

**TOWARDS A MORE STRATEGIC ARBITRATION:
EVALUATING THE ARBITRAL FORESIGHT MECHANISM WITH COMPARATIVE
INSIGHTS**

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I. Introduction: Thinking Ahead, Acting Now

Obtaining an unforeseen or unexpected outcome often inevitably leads to reflection on what could have been done better. Constructing an appropriate strategy with the advantage of a known result is an easy task; imagining alternatives seems simpler when one understands how events unfolded. This reality, so inherent to human nature, is not foreign to arbitral proceedings. Upon concluding an arbitration, it is common for both the parties and the arbitrators to conduct a retrospective review to identify what might have been done differently and to recognize the key moments or elements that led to the final outcome.

In the films *Sherlock Holmes* and *Sherlock Holmes: Game of Shadows*, directed by Joel Silver, the protagonist—portrayed by Robert Downey Jr.—uses the available information to anticipate what is about to happen. Occasionally, his predictions align with the actual outcome; other times, they do not. Nevertheless, his ability to foresee possible scenarios allows him to make strategic decisions in contexts of uncertainty.

Undoubtedly, anticipating a possible outcome enables one to face situations with greater tactical intelligence, allocating resources to the crucial aspects that may influence the resolution. In arbitration, if the parties or their counsel could know, at a critical stage of the proceedings, the tribunal's preliminary views or concerns regarding the dispute, they could focus their efforts on truly determinative points, thereby increasing the likelihood of achieving an efficient resolution.

In this context, Chris Campbell has proposed, as an in-house lawyer, an innovative tool called *Arbitral Foresight* (hereinafter, *Foresight*). This concept refers to the arbitrators' ability, with the parties' consent, to issue a preliminary and anonymous assessment on the central aspects of the dispute. This mechanism seeks to improve the predictability of arbitral decisions without compromising the tribunal's impartiality, while at the same time encouraging early dispute resolution and minimizing financial and temporal costs for the parties involved. It is important to highlight that *Foresight* does not constitute a binding mechanism nor should it be understood as a definitive ruling. On the contrary, it offers a

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provisional perspective based on the elements presented up to a specific point in the process.

II. *Arbitral Foresight*: Definition and Implementation

Chris Campbell proposes *Foresight* as a faculty of the arbitral tribunal, granted by the parties, to enable arbitrators offering a preliminary and anonymous perspective on the dispute submitted to arbitration. This tool aims to provide the tribunal with a mechanism to resolve the dispute more quickly, economically, and efficiently, significantly reducing both the costs and the duration of the proceedings.

It is important to emphasize that *Foresight* does not imply a binding decision on the parties, nor should it be understood as a premature pronouncement that creates legitimate expectations or substantive rights. It is a tool designed to offer a tentative view based on the procedural elements available at the time the tool is used, without compromising the tribunal's impartiality or independence.

Likewise, the implementation of *Foresight* requires the express and mutual consent of the parties, either through a specific agreement or by incorporation into the applicable institutional rules. In this regard, Campbell proposes the following model, inspired by the standard clause of the International Chamber of Commerce:

“[Language]. Once the tribunal has been constituted, and at any time prior to the issuance of the final award of the tribunal, either party may request that the tribunal issue an advisory preliminary perspective (“Perspective”) that indicates how the tribunal would rule on the matters then before it, were no further submissions by the parties to be made. The tribunal, in its sole discretion, may provide such an Opinion so long as the Opinion is anonymized as to the identity of each member of the tribunal. Said Opinion is non-binding and may not be relied upon should the dispute continue after the Opinion is provided. The parties agree that the tribunal’s provision of the Opinion shall not be grounds of any attempt to set aside, annul, or otherwise undermine the award.”

One of the crucial aspects of *Foresight* is the timing of its implementation. In this regard, Dr. Campbell suggests its application at two key stages of the arbitral process. The first would be prior to document production. At this phase, the parties have already presented their initial arguments, and the tribunal has had the opportunity to analyze the core of the dispute. A preliminary foresight at this point can help the parties assess the strengths

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and weaknesses of their positions before incurring the significant costs associated with document production and subsequent hearings.

The second stage would occur immediately after document production or discovery procedures. Once these processes are completed, the parties have access to key evidence that may decisively influence their strategies. At this moment, a preliminary foresight can provide greater clarity on how the dispute might be resolved if current approaches are maintained until the final stage. In this way, not only does it allow the parties to focus on the main issues or vulnerable points, but it also encourages negotiation and settlement efforts.

