Kluwer Arbitration Blog

2023 Petersberg Arbitration Days Recap: “Out of the box” – What Arbitration Can, Should, and Must Learn From Neighbouring Sciences

Henriette Sigmund (Busse Disputes) · Thursday, April 27th, 2023

On March 3 and 4, 2023, the 19th Petersberg Arbitration Days took place at the Althoff Grandhotel Schloss Bensberg in Bergisch Gladbach, Germany. The organizers of the annual conference, the Beck Academy and the German Arbitration Institute (DIS), put together an impressive, interdisciplinary program with top-class speakers. The multidimensional impulses ranged from law and economics and legal history, speech science and psychology to politics and rhetoric. This post provides a description of the discussions held during this event.

Kick-off – Impulses on a Progressive Arbitration Scene

As a harbinger for the interdisciplinary and future-oriented conference day, Prof. Christian Duve (Duve Law) addressed the potential and limits of artificial intelligence in arbitration with a view to the automated text generation program ChatGPT in his keynote speech on the eve of the conference day. The ensuing discussions paved the way for the vivid exchange on desirable dynamics in the arbitration scene. On the conference day, the co-organizers Reinmar Wolff (University of Marburg/DIS) and Prof. Jörg Risse (Baker McKenzie) guided the participants through the versatile program.

Law & Economics – An Economic Analysis of Arbitration

With an impressive lecture on an economic analysis of arbitration, Prof. Gerhard Wagner (Humboldt University of Berlin) opened the conference day, initiating the discussion on the future of arbitration in various ways. To begin with, he presented dispute resolution from an economic point of view by contrasting the cost/benefit analysis of unilateral and bilateral choices of dispute resolution mechanisms. He demonstrated the crucial differences of said scenarios and highlighted that parties jointly opting for arbitration or forum selection agreements *ex ante* aimed at ensuring legally accurate decisions to set optimal compliance incentives, whereas a plaintiff’s unilateral choice was not directly guided by such quality concerns.

Furthermore, Prof. Wagner discussed network effects in dispute resolution and why the parties’

choice of law and forum often coincide. In particular, he illustrated how network effects emerge self-sustainably if a court or national law has specific expertise on a matter (such as e.g. courts in Delaware, US, for corporate law) which again attracts more cases and deepens the expertise even further. For the coinciding choice of law and forum, Prof. Wagner explained that the gain of a choice of forum is only exploited at full if the chosen court applies its "home law" as the one it masters without the need to resort to advice on foreign law.

He then applied cost/benefit analysis to arbitration and alternative dispute resolution mechanisms. With respect to arbitration, he distinguished between national and international disputes, and discussed the relevant factors in each case including less obvious ones such as costs due to the time value of money or collateral damage caused by disclosure. By way of example, parties in international disputes primarily aim at neutrality of the chosen forum and enforceability of a decision to avoid diverging incentives (the choice of one party's home forum would benefit that party and encourage its opportunistic behaviour), whereas these factors matter less in national disputes where both parties stand on equal footing. Finally, he outlined externalities such as arbitration impairing judicial development of the law and illuminated which incentives lead judges and arbitrators.

Legal history – What History Teaches Us About Arbitration

Subsequently, Prof. Wolfram Buchwitz (University of Würzburg) demonstrated how legal history contributes to today's legal practice based on three examples. *First*, he presented the concept of a binding decision period for arbitral awards, being known both historically and abroad, and discussed whether such time-limited mandate should be (re)adopted in favour of timely decision-making. *Second*, he asked whether specific arbitrators (including replacements) should be designated in the arbitration agreement to shorten the phase of constituting the arbitral tribunal and thus increase the efficiency of arbitration proceedings. Based on historical evidence such as Roman law and medieval scriptures, Prof. Buchwitz encouraged this approach.

Finally, he discussed the legitimacy of arbitration in terms of legal policy analysing the hypothesis that arbitration only served as a transitional solution supplementing the state court system – which he firmly rejected with recourse to legal history. In view of the recurring discussions about free trade agreements providing for arbitration, he suggested that historically recognized unique features of arbitration, such as neutrality and the increased trust parties place in self-selected decision-makers, should be emphasized more strongly.

Speech Science – Argumentation and Narration in Arbitration Proceedings

Diving further into interdisciplinarity, Prof. Kati Hannken-Illjes (University of Marburg) shed light on the roles and functions of argumentation and narration in arbitration and their specific relationship. She complemented the presented theories and concepts of speech science with illustrative case studies from her research.

By way of introduction, she reminded the audience that narration always has a specific function, and that this function is particularly argumentative in law. In clarifying the concept of narration, she emphasized the subjective, strongly situated component of narration which does not only

provide information but also reveals aspects of the narrator's identity and positioning.

