


IS ARBITRATION LOSING ITS LUSTER?

- 1. Introduction**
 - 2. Challenges: loss of flexibility**
 - 3. Remedies**
 - 4. Conclusion**
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IS ARBITRATION LOSING ITS LUSTER?

1. Introduction

- **Short answer: no!**
 - **Reasons for this short answer**
 - **Room for improvement**
 - **Danger of self-fulfilling prophecy**
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« The age of innocence has come to an end (... and) the subject has inevitably lost some of its charm. Once the delightful discipline of a handful of academic aficionados on the fringe of international law, it has become a matter of serious concern for a great number of professionals determined to master a process because it is essential to their business. They labor, but not for love » (Jan Paulsson)

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2. Challenges: loss of flexibility

- **Where have we come from?**
 - **Globalization of international commerce**
 - **Worldwide success**
 - **Arbitrators: from the elderly gentlemen to the technocrats**
 - **Arbitral institutions: increasing « bureaucratisation »**
 - **« Jurisdictionalisation » or « Americanisation » of the proceedings**

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« All the elephantine laboriousness of an action in court, without the saving grace of the exacerbated judge's power to bang together the heads of recalcitrant parties » (Lord Mustill)

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Reasons for an alleged decline of arbitration?

- **Highly competitive business**
- **Off-shore justice**
- **« Americanised », « civilised » or « harmonised »?**

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Harmonisation

- **Procedure** (e.g., 2010 IBA Rules on the Taking of Evidence: discovery)
- **Rules of arbitral institutions**
- **Legislation** (1985/2006 UNCITRAL Model Law on International Commercial Arbitration, 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards)

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Harmonisation

- **Pro: Legal Certainty and Foreseeability**
- **Contra: Loss of Flexibility**

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IBA Evidence Rules:

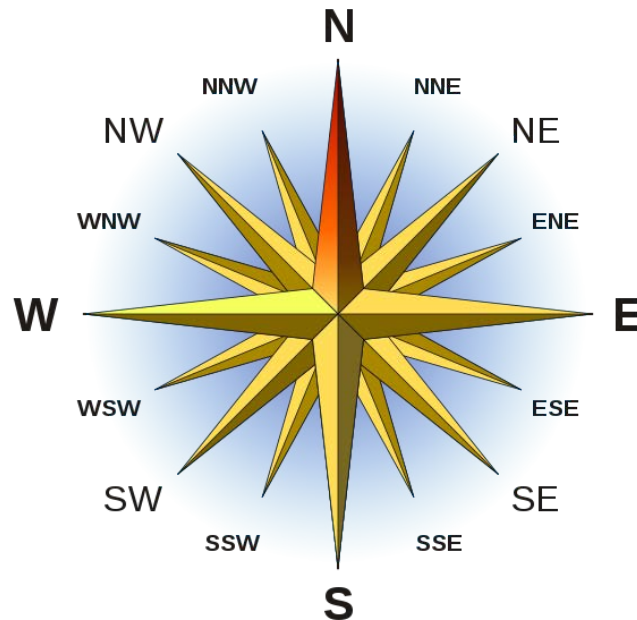
Straitjacket ...



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IBA Evidence Rules:

... or Compass?



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Competition from Commercial Mediation and Conciliation

- **Better control by the parties and counsel**
 - **Wider picture of the dispute**
 - **Greater variety of possible outcomes**
 - **Less expensive and speedier**
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Commercial Mediation and Conciliation



IS ARBITRATION LOSING ITS LUSTER?

3. Remedies

Flexibility

AND

Certainty and Foreseeability



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IBA Evidence Rules: Straitjacket or Compass?

Preamble 2:

*« Parties and Arbitral Tribunals may adopt the IBA Rules of Evidence, in whole or in part, to govern arbitration proceedings, or they may vary them or use them as guidelines in developing their own procedures. The Rules are **not intended to limit the flexibility that is inherent in, and an advantage of, international arbitration,** and Parties and Arbitral Tribunals are free to adapt them to the particular circumstances of each arbitration ».*

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4. CONCLUSION



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To the parties, counsel, arbitrators, arbitral institutions, legislators and teachers:

Make efficient use of your freedom of choice!



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Thank you for your kind attention!

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