III. International Parallels of Procedural Anticipation

It is important to highlight that *Foresight* is not an isolated mechanism within contemporary arbitration. Comparative practice reveals similar experiences, both in arbitral and judicial settings, aimed at enhancing procedural efficiency through predictability and the strategic use of preliminary opinions.

1. Preliminary Views

A common practice in German proceedings is the issuance of *preliminary views*. According to the ICC report *Facilitating Settlement in International Arbitration*, *preliminary views* “basically involve an arbitral tribunal giving the parties its nonbinding and preliminary assessment on the issues in dispute in the arbitration” (2023, p. 14).

These preliminary opinions may address the full scope of the dispute or focus on specific aspects of the case, with the purpose of promoting a settlement between the parties.

It is necessary that such opinions be issued with the parties’ express consent, ideally in writing. The ICC (2023) justifies this requirement as follows:

“One reason for the need for express party consent (which is best given in writing) is the potential concern that having expressed its preliminary views on the merits, an arbitral tribunal no longer has an open and impartial mind and could be subject to confirmation bias on material issues. This concern could lead to a later challenge of a tribunal’s award” (p. 15).

The manner in which arbitral tribunals express their preliminary views may vary depending on the circumstances of the case, the tribunal’s preferences, and the

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complexity of the dispute. However, the ICC (2023, p. 15) recommends considering at least the following principles to preserve the impartiality and effectiveness of the mechanism:

- a. The opinions should be issued only when the tribunal has an adequate understanding of the issues under evaluation.
- b. The express consent of the parties is required.
- c. It must be made clear that the opinions are preliminary, based on the elements presented up to that point, and valid only in that context.
- d. The opinions are presented orally, without transcription, during a hearing with the parties.
- e. Both the tribunal's opinions and the parties' comments are unofficial and protected by settlement privilege.
- f. The tribunal may use visual aids to support its assessments.

It is important to highlight that this practice goes beyond the measures that the tribunal may adopt to facilitate settlements under Article 2.4 of the Prague Rules (ICC, 2023, pp. 14–15). This distinction is significant, as the issuance of *preliminary views* by tribunals requires the explicit consent of the parties, which is not sufficiently covered by the provisions of Article 2.4 of the Prague Rules.

2. Artículo 2.4 de las Prague Rules (2018)

The *Rules on the Efficient Conduct of Proceedings in International Arbitration*, also known as the Prague Rules, adopted in 2018, seek to promote efficiency in international arbitration proceedings. Article 2.4 regulates the arbitral tribunal's authority to express a preliminary assessment of the parties' positions, with the aim of encouraging settlement².

² "2.4. The arbitral tribunal may at the case management conference or at any later stage of the arbitration, if it deems it appropriate, indicate to the parties:

- a. the facts which it considers to be undisputed between the parties and the facts which it considers to be disputed;
- b. with regard to the disputed facts – the type(s) of evidence the arbitral tribunal would consider to be appropriate to prove the parties' respective positions;
- c. its understanding of the legal grounds on which the parties base their positions;
- d. the actions which could be taken by the parties and the arbitral tribunal to ascertain the factual and legal basis of the claim and the defence;
- e. its preliminary view on:
 - i. the allocation of the burden of proof between the parties;
 - ii. the relief sought;
 - iii. the disputed issues; and
 - iv. the weight and relevance of evidence submitted by the parties".

These rules allow the tribunal, once the case has been received, to hold a preliminary conference for various purposes: establishing the disputed facts, delimiting the claims and their grounds, defining the procedural framework, among others (Méndez & Méndez, 2019, p. 11). Thus, at this stage or subsequently, the tribunal may indicate to the parties the facts it considers disputed, the relevant evidence, its understanding of the parties' legal grounds, and may even issue a preliminary opinion.

The more information the tribunal has from the outset, the better it can assist the parties in structuring an efficient procedure. For example, a tribunal familiar with the case details from the beginning can adopt a proactive role, providing relevant suggestions regarding documentary and testimonial evidence, the need for expert reports, and the relevance of document production.

This tool is also justified by the parties' consent and allows for better strategic structuring, enhancing the efficiency of the arbitral process. In this regard, Mazuera (2019) states:

"It is worth mentioning that the justification for granting this authority lies, on one hand, in the parties' willingness to submit to this procedure, and on the other hand, in the fact that knowing the arbitrator's position in advance allows for a better-structured defense, enabling the arbitrator to understand the party's stance rather than simply presenting it as the party believes is most convenient" (p. 11; free translation).