She also discussed the structure of narration and contrasted complete and fragmented narration. Furthermore, she presented different levels of narrative in law, ranging from overarching master narratives to micro-stories and selective raising of individual aspects. With regard to the relationship of narration to argumentation, she pointed out that the indispensable contribution of narration to convincing has been acknowledged for millennia. In more depth, she explained three forms of combining narrative and persuasion: the illustrative example, the substantive example, and the so-called counter-story. She concluded with an appeal to the audience to pay attention to types and functions of narration, and to resort to its argumentative power to enable the recipient to experience and emotionally participate, especially in arbitration.

Psychology – Psychological Factors in Judicial Decision-Making

Alica Mohnert (University of Cologne) continued with a lively contribution on psychological competences that serve factually correct legal decision-making. To begin with, she emphasized that psychological phenomena impacted any decision-making and appealed for greater awareness. Her following lecture was devoted to three specific phenomena, which she vividly described in terms of their operation and impact: cognitive dissonance, anchor effects and confirmation bias.

First, she discussed the conflict state of cognitive dissonance and the resulting dangers for (judicial) decision-making. Cognitive dissonance ensues if an information, action or decision conflicts with a person's prior belief, and triggers attempts to reconcile said conflicting positions. This often results in irrational behaviour such as justifying the prior belief or re-construing or misinterpreting the conflicting new information. Subsequently, Ms. Mohnert outlined that heuristics were indispensable but susceptible to errors and addressed anchor effects and confirmation bias as such errors. She pointed out how confirmation bias may lead to overweighting of information and misjudgements. With regard to anchor effects, she illustrated on the basis of study results and everyday examples in which ways numerical statements influence subsequent assessments – even if such statements were completely unrealistic. She then presented effective strategies to counteract systematic errors of reasoning in legal decision-making. Concluding her insightful speech, she advised the participants to watch out for and recognise influencing psychological phenomena, and to actively neutralize them through appropriate counterstrategies.

Politics – Why Politics Does Not Like Arbitration (So Much)

Complementing the program by another facet, Thorsten Lieb (Member of the Bundestag) took the audience on a journey into politics. He provided a multi-layered insight of challenges arbitration faces in the legal-political debate and appealed for overcoming them through sound exchange.

By way of introduction, he raised "Law – Made in Germany" as an initiative to strengthen Germany as a legal location, including making Germany more attractive as arbitration forum. In this respect, Mr. Lieb referred to the EU-Canada Comprehensive Economic and Trade Agreement (CETA) and the ensuing intense debate on investment arbitration. In this context, he emphasized that the previously heated discussion has calmed down since its peak in 2015, and he reported on the atmosphere during the CETA's ratification on January 20, 2023.

Furthermore, he discussed recent case law of the Federal Constitutional Court, which did not question international arbitration as a method of dispute resolution (for example the Pechstein ruling dated 3 June 2022, reference no. 1 BvR 2103/16, rightly not questioning the fundamental constitutionality of international arbitration as a method of conflict resolution). Moreover, presenting various examples, he illustrated that legal history proved that there was no fundamental rejection of arbitration amongst (historical) lawmakers.

To conclude, Mr. Lieb pointed at an apparent lack of knowledge about arbitration in politics and society, which frequently led to unfounded criticism and stigmatisation. Overall, he appealed for more openness and exchange to ensure a better understanding. Specifically, he asked for more involvement of arbitration practitioners in the political discussion, expressly inviting the audience to contribute to the upcoming reform of the German Code of Civil Procedure regarding arbitration.

Rhetoric – Just Talking? A Look Into the World of Rhetoric

Prof. Jörg Risse (Baker McKenzie) completed the interdisciplinary journey with an impressive presentation on rhetoric. He conveyed the power of rhetoric and captivated the participants right at the beginning of his presentation with a gripping story based on an experiment of the Washington Post that evaluated the (non)response of passers-by to a performance of the world-famous violinist Joshua Bell dressed as street musician in New York's metro station.

With this example, he illustrated that rhetorical success may depend less on substantive performance than frequently assumed, especially in the legal world. He then went on to discuss the three factors of rhetorical success: person, emotion, and content, explaining them in isolation and in interaction. In particular, convincing an audience with a statement can relate to the outstanding personality making it, the associated emotion raised in the listener (who interrelates and thus responds on a different neuronal level), or the pure content being of particular interest. Against this background, Prof. Risse discussed how rhetorical potential could best be exploited in arbitration proceedings and offered three concrete suggestions supported by neuroscientific findings.

First, he advised to reconsider the use and value of Powerpoint presentations in arbitration proceedings critically. *Second*, he suggested to speak more with and in pictures – both visually and linguistically – to exploit their genuine potential to convince. *Third*, he appealed for telling stories and highlighted their unique potential to fully capture the attention of listeners and thus avoid distraction by parallel streams of thought.

Conclusion

Overall, the conference fulfilled its promise of looking beyond the end of one's nose, enlightened the participants in various ways, and allowed for professional discussions as well as personal exchange. Most remarkably, the who's who of the present arbitration community demonstrated an open-minded and self-reflective attitude, honestly acknowledging shortcomings of the own legal discipline and actively welcoming insights from neighbouring disciplines. This progressive approach and proven willingness to learn promises a great dynamic and will certainly enrich the arbitration scene.

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