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A Model Clause for a New Kind of Final Offer Arbitration in International Commercial Arbitration: the “Final Draft Award” Arbitration

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A recent post discussed the upsides and downsides of the so-called Final Offer Arbitration (“***FOA***”) also known as Baseball Arbitration. In short, in an FOA, instead of crafting an award from scratch, the arbitral tribunal simply has to pick either party’s final offer on the claims and elevate it to the final award, usually without making any changes or additions. Some institutional rules, however, do allow tribunals to provide supplementary reasons to justify their choice.

This post will build on the advantageous features of the FOA, whilst mitigating the risks inherent to such a streamlined type of arbitration. The resulting proposal will be supported alongside a purpose-built framework, comprising a procedure and a *prêt-à-porter* arbitration clause.

Weighing up risks and rewards towards a viable solution

One of the risks commonly associated with the use of FOA is the lack of reasoning in the resulting award. This limits itself to a choice between one of the parties’ final offers regardless of its adherence to the law or the facts relevant to the case. An award lacking reasoning jeopardizes the whole arbitral proceeding and opens the resulting award to challenges on three different fronts:

(1) failure to rule on the dispute in its entirety;

(2) failure to show that the losing party was given the chance to present its case; and

(3) very simply, lack of reasoning itself.

Some FOA proceedings circumvent this risk by demanding that arbitrators provide reasons for having selected one party’s offer over another. A good example are the ICDR/AAA Final Offer Arbitration Supplementary Rules, which state that: “[t]he tribunal’s award shall be reasoned, stating the rationale for its selection of one party’s final offer over that of the other party or parties”.[1)]

While this specific type of FOA protects the award from any challenges stemming from the lack of reasons, it also encourages parties to engage in virtuous conducts, given that their chances of winning the case are proportional to the reasonableness of their requests. And yet, this type of FOA does not make the most out of its potential, especially in terms of increased efficiency, promptness and party control over the final award.

An alternative to the FOA would conversely direct the parties not to make final offers, but rather to submit entire draft awards. Under this setting – which could be named "Final Draft Award Arbitration" ("***FDAA***") – the tribunal would be presented with each party's *full-blown* award proposal. The *full-blown* award proposal means that while the tribunal would be authorized to amend the parties' reasoning, it would still be bound by the actual conclusion (decision) advanced by the prevailing award on the claims. In other words, the chosen draft award's reasons would be persuasive, yet its conclusion would be binding on the arbitral tribunal.

There are many aspects that would make the FDAA more appealing overall than the classic FOA. It would increase the parties' control over the proceedings as the parties would draft the award's conclusions as well as its reasons. Ultimately, it would be more time efficient in the issuance of the final award, which, under this mechanism of 'reverse-scrutiny' may require only a few adjustments by the tribunal.

Whole Package FDAA or Issue-by-Issue FDAA?

More often than not, arbitrations present a multitude of claims and/or disputed issues at stake. In a traditional FOA setting, the question that arises is: would it be possible for arbitrators to pick-and-choose between the parties' offers and then combine them to issue a mixed award? This possibility exists and is known as an *issue-by-issue* FOA. It is different from the classic *whole package* **FOA,** in which the arbitral tribunal must choose a single offer made by one of the parties and encompassing all claims.

At first glance, a *whole package* FOA would force arbitrators to choose between extreme positions, which might seem inefficient. Thus, by the same token, the *issue-by-issue* FOA would allow arbitrators to build a more convenient global solution by choosing more reasonable offers for each claim or issue.

On the other hand, the *issue-by-issue* FOA comes with at least two downsides. Firstly, it allows arbitrators to form their own package, giving way to compromised awards and 'split-the-baby' decisions, not to mention the possibility of *Frankenstein* like awards. Secondly, and most importantly, parties may propose more extreme – and inefficient – solutions to issues to which they have stronger claims in order to "abandon" weaker ones. In other words, the wrong incentives might compromise the success of the FOA in the *issue-by-issue* setting.