Méndez et al. (2019, p. 13) explain that these opinions should not be considered as evidence of a lack of impartiality or independence of the tribunal, nor do they constitute grounds for disqualification, as they do not imply any prejudgment. The primary purpose of Article 2.4 is to facilitate settlements by issuing a preliminary assessment of the positions, aiming to encourage a negotiated resolution. This assessment is non-binding, does not condition the tribunal's final decision, nor prejudge the merits of the dispute.

3. Indicative Ruling: The German *Hinweisbeschluss*

The implementation of preliminary mechanisms that allow the tribunal to express its perspective on the substantive aspects of a dispute is not exclusive to arbitration. On the contrary, the use of such tools is also common in judicial proceedings.

In fact, in German civil procedural law, similar tools have been developed, among which the *Hinweisbeschluss* stands out. This practice is particularly relevant considering that Germany has also been a pioneer in the development of *preliminary views*, reflecting a

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legal tradition oriented towards procedural efficiency and the promotion of early settlements through transparency in case management.

The *Hinweisbeschluss* is a figure within German civil procedural law that enables the tribunal to issue a ruling in which it communicates to the parties its provisional opinion on the factual and legal aspects of the case. The purpose of this practice is to guide the parties regarding the possible direction of the judgment, thereby encouraging early resolution of the dispute and avoiding prolonged proceedings. Its normative basis can be found in Articles 139 and 522, paragraph II, of the German Code of Civil Procedure (*Zivilprozessordnung*, ZPO).

This figure—also known as an indicative ruling—is framed within the principle of *materielle Prozessleitung* (material direction of the process), which assigns the tribunal the responsibility of clarifying and delimiting the points in dispute. According to Article 139 ZPO, the tribunal must discuss with the parties the factual and legal situation of the case, pointing out any aspect it considers relevant or that may have been overlooked (Pérez Ragone & Ortiz Pradillo, 2006, p. 52).

Along the same lines, Ormazabal (2020) explains:

“Article 139 ZPO establishes a joint responsibility of the tribunal and the parties in clarifying or delimiting the factual and legal terms of the dispute, applicable both at first instance and on appeal. Far from adopting a passive stance, the tribunal must actively engage in the legal clarification of the controversy by posing questions, requesting clarifications, or discussing with the parties the relevance of raising certain substantive issues. Within the framework of this procedural organizational authority, the German Supreme Court occasionally issues interlocutory rulings (Hinweisbeschlüsse) in which it provides the parties with a direct response to the substantive legal questions under debate, while cautioning that these do not constitute a definitive opinion. These decisions receive the same publicity as judgments, allowing them to be publicly known and easily accessible” (p. 49, free translation).

Throughout the proceedings the court may issue one or more indicative rulings at different stages, depending on the complexity of the case and the development of the evidence and arguments. These rulings allow the parties to adjust their litigation strategies, present new evidence, or reconsider their positions, thereby promoting greater procedural efficiency and the possibility of reaching out-of-court settlements.

4. ICSID Arbitration Rules: Rule 31 (2022)

The trend toward greater efficiency in arbitral proceedings is also reflected in the field of investment arbitration, particularly in cases administered under the auspices of the *International Centre for Settlement of Investment Disputes* (ICSID). In this context, Rule 31 of the ICSID Arbitration Rules, revised in 2022, introduces a case management mechanism which, although not a preliminary view *stricto sensu*, serves a comparable function in terms of procedural organization and the promotion of early resolution.

Indeed, Rule 31 provides that the arbitral tribunal may convene, at any time after the first session, one or more case management conferences with the parties for the purpose of: (a) identifying uncontested facts; (b) clarifying and narrowing the issues in dispute; or (c) addressing any other relevant procedural or substantive matter (ICSID, 2022).

These conferences are intended to foster the efficiency and effectiveness of the arbitral process, enabling the tribunal and the parties to more precisely identify the disputed issues. To facilitate expeditious and cost-effective proceedings, Rule 31 requires that tribunals hold one or more case management conferences to clarify and delimit the issues in dispute and to identify uncontested facts (Adra & Noujeim, 2022). As such, this mechanism promotes the early identification of substantive and procedural matters that could affect the duration and costs of the proceedings, thereby contributing to improved arbitral justice.

