What Really Matters When an Arbitration Award is Made

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Lorenzo C. Martinez IV

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Season two, episode twelve of Delos Dispute Resolution's esteemed "Tagtime" webinar and podcast series is titled 'Inside the Black Box: What Happens During the Deliberations and Drafting of an Award.' The episode features Professor Pierre Tercier who is, among others, one of the most respected legal scholars in Switzerland. He is the Honorary President of the ICC International Court of Arbitration, author of more than 250 legal writings focusing on contract law and international arbitration, and chairperson of more than 100 international arbitrations.

As the episode title indicates, Professor Tercier and the TagTime hosts discussed what factors really matter during the deliberation process and drafting of an arbitral award, although they also touch upon other parts of the arbitration process from time to time. TagTime is a live webinar series showcasing discussions of substantive issues in international arbitration with leading figures in the field. At the end of the discussion and an audience Q&A, the guest speaker "tags" a guest speaker who will appear in a subsequent episode. TagTime is hosted by Amanda Lee and **Dr** Kabir Duggal. Below are some of the highlights from this episode.

Themes

The discussion was prefaced by three caveats or disclaimers that also served as

the underlying themes of the episode.

First, it was emphasized that there are many ways to decide an individual case because arbitration is not as reliant on tradition or institutions as it is on the individuals that comprise the tribunals. As such, outcomes depend greatly on the composition of the tribunals.

Second, having different cultures and traditions involved in an arbitration means that there is no standardized way of deciding cases. This is part of the specificity and diversity of arbitration.

Third, what comes out of the "black box" is a result of what the parties put into it. In other words, the award is largely determined by the quality of the parties' submissions, because these determine what the tribunal can do.

The Effect of Arbitrator Backgrounds

It is normal for a tribunal to be composed of members of different legal traditions and cultures, and this part of the arbitration is effectively in the parties' control because they usually appoint the tribunal. It was explained that the way that justice is rendered by a tribunal is linked to the culture of its members.

From that vantage point, it was further explained that a good arbitrator understands that his or her law may not be the only way to solve the dispute. Every arbitrator comes from a different culture and legal tradition, and it is important to accept and be aware of this. But this does not mean that good arbitrators compromise; rather, it means that they work together to come to a solution that is acceptable to the tribunal and is adapted to the dispute. The key virtue in this instance is tolerance. Arbitrators are human. They come with their own views that each must strive to reconcile with the views of others. The most difficult arbitrator to work with is one who decides that he or she knows everything, has no doubts, and/or is narrow-minded.

The tribunal strives for a unanimous award because it is less likely to be overturned and is easier to enforce. Nevertheless, dissents and separate opinions are normal. It is to be expected that different people have their own reasons for deciding the way that they do. The role of the chairperson is to orient the

discussion to allow the tribunal to come to a decision. The chairperson should build rapport among the members, allow the members to get to know each other, and prepare a procedure for answering the questions arising from the case in order to ensure smooth case management. However, one cannot impose their point of view.

It was confirmed that there are some party-appointed arbitrators intent on demonstrating, to the party that appointed them, their efforts in influencing the tribunal and preparing the award, and this can sometimes take the form of a dissenting opinion. However, this is a normal occurrence and by no means implies that the tribunal makes compromises during the deliberations.

"Splitting the baby"

Despite the common belief that tribunals tend to "split the baby," so to speak, by finding a middle ground between the relief requested by the parties, compromise is rarely, if ever, the order of the day during deliberations. A study conducted by the ICDR debunked this idea. In fact, awards are often given completely in favour of one party.

The aim during deliberations is always to come to a decision, not a compromise. There is no "averaging" of opinions. An award that appears to be a compromise is merely a reflection of the difficult legal questions posed by the case, the varying views of the arbitrators, and the differences in the way that they evaluate the evidence. There may be some compromises during drafting, given that the tribunal strives as far as possible to write an award that is agreeable to each of its members.

Changing Practices

It was observed that, in the past, tribunals were generally active participants in the arbitration proceeding. Nowadays, the case is more in the hands of the parties. For example, the tribunal used to be more empowered to directly ask the witness questions – increasingly, the use of witness statements to elicit direct testimony is far more common. Moreover, the procedure of the arbitration used to result from a

dialogue between the tribunal and counsel – increasingly, these matters are determined by the parties themselves while the arbitrators are more passive and adhere to what the parties decide. It was further observed that this is an area of arbitration that could use some improvement.

Virtual hearings are difficult. Besides the technical problems, communication has become more problematic. It has become challenging to assess a witness' credibility and body language over a screen. Deliberations are also more difficult. There are certainly some advantages, such as the ability to see everybody's faces easily. Interestingly, both counsel and witnesses seem to take much less time to speak at virtual hearings. But many of the personal touches that comprise the chemistry of arbitration, such as the ability to receive immediate reactions from the hearing's attendees, as well as informal corridor discussions, are gone. That said, virtual hearings are very doable and necessary at present.

Differences between Deliberation and Drafting for Commercial and Investment Arbitration Awards

Two differences were mentioned at the outset concerning deliberation and drafting practices for awards in commercial as compared to investment arbitration. First, the process or the way the arbitrators decide the case and, second, the basis of the decision. Whether the arbitration is brought via a contract, an investment, or by a submission agreement makes a real difference. With respect to investment arbitration, it was observed that it may be necessary to have a mix of commercial and international law experts on the tribunal because of their differing expertise. Finally, investment arbitrations have been said by some to require more discussions and result in more disagreement and dissenting opinions. However, all told, the way commercial and investment arbitrations are addressed was considered to be the same, and one cannot easily differentiate between them. At the end of the day, these cases all involve businesses and money, with the implication that these cases are more alike than they are different.

Best Practices for Addressing the Lengthy Process of Deliberation and Drafting Awards

Drafting an award takes time. The tribunal must engage with the exhibits and footnotes of submissions before producing an acceptable draft. Sometimes, an arbitrator is not entirely convinced by the majority and is given some time to reconsider their position. Unlike counsel, who often have an army of support staff at their disposal, the tribunal is often relatively less well-resourced, and in many cases could use more assistance. Longer submissions can also lead to longer awards, which take more time to draft.

But the drafting of the award can be started ahead of time. The list of documents, the chronology, the arguments, and the relief sought are examples of matters that can be prepared in advance of a hearing. Deliberations can likewise begin early, not just after receiving the final submissions from the parties or after the hearing. The use of the Reed Retreat, where the arbitrators meet and discuss relevant topics prior to the hearing, was recommended. Discussions can be held during hearings. It was also advised that there be an immediate exchange of post-hearing first impressions.

Ideally, a shorter, straightforward award that does not touch on all the issues would also be quicker to draft and would be of superior quality to a longer one. But drafting such an award would take courage due to the risks it may bring of challenge or non-enforcement.