In the proposed FDAA, however, as arbitrators are allowed to modify or add reasons to the chosen draft award – being bound solely to the draft award's conclusion on the claims – the use of the *whole-package* feature is even more compelling; given that the right incentives are in play along with the possibility to adjust the reasoning of the award.

The FDAA in action

Our proposal would be for the FDAA procedure to mirror a regular arbitration procedure until the closing of the proceedings (parties' submissions and production of evidence). Following the closing, instead of presenting final submissions on the merits of the arbitration, each party would submit a draft award to the arbitral tribunal. The tribunal would then have to choose between one of the submitted awards in its entirety (unless it is an *issue-by-issue* FDAA, in which case the tribunal could choose different chapters from each award).

In any case, the arbitral tribunal would be bound solely to the actual *conclusion* (i.e. decision on the claims) of the chosen draft award. The tribunal could change the draft award's reasoning as it sees fit.

Before issuing its final award, the arbitral tribunal would also be authorised to notify the parties either to clarify any of the draft awards or to correct a clerical, computational or typographical error, or any errors of similar nature contained in the draft award.

Some national arbitration laws (such as the English Arbitration Act, Section 69) allow the parties to appeal to the court on a question of law arising from an award. The choice for an FDAA would necessarily be considered a waiver of such an appeal and an exclusion of such court's jurisdiction because in an FDAA procedure the arbitral tribunal has no control of the correctness of the parties' draft award conclusions or of their adherence to the law. Hence, one should be mindful of the possible need to address this issue when drafting institutional rules, terms of reference or arbitral agreements providing for FOA (in most cases, the choice for institutional rules that preclude the right to appeal suffices).

A Model FDAA Clause

Ideally, the FDAA procedure should be detailed in the institutional rules. This would not only simplify the arbitration agreement – which could plainly refer to the "FDAA rules" of a given institution – but also allow for a more thorough explanation of the procedure.

Another option would be for the parties to agree on adopting the FDAA in the outset of the arbitration (such as in the Terms of Reference in an ICC arbitration) or the first procedural order issued by the arbitral tribunal.

Both solutions depend upon future and uncertain circumstances. With the exception of the ICDR/AAA, no main arbitral institution has specific FDAA procedures detailed in its rules yet, and there is no way to guarantee that parties would spontaneously agree to that once an arbitration initiates.

For these reasons, we suggest the adoption of a model FDAA clause that could be used in contracts immediately. The clause follows the *whole package* feature and is inspired on the ICC model clause and it reads as follows:

> **A – Final Draft Award Arbitration ("FDAA")**

> A.1. All disputes arising out of or in connection with the present contract will be submitted to the [name of institution] and will be finally settled by a Final Draft Award Arbitration ("FDAA") under the Rules of Arbitration of the [institution] by an arbitral tribunal composed of 3 (three) arbitrators appointed in accordance with said Rules.
>
> A.2. After the closing of the proceedings, the arbitral tribunal will notify the Parties to submit their respective draft awards. Once such awards have been received, the arbitral tribunal will choose one award and disregard the other. When issuing the final award, the arbitral tribunal is strictly bound by the conclusion of the chosen draft award regarding the parties' claims, only being allowed to change or complement its reasoning. Before issuing its final award, the arbitral tribunal may ask any of the parties to clarify its draft award, as well as to correct a clerical, computational or typographical error, or any errors of similar nature contained in the draft award.
>
> A.3. The FDAA proceeding will also be observed in the event of a partial award.

References

6. Award *"The arbitral tribunal shall be limited to choosing only one of the final offers submitted by the parties. The tribunal's award shall be based solely thereon, plus any interest, costs, or fees* **?1** *to be awarded pursuant to the governing arbitration rules, applicable law, or the agreement of the parties. The tribunal's award shall be reasoned, stating the rationale for its selection of one party's final offer over that of the other party or parties."*

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