Although these conferences are not intended to lead tribunals to express a preliminary position on the merits of the dispute, the implementation of Rule 31 has allowed ICSID tribunals to address the complexities of investment disputes more effectively, fostering greater clarity and efficiency in the conduct of proceedings.

In sum, although the tools described differ in form, scope, and context of application, they share a common objective: to provide parties and tribunals with mechanisms that enhance the conduct of proceedings and encourage earlier, more efficient, and economically viable resolutions. Whether through preliminary views, indicative rulings, or case management conferences, these practices reflect an evolution in the procedural culture of arbitration and international litigation, aimed at increasing predictability, transparency, and strategic cooperation. In this context, *Foresight* does not constitute a departure from established practice, but rather a coherent proposal aligned with this global trend—recognizing the value of anticipating, without prejudging, in order to act with greater procedural intelligence.

IV. Critical and Positive Aspects of *Foresight*

Foresight is an emerging procedural tool aimed at enhancing efficiency and predictability in international arbitration. It consists of a preliminary, non-binding assessment delivered by the arbitral tribunal to the parties with the purpose of guiding them during the early stages of the proceedings. This mechanism seeks to assist the parties in making strategic decisions, reducing costs, and potentially encouraging an early resolution of disputes.

However, despite its innovative nature and potential advantages, *Foresight* is not free from criticism. This section presents both the positive impacts and the main concerns that its implementation has raised, with reference to comparative legal practices and existing regulatory frameworks.

1. Positive Contributions to Arbitration

One of the most notable advantages of *Foresight* is its potential to reduce the costs of arbitration, a persistent concern in the resolution of international disputes. According to a report by the ICC Commission on Arbitration, the majority of arbitration costs are borne by the parties themselves³ (ICC, 2015, p. 3). By providing a preliminary assessment of the merits of the case, *Foresight* enables the parties to reconsider the feasibility of continuing with the proceedings or to explore the possibility of a settlement, thereby optimizing the use of legal and financial resources.

In addition to economic efficiency, *Foresight* enhances predictability —another central challenge in arbitration. Uncertainty regarding the outcome of a case can hinder the parties' ability to effectively manage risks and develop coherent strategies. By receiving initial feedback from the tribunal, parties are better positioned to align their arguments with the tribunal's preliminary concerns, which facilitates more effective risk management and more precise strategic planning (Faenza et al., 2024, p. 3).

Furthermore, this mechanism encourages early dispute resolution. When parties are informed of the tribunal's initial impressions, they may be more inclined to negotiate or reach a settlement, thereby avoiding unnecessary delay of the proceedings. By identifying the key issues in the dispute at an early stage, *Foresight* fosters greater

³ "The parties' costs (including attorney fees and expenses, costs related to testimonial and expert evidence, and other expenses incurred by the parties in the arbitration) constitute the largest part (an average of 83%) of the total costs of the proceeding. Arbitrators' fees and case administration represent a much smaller proportion of the total costs (...)" (ICC, 2015, p. 3).

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procedural clarity, more efficient allocation of resources, and overall increased efficiency in the conduct of the arbitration.

In summary, *Foresight* addresses three fundamental challenges in international arbitration: (i) high procedural costs, (ii) excessive duration of proceedings, and (iii) lack of predictability in arbitral decisions. By offering preliminary, anonymous, and non-binding assessments with the consent of the parties, it promotes greater transparency and procedural efficiency.

2. Main Criticisms and Associated Risks

Foresight also raises legitimate concerns regarding due process and procedural integrity. The most frequent criticism is that the issuance of a preliminary assessment could compromise the impartiality of the arbitral tribunal. It is argued that, by expressing an early opinion, arbitrators might unconsciously feel bound to their initial impressions and become reluctant to reassess the case in light of new evidence and arguments.

However, it should be noted that arbitrators inevitably form preliminary impressions throughout the course of the proceedings, even if they do not always express them. An example of this are precautionary measures; since they are temporary measures ordered to address urgent situations and protect the rights of the parties pending a final decision, for which a preliminary assessment is required. The innovation introduced by *Foresight* lies in making such reasoning more transparent. Moreover, its non-binding nature reinforces the idea that no prejudgment is involved. Rather than compromising impartiality, it could enhance the credibility of the tribunal by demonstrating its willingness to guide the parties without sacrificing its independence.

