

Vienna Arbitration Days 2020

Safeguarding Public Interest I Public Policy I Competition and Insolvency

World Café Panel - Saturday 22 February 2020, 10:00 a.m. - 1:15 p.m.

Moderators:

- Johanna Kathan-Spath, VIAC
- Nikolaus Pitkowitz, Graf & Pitkowitz
- Anna Katharina Radschek, Graf & Pitkowitz

Table Moderators:

- Alexey Anischenko
- Jonathan Barnett
- Beata Gessel
- Christoph Herbst
- Ilya Nikiforov
- Christian Oetiker
- Irina Paliashvili
- Hendrik Puschmann
- Evgeny Raschevsky
- Ana Stanič
- Roman Zykov

Co-Moderators:

- Markus Beham
- Marianela Bruno
- Werner Jahnel
- Ulrich Kopetzki
- Eva Niel
- Paul Nimmerfall
- Gunnar Pickl
- Elisabeth Rath
- Florian Stefan
- Clemens Treichl
- Ilona Zekely
- Alexander Zojer

1. Organisation

The Arbitration World Café was first introduced by Nikolaus Pitkowitz at the Vienna Arbitration Days 2016 as a novel format for the Saturday sessions permitting interaction of the audience with top arbitration experts aimed at voicing common understandings, demands for changes and developing new concepts. The World Café received from the beginning positive feedback and has since then become a fixed component of the Vienna Arbitration Days. For 2019 we plan to have 13 tables, each dealing with a distinct subject related to the general conference topic (see the preliminary overview below under 5). Each table will be presided by one table moderator who will be supported by an experienced young practitioner as a “co-moderator”. The discussion round at each table is expected to involve approx. 8-12 conference participants and will take place in two rounds of approx. 50 minutes each.

Before the first round of discussion starts, each table moderator (together with the co-moderator) will provide a short teaser introducing the topic to be discussed at their table. After each round, the audience will be moving to another table of their choice while the table moderators and co-moderators stay. The outcome of the discussions will be presented by the table moderators (together with the co-moderator) in their contribution to the Austrian Yearbook of International Arbitration 2020.

For general information on the World Café Format please visit [Cafe-To-Go-Revised](#).

2. Tasks of Table Moderators and Co-Moderators

The task of the table moderators (together with their co-moderators) is to structure and lead the discussion concerning the table topic as well as to insure a continuous flow of discussion. Ideally, issues connected to the topic should be prepared in advance in order to trigger further thoughts and discussions.

Ideally, the two World Café sessions at one table are built on each other, i.e. thoughts discussed during the prior session are further developed in the following session, taking into account input received from further participants (including their reports from other tables).

3. Follow-Up Publication

The outcome of the World Café sessions should be well documented since it will be developed into an article to be published, as that of the 2016 2017 and 2018 sessions, in the Austrian Yearbook on International Arbitration 2021 (available at Manz Verlag as a hardcover book and online via Kluwer).

We kindly ask each moderator & co-moderator, to provide us with a summary of the outcome of their table discussions within four weeks after the conference took place.

4. Conference Material

Albeit possible, it is not necessary to distribute any conference material for the individual World Café Sessions. In the past years, some Table Moderators have prepared questionnaires or outlines which were included in the conference materials so that the participants could prepare for the sessions.

In order to give conference participants an overview of the table topics and the allocation of moderators and secretaries, we plan to distribute a **schedule for the World Café**.

5. Allocation of Topics

Moderators:

Johanna Kathan-Spath, Nikolaus Pitkowitz and Anna Katharina Radschek

NO	Topic	Moderator	Co-Moderator
1	Through the lens of TRANSPARENCY in International Arbitration	Irina Paliashvili	Marianela Bruno
2	Climate change related disputes – is there a need for International Arbitration Court for Environment	Beata Gessel	Florian Stefan
3	Insolvency Issues in International Arbitration	Alexey Anischenko	Werner Jahnel
4	The Impact of Economic Sanctions on International Arbitrations	Roman Zykov	Alexander Zojer
5	Article 6 ECHR and its Bearing upon International Arbitration	Christoph Herbst	Eva Niel
6	Public Interest in the Publicity of Arbitral Proceedings	Hendrik Puschmann	Markus Beham
7	The Clash between EU Law and International Law in Investment Arbitration – EU Public Policy, Enforcement of Awards and Nord Stream 2	Ana Stanič	Clemens Treichl
8	The good, the bad & the ugly: Safeguarding Public Interest in Arbitration via Public Access to Justice	Jonathan Barnett	Ulrich Kopetzki
9	Arbitration and Insolvency – Arbitrability in case of insolvency	Christian Oetiker	Gunnar Pickl
10	Corruption in Arbitration Arbitrators' Powers and Duties	Ilya Nikiforov	Paul Nimmerfall
11	Arbitration evergreen: Looking for a balance between private and public interest. A special focus on comparative perspectives	Evgeny Rashevsky	Elisabeth Rath, Ilona Zekely

