

President's Message

Judging, Fast and Slow

In 2011, Daniel Kahneman published his book, “Thinking, Fast and Slow”.¹ It rightly became a bestseller and made Kahneman – by then already a winner of the Nobel Prize for economics – known to a broader audience, including me. He genially boiled down decades of research in psychology into a simple dichotomy: the human brain works at two speeds, a fast, instinctive System 1 and a slow, deliberative System 2. Both have their merits and their function. When you get up in the morning you do not need to ponder in great detail the pros and cons of drinking a cup of coffee with or without milk. By the time you have reached a thoughtful conclusion you will probably be late for work. Conversely, when you get fed up with your job you might spend some time deliberating alternatives and their impact on your career, your finances, and your family life. Kahneman put it a bit more sophisticatedly, but I do not want to keep you from reading his book to get the full picture. It is really worth it.

There is an analogy in law to thinking, fast and slow, in how jurisdictions deal with challenges to arbitral awards. In my President's Message last June,² I listed the duration of setting-aside proceedings as one of the criteria by which to choose an arbitral seat. Let's look at the issue more closely now.

As a young partner, I was retained by an IT company in a very large case. I received my instructions from in-house counsel. When we prepared for the statement of defense, we had a meeting with the head of the relevant division. He asked us how long it would take until the award was issued. We estimated a further 18 months. He looked at us and said that was too late in this fast-evolving business and he was no longer interested in the case. We then discussed interim relief, but he was visibly underwhelmed about the time the case would require.

He did not even ask how long it would take until the award was in fact final. We are all aware of the Dutch setting-aside proceedings against the USD 50b Yukos award rendered in 2014: it has so far been nine years and there is no end in sight.³ A similar fate befell a French BIT award against

¹ DANIEL KAHNEMAN, *Thinking, Fast and Slow*, Farrar, Straus and Giroux 2011, 499 pages.

² FELIX DASSER, *Choosing a Seat? Ten questions to Ask (on Setting-Aside Proceedings)*, 40 ASA Bulletin 2/2022, 267 et seq.

³ See decision by the Dutch Supreme Court, Case 20/01595, 5 November 2021, ECLI:NL:HR:2021:1645, remitting the case to the Court of Appeal for renewed decision.

Russia: rendered in 2018, the Paris Cour d'appel set it aside, the Cour de cassation reinstated it last December but remanded it to the Cour d'appel, which so far has not ruled again.⁴ In the similarly famous *Kabab-Ji* case, the same Cour de cassation only confirmed an ICC award six years after it was rendered.⁵ In the recent *Halliburton* case, the English courts took four years simply to decide whether or not an arbitrator had a conflict of interest.⁶

By contrast, Swiss setting-aside proceedings are lightning fast. The proceedings before the Swiss Federal Supreme Court as sole instance are over within half a year after a tribunal renders an award. Even complex cases rarely take more than nine to twelve months.⁷ One slight exception is the Swiss *Yukos* case against Russia, which took 13 months.⁸ This looks pretty competitive and is indeed one of the unique selling points of arbitration in Switzerland.

There is a catch, however. The Federal Supreme Court gives short shrift to challenges. That only 7 percent of set aside applications succeed in Switzerland is well known. Sometimes one wonders how the Court managed *not* to set aside a particularly awkward award. Its motto seems to be: you chose arbitration, you got arbitration, so don't complain.

Users must decide what they prefer. In essence, for setting-aside proceedings, the Rule of Law can be split into the Rule of Tough Law and the Rule of Late Law. Users may prefer one or the other. It is their choice and counsel need to advise them accordingly.

Recently, I was told about an Asian party who was asked to accept a European seat. He asked his counsel what he thought about Barcelona, Geneva or London, all of them nice places to visit and all the same, right? Not really. It is about judging fast or slow.

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⁴ Cass., 1^{ère} civ., n° 21-15.390, 7 December 2022, ECLI:FR:CCASS:2022:C100877.

⁵ Cass., 1^{ère} civ., n° 20-20.260, 28 September 2022 ECLI:FR:CCASS:2022:C100679

⁶ UK Supreme Court, 27 November 2020, *Halliburton Company v Chubb Bermuda Insurance Ltd*, [2020] UKSC 48.

⁷ FELIX DASSER/PIOTR WÓJTOWICZ, *Swiss International Arbitral Awards Before the Federal Supreme Court. Statistical Data 1989-2021*, 39 ASA Bulletin 1/2021, 7, 23 et seq.

⁸ Federal Court Decision 4A_492/2021, 24 August 2022. The award is dated 23 July 2021.

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