantum where they find that there was a breach; this explanation holds true particularly where the behaviour that led to the claim was particularly reckless or reprehensible.[6]

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3 Unless the decision to educate the tribunal was knowingly taken with the aim of providing a low-range computation of damages, precisely in order to reduce the risk of the tribunal going on a frolic of its own.

4 Obvious examples are claims for brokerage fees or for royalties based on sales. This applied to neither of the examples given here.

5 Which does not mean, however, that the burden of (negative) proof shifts to the respondent if the claimant's evidence is found to be deficient.

6 This was the case in neither of the examples discussed here.

That said, I believe that the wearisome joke about the judges and arbitrators is also a major part of the problem. Arbitrators are generally intelligent people. With intelligence comes curiosity. In turn, intellectual curiosity frequently leads to dissatisfaction when one does not have the complete picture. This is where the trouble begins: do arbitrators really need to know whether a claimant actually did suffer financial harm and, if so, in which amount? Is the real question for arbitrators to resolve not, "*Has the claimant given me sufficient proof enabling me to grant monetary relief it seeks?*" And if the answer to that question is negative, the question should be, "*Has the claimant given me sufficient proof to award at least part of the sums it is claiming?*" If this second question also receives a negative answer, arbitrators should (at a minimum) seriously consider stopping there. And they should certainly not blame – let alone punish – the respondent for not having done the claimant's job.

To do otherwise brings us back to undue curiosity about the designer's cat. Popular wisdom teaches us that curiosity and cats mix poorly.

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SAVE THE DATE

ASA General Meeting & Conference
Domestic Arbitration Worldwide, What Works Best?
4 September 2015, Bern

Dreiländerkonferenz 2015
ASA Schweiz, ArbAUT Österreich, Liechtensteinischer Schiedsverein
11 September 2015, Vienna

ASA Annual Conference 2016
Commercial Arbitration Involving States: Public Interests and Private Justice?
22 January 2016, Zurich

For more information see www.arbitration-ch.org