Outlines of the World Café Table Topics

1. Through the lens of TRANSPARENCY in International Arbitration

Table Moderator: Irina Paliashvili

Co-Moderator: Marianela Bruno

-1- Balancing confidentiality and transparency

- in investor-state treaty-based arbitration
- in commercial arbitration

-2- Transparency in your daily professional practice

- experiences in dealing with transparency:
 - in commercial arbitration, e.g. regarding information on arbitrators, third party funding;
 - in investment arbitration (in other words how the Transparency Rules and other Transparency Standards are applied)

-3- The aftermath of transparency

- on concerns related to apparent lack of independence and impartiality of arbitrators and decision makers
- in ISDS concerns related to lack of consistency, coherence, predictability and correctness
- how confidentiality is affected when arbitral awards are challenged in domestic courts

-4- Outlook of transparency

- less or more transparency in both commercial arbitration and ISDS,
- impact on other issues (such as corruption, third party funding, etc)

2. Climate change related disputes – is there a need for International Arbitration Court for Environment

Table Moderator: Beata Gessel

Co-Moderator: Florian Stefan

Global climate change is a defining challenge of our time for individuals, corporations, NGO's and states. It raises questions of justice and human rights. Climate change will disproportionately affect people who have less ability to prevent, adapt or otherwise respond to increasingly extreme weather events, rising sea levels and new resource constraints. We propose to discuss what role can be played by arbitration mechanisms in this difficult time. Therefore, the following issues will be discussed:

- Can we sue Donald Trump? What are climate change related disputes? Who can be a Claimant and who can be a Respondent? Is there a specific approach to the problem of causation?
- Can common characteristics be discerned that allow a classification as climate change related dispute? Is such classification necessary and/or helpful?
- What are the main sectors that will see climate change related disputes?
- Is arbitration well placed to deal with climate change related disputes? Is the International Court for the Environment, an arbitration institution as proposed by IBA, a good option? Could it be an alternative to PCA's 2001 Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment (2001 Rules) and International Tribunal on the Law of the Sea (ITLOS)?
- What specific features are required for a dispute resolution mechanism to effectively resolve climate change related disputes and is arbitration able to provide these features?
- Could investment treaties be a preferred instrument to promote measures curbing the rise in global temperatures and what role should arbitration play in that regard?

3 **Insolvency Issues in International Arbitration**

Table Moderator: Alexey Anischenko

Co-Moderator: Werner Jahnel

The following questions will be discussed:

- parallel proceedings (in arbitration and in the insolvency court): possibility, consequences;
- suspension of arbitration ex lege: is it envisaged by law, what if arbitrator refuses to comply;
- legal force of the arbitral award that was not recognised and enforced before the insolvency has started;
- possibility to enforce the arbitral award in the third state, where there are assets of the debtor are located;
- different types of insolvency proceedings: does it make a difference?

4 The Impact of Economic Sanctions on International Arbitrations

Table Moderator: Roman Zykov

Co-Moderator: Alexander Zojer

- The nature of economic sanctions:
 - Types and forms of sanctions
 - Current examples
- The impact of sanctions on the applicable substantive law
 - Nullity / Voidability of Contracts (Impossibility, Force Majeure, Foreseeability etc.)
- The impact of sanctions on the arbitration proceedings
 - Institutions
 - Counsel
 - Arbitrators
- The impact of sanctions at the enforcement stage
 - Arbitrability
 - Ordre public
- Practical considerations
 - Is there a sanctions free law and arbitration venue?

5 Article 6 ECHR and its Bearing upon International Arbitration

Table Moderator: Christoph Herbst

Co-Moderator: Eva Niel

The following questions will be discussed:

- In which cases are the guarantees contained in Article 6 paragraph 1 ECHR directly applicable (see in particular ECHR 2.10.2018, No 40575/10 and 67474/10, Mutu and Pechstein ./ Switzerland)?
- Which guarantees of Article 6 ECHR paragraph 1 ECHR can be considered of such a fundamental nature that no one can be legitimately permitted to give them up and are to be considered truly as international procedural public policy which everybody must respect?
- Are there any other fundamental (human) rights which can be considered as international (procedural) public policy to be respected by everybody?

