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 time

is 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/2\(^{nd}\) 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**