Another concern is that a party dissatisfied with the preliminary evaluation might attempt to use it as grounds to challenge the final award. Indeed, the 1958 New York Convention allows an award to be set aside if it is shown that a party was denied the opportunity to properly present its case (Bermann, 2017). In this context, a preliminary assessment could be interpreted as evidence that the tribunal had already taken a position before considering all relevant elements. To mitigate this risk, it is recommended that *Foresight* be implemented only with the express consent of the parties and that the evaluations remain anonymous.

An additional challenge lies in the absence of a clear regulatory framework. Unlike mechanisms such as the *Hinweisbeschluss*, *Foresight* is not yet formally included in major

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arbitration rules. This lack of regulation may lead to inconsistencies in its application and some resistance among arbitration practitioners.

However, *Foresight* might be incorporated into the institutional rules of leading arbitral institutions such as the ICC, SIAC, or LCIA. Just as the *Hinweisbeschluss* has a normative basis in the German Code of Civil Procedure, *Foresight* could likewise benefit from formal regulation to promote and standardize its use.

Finally, it has been suggested that counsels may use this tool strategically, adapting their arguments based on the tribunal's preliminary perceptions. This could create a procedural imbalance in favor of the party that best tailors its strategy, it is said. However, this risk is inherent in any mechanism involving early assessments and can be managed by arbitrators through restrictions on the timing, scope, and frequency of such evaluations. In this respect, Swiss case law regarding a practice similar to the *Hinweisbeschluss*⁴ demonstrates that it is possible to issue preliminary opinions without undermining the neutrality of the adjudicator (Kozmenko & Grosel, 2021).

In conclusion, *Foresight* represents a procedural tool with significant transformative potential in international arbitration. While it raises legitimate concerns regarding impartiality, the lack of regulation, and the possibility of strategic misuse by parties, these risks can be mitigated through a carefully designed implementation: express consent, anonymity, and clear guidelines incorporated into arbitral rules.

The experience of legal systems that employ comparable mechanisms—such as Germany—demonstrates that procedural transparency can indeed be reconciled with judicial impartiality. Far from constituting a threat to arbitration, *Foresight* has the potential to become an innovative instrument that effectively addresses current demands for greater efficiency, predictability, and resource rationalization in the resolution of international disputes.

⁴ “Concerns have been raised regarding the involvement of such tribunals in settlement facilitation, as any arbitrator engaged in settlement negotiations is likely to receive confidential information about the commercial realities of the dispute, as well as the strengths and weaknesses of the parties’ cases. This also applies to early neutral evaluations (i.e., *Vergleichsverhandlung* or similar concepts), where arbitrators would issue a preliminary opinion on the likely outcome of the case. In both scenarios, one or both parties might be tempted to challenge the arbitrators for apparent lack of impartiality, especially in cases where the arbitrators’ attempt to reach a settlement failed and the proceedings continued.

However, these concerns regarding the parties’ right to due process and the impartiality of arbitrators can be addressed through proper management of the settlement facilitation process. First, it is uncommon for parties to disclose sensitive information not included in their prior (written) submissions. Second, a preliminary case evaluation does not necessarily imply that arbitrators are prejudging the case. Issuing preliminary opinions at a given procedural stage does not prevent arbitrators from reaching completely different conclusions in their final award, as decision-making is an evolving process. To avoid any appearance of bias, experienced arbitrators explicitly state that they reserve the right to revise their opinions on the factual and legal situation following the preliminary case evaluation hearing and remain open to hearing additional submissions from the parties”.

V. Conclusion

Foresight emerges as an innovative tool capable of positively transforming international arbitration by promoting greater efficiency, predictability, and cost reduction in arbitral proceedings. Its feasibility to provide a non-binding preliminary assessment enables parties to make informed decisions, facilitate early negotiations, and better manage the resources involved, which are key factors in addressing the current challenges facing arbitration. Furthermore, by increasing transparency in early stages of the process, *Foresight* helps strengthen trust in the arbitral system and mitigates the uncertainty often experienced by participants in such disputes.

Nonetheless, the success of *Foresight* will largely depend on how it is designed and regulated. Legitimate concerns regarding tribunal impartiality, the potential for challenges based on preliminary assessments, and the risk of strategic misuse must be carefully addressed. Comparative experiences with similar mechanisms in legal systems such as those of Germany and Switzerland demonstrate that these risks can be minimized through the inclusion of clear guidelines in arbitral rules, the express consent of the parties, and the preservation of anonymity in assessments. In this way, *Foresight* can be consolidated as a valuable instrument that balances innovation with respect for the fundamental principles of arbitration.

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