6 Public Interest in the Publicity of Arbitral Proceedings

Table Moderator: Hendrik Puschmann

Co-Moderator: Markus Beham

- framing the debate – publication of what?
 - case details (parties, arbitrators, seat, case number, industry ... see 2013
 - UNCITRAL Rules on Transparency, Article 2)
 - documents (see 2013 UNCITRAL Rules on Transparency, Article 3)
 - awards (on jurisdiction, merits ...)
 - procedural orders
 - communication between tribunal / parties / institution / expert /
 - witnesses / ...
 - *amicus curiae* (see 2013 UNCITRAL Rules on Transparency, Article 4)
 - counsel, fee arrangements, third party funding, insurance ...
- moot argument of incomparability of investment treaty arbitration
 - involvement of a sovereign / (partially) state-owned entity
 - at least one party in investment treaty arbitration is also usually private
 - public interest in commercial disputes
 - in various typical areas, such as concessions, oil and gas, large-scale infrastructure ...
 - in certain business practices
 - corruption, fraud, money laundering, human rights abuses ...
 - commercial arbitration as an exception to the “domestic rule of law”
- confidentiality vs transparency
 - confidentiality as a core concern
 - 87% of respondents in the 2018 QMUL 2018 Survey
 - preference for opt-out, rather than an opt-in
 - transparency as an opposite?
 - confidentiality of proceedings vs transparency of process = possibility of a confidential, yet transparent system (see disclaimers in 2013 UNCITRAL Rules on Transparency)
 - anonymity through redaction?
 - market gossip (IARepporter, GAR, Juve ...)
- should parties get to choose
 - party autonomy as a pillar of commercial arbitration
 - private and closed system?
 - challenges in domestic courts
 - “new” forms of ADR
- publication
 - often no default prohibition of unilateral disclosure (cf. 2018 HKIAC Rules, Article 45.1)
 - internal repositories already exist
 - different approaches

- default (with exceptions)
 - 2013 UNCITRAL Rules on Transparency
- with consent of either parties and/or tribunal
 - opt-out (ICC Notes 2019, 40-46: two-year period; 2018 VIAC Rules, Article 41: “30 days after service of the award”; 2018 HKIAC Rules, Article 45.5: “time limit fixed for that purpose by HKIAC”)
 - opt-in (2013 UNCITRAL Rules, Article 34.5; 2018 DIS Rules, Article 44.3; 2014 LCIA Rules, Article 30.3; 2015 CIARB Rules, Article 34.5; 2012 SCAI Rules, Article 44; 2016 SIAC Rules, Article 32.12; 2017 SCC Rules, Article 3)
- advantages of publication
 - development of the law
 - quality assurance
 - de facto precedents = predictability and stability
 - reflection by academia and practice
 - focus on actual issues as opposed to theory
 - avoidance of outrageous arguments /factual propositions
 - equality of arms
 - no more exclusive knowledge
 - legal/market certainty (ICC Notes 2019, 40: “facilitating the development of trade worldwide”)
 - legitimacy of tribunals / individual arbitrators / institutions ...
 - accountability
 - necessity of publishable quality
 - o may encourage settlement in similar legal / factual constellations
 - o may guide court judges and other institutions
- concerns
 - administrative burden / costs
 - who publishes? who redacts?
 - arbitrators, parties, institutions, independent repositories ...
 - potential disputes over publication / redaction
 - arbitrator cherry-picking
 - although already exercised by word of mouth and insider knowledge (compare 2018 QMUL Survey) / Arbitrator Intelligence
 - disclosure of know-how
 - arbitrators writing awards for the market, public, academia ... – not the case
 - de facto precedents as a bar to innovation in decision-making
 - limited value of redacted reasoning
 - reduced efficiency
 - “due process paranoia” (see 2018 QMUL Survey)
 - GDPR (see ICC Notes 2019, 82)

7 The Clash between EU Law and International Law in Investment Arbitration – EU Public Policy, Enforcement of Awards and Nord Stream 2

Table Moderator: Ana Stanič

Co-Moderator: Clemens Treichl

The following issues will be discussed:

- Invoking public policy as a ground for setting aside and refusing enforcement of arbitral awards pursuant to NY Convention post Achmea
- Scope of EU public policy
- Inter-play between duty of sincere corporation and provisions of ICSID
- Nature and scope of Nord Stream 2 ECT claim and its annulment case before CJEU
- Impact of Achmea on such claims
- Can the clash between EU and international law be resolved?
- Where does this leave us?

