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# ITA IN REVIEW

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## REPORT:

### #YOUNGITATALKS & YAAP JOINT CONFERENCE–VIENNA

### PUBLICATION OF AWARDS: PROMISING FUTURE STANDARD OR UNFORTUNATE TRANSPARENCY HYPE?

by Viktor Cserép

#### I. INTRODUCTION

The very first joint conference of Young ITA and the Young Austrian Arbitration Practitioners (YAAP), organized by Andreas Schregenger, Alexander G. Leventhal, Lisa Beisteiner, and Christian Koller was held under the title: “*Publication of Awards: ‘Promising Future Standard or Unfortunate Transparency Hype?’*” in Vienna on 20 February 2020, on the eve of the annual Vienna Arbitration Days.

Following introductory remarks by **Natscha Tunkel** (KNOETZL, Vienna), two panels consisting of lawyers with diverse backgrounds addressed potential advantages and concerns related to the publication of arbitral awards in commercial arbitration.

#### II. FIRST PANEL

The first panel, moderated by **Andreas Schregenger** (GABRIEL Arbitration, Zurich), dealt with “*Chances and Risks.*”

**Ryan Manton** (Three Crowns, Paris) examined some of the risks that may follow from the greater publication of awards, focusing on the preferences of users of arbitration. He noted that 73% of the respondents to Queen Mary University’s 2018 International Arbitration Survey considered confidentiality to be either “very important” or “quite important”, and he suggested that the greatest risk of pushing parties towards publishing more awards is that the views of those who choose, and therefore sustain, international commercial arbitration will be ignored. Dr. Manton acknowledged the possibility that users’ preferences may change over time and observed that some institutions, such as the ICC following the introduction of its opt-out procedure for the publication of awards in its 2019 Note to Parties, appear to be seeking to nudge users in that direction. But he also raised the point that some of the



main arguments in favor of publishing awards raised difficult questions; for example, the argument that publishing awards would satisfy a public interest for greater transparency obscured difficult questions about who determines the public interest, especially in circumstances where some sovereign States and State-owned entities themselves appear to prefer maintaining the confidentiality of awards.

As to the *chances*, **Katia Renner** (Wenger & Vieli, Zurich) noted that publicizing awards might contribute not only to an increase in transparency in international commercial arbitration but also to a development of the law—especially with regard to specific (arbitration-related) procedural matters or the interpretation of international conventions or trade usages. Moreover, it might provide a certain degree of quality assurance by essentially holding arbitrators accountable for their decisions and subjecting them to an external “peer review”. Finally, Dr Renner noted that publicizing awards might also serve an educational purpose by providing a database from which arbitrators could draw inspiration from.

### III. SECOND PANEL

The second panel, moderated by **Tamara Manasijević** (ARP, Vienna) aimed to explore “*Different Perspectives on the Publication of Awards.*”

From the academic perspective, **Markus P. Beham** (University of Passau) commented that a greater window into practice would be an invaluable asset, particularly in certain types of recurring factual constellations. According to Dr. Beham, the question of “representativeness” of the sample of published awards is less important than the reasoning of the individual award. He concluded by adding that, historically, it might be important to recognize that the core concerns in the development of this dispute resolution method were arbitrator selection and trust, not confidentiality.

According to **Joseph Schwartz** (WAGNER Arbitration, Berlin), *from a decision-making perspective*, the publication of commercial arbitral awards remains desirable despite the obvious challenges. While case law and legal interpretation of the respective substantive law will be available in many jurisdictions (in the form of national court decisions), the publication of commercial arbitral awards still seems



highly relevant for the development of the law with regard to the interpretation of arbitration laws and rules of procedure. Furthermore, arbitral awards would partake in the development of the substantive law, in particular in areas in which disputes are commonly resolved through arbitration. Dr. Schwartz added, however, that safeguarding a neutral and representative picture seems challenging in an environment where parties decide about the publication of awards themselves and the self-regulation through appeal proceedings does not occur.

Approaching the issue *from a client's perspective*, **Maria Gritsenko** (VEON, Amsterdam) commented that she does not see the advantages of systemic publication of arbitral awards, especially given the practical difficulties of suitably anonymizing an award. At the same time, she acknowledged that the international arbitral community (including its clients) would benefit from a wider publication of the (anonymized) decisions on issues proper to the arbitral process (such as arbitrator challenges, disclosure matters, security for costs). She added, however, that it is also important to preserve the right to disclose an award (in subsequent or connected proceedings, for example), subject to adequate control by a court.

Providing insights into *an institutional approach*, **Klaudia Dobosz** (Vienna International Arbitral Centre/VIAC, Vienna) pointed out that Article 41 of the Vienna Rules allows the Board and the Secretary General to publish anonymized summaries or extracts of awards—and other decisions of the arbitral tribunal—in journals or VIAC's own publications, unless a party has objected to publication within 30 days of service of the award. Based on this provision, VIAC was able to issue a book with a selection of 60 arbitral awards (out of 1,600 cases), detecting interesting abstracts containing (mainly) procedural as well as occasionally substantive issues that have arisen and evolved over the years 1975–2015 and which have been considered to be of great avail for the arbitration community. This publication was and is going to be—2nd edition is planned—a response to the increasing call on the part of parties, counsel and arbitrators alike for measures to ensure greater transparency in commercial arbitration proceedings in the form of enhanced accessibility of arbitral awards as well as their content and reasoning.



#### IV. CONCLUSION

Finally, in his closing remarks, **Christian Koller** (University of Innsbruck, YAAP co-chair) also referred to a potential competition to arbitration in the form of specialized courts and judges, which might increase in the future because of the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. The publication of arbitral awards of a high standard might play a significant role in counter-balancing this competition.



**VIKTOR CSERÉP** (rapporteur for Young ITA/YAAP), a lawyer from Budapest, Hungary and PhD student at the University of Vienna.





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