8 The good, the bad & the ugly: Safeguarding Public Interest in Arbitration via Public Access to Justice

Table Moderator: Jonathan Barnett

Co-Moderator: Ulrich Kopetzki

Discuss the current debate about ISDS reform, in particular by the UNCITRAL Working Group III:

- Multilateral Investment Court and Appellate Mechanism;
- Multilateral Advisory Center;
- Arbitrator Code of Conduct;
- Third-Party Funding

9 Arbitration and Insolvency – Arbitrability in case of insolvency

Table Moderator: Christian Oetiker

Co-Moderator: Gunnar Pickl

- Four basic scenarios (arbitral tribunals with their seat in Austria and Switzerland, Respondent goes bankrupt before or after the commencement of the arbitral proceedings).
- What is the impact on the arbitrability? Which law applies? Are there differences between the objective and the subjective arbitrability?
- What is the impact on the proceedings? Can the bankruptcy administrator opt out of the arbitration agreement?
- What is the impact of the arbitrability questions at the enforcement stage?

10 Corruption in Arbitration | Arbitrators' Powers and Duties

Table Moderator: Ilya Nikiforov

Co-Moderator: Paul Nimmerfall

To start with ... a quick poll ...

- • What (illicit) behaviour could be qualified as "*corruption*" in your home jurisdiction?
- • Have you witnessed allegations of corruption in cases you have handled?
- • Do tribunals/arbitration institutions have to report suspicious cases to public authorities?

Some food for thought ...

- **Meaning and Scope of Corruption**
 - What definition can/should be used?
 - What forms of corruption are relevant for the tribunal ("necessary" small-scale bribery vs. corruption of public officials)?
- **Powers and Duties of the Tribunal**
 - What are indicators of corruption (red flags) if no intermediary/agent is involved?¹
 - Are the powers and duties of the tribunal based on general principles or merely on the applicable law?²
 - Power/duty to investigate ex officio vs. the principles of ultra vires and ne ultra petita
 - Power/duty to report corruption findings to national authorities vs. confidentiality
 - In case the tribunal finds corruption (i.e. underlying contract/transaction is tainted): What measures should it take to deprive the wrongdoer of windfall profit?
- **Burden of Proof**
 - Do allegations/findings of corruption justify shifting the burden of proof?

Additional issues (depending on time) ...

- **Arbitration Award**
 - Do national courts have to consider corruption-related findings of the tribunal when assessing the award? Would allegations/findings of corruption justify to set aside the award?
- **Corruption: A Procedural or Substantive Issue?**
 - Do arbitral tribunals have jurisdiction to consider cases of alleged corruption/bribery?
 - Doctrine of separability

¹ See Basel Toolkit for Arbitrators 2019 providing a list of *red flags* but focusing on scenarios involving inter-mediaries, agents or other "*middlemen*".

² E.g. if the applicable law does not provide for suitable measures against corruption.

11 Arbitration evergreen: Looking for a balance between private and public interest. A special focus on comparative perspectives

Table Moderator: Evgeny Raschevsky

Co-Moderators: Elisabeth Rath, Ilona Zekely

Overview:

1. Introduction:

- Multifaceted tensions between private and public interest in arbitration

2. Focal point: public interest in public-private arbitrations

- (How) Does arbitration as a means of private dispute resolution endanger the safeguarding of public interest?
- What are the values that need to be balanced?

Food for thought: confidentiality v accountability, correct application of (public) law v finality

- Is it necessary to define a common concept of what is public interest? How can public interest and public policy be delimited in order to avoid the arbitrary denial of enforcement in accordance with Article V(2)(b) of the 1958 New York?

3. How to safeguard public interest in public-private arbitrations: a comparative perspective

- Which means can be used to ensure that public interest is safeguarded?

Food for thought: subjective arbitrability, expansion of the scope of review, increased transparency

- How do different jurisdictions deal with public interest?

Examples include United Kingdom, United States, France, Germany, Lithuania

- Telling tales: stories from the audience's perspectives

4. Policy considerations:

- Field of tension: arbitration as a means for insulating contractual relationships against political arbitrariness by potentially influenceable national courts versus arbitration as a means of covering up the deals of corrupt politicians
- Arbitration is naturally dependent, to a certain degree, on state support. To what extent should arbitration interfere the state sphere – and ultimately sovereignty – to ensure the future of arbitration as a successful means of dispute resolution?

5. Wrap-up