Kluwer Arbitration Blog

Puma v. Estudio 2000: Three Learned Lessons

Julio Olórtegui (Rodrigo Elías & Medrano) and José María de la Jara (Bullard Falla Ezcurra +) · Monday, May 29th, 2017

Back in 2010, an arbitral tribunal composed by Luis Ramallo García (chairman), Miguel Temboury and Santiago Gastón ordered Puma to pay € 98 million to Estudio 2000 for the wrongful termination of their distribution contract.

Notably, Mr. Gastón – appointed by Puma – did not sign the award. It was later revealed that he was not given a chance to deliberate. Even though he had a discrepancy regarding the compensation to be awarded to Estudio 2000, surprisingly, his fellow arbitrators met without notifying him, changed the content of the previously agreed project and finished writing the award. The arbitrators even managed to sign it and notify the parties that *same* day.

On 15 February 2017, the Spanish Supreme Court declared the two arbitrators professionally liable for excluding Mr. Gastón from the deliberation procedure, and obliged them to pay Puma € 1'500,000.00 plus legal interests.

The decision of the Spanish Supreme Court constitutes an international landmark in relation to the deliberation process. In this post, we will open the arbitrator's black box to dive into such process, explain its basic rules and suggest several tips to protect an award in difficult deliberations.

Lesson No. 1: consensus should not be the main goal

As Berger points out, deliberation is a joint effort to identify the relevant issues and exchange arguments, ideas and reflections that allow weighing the different options available to the arbitral tribunal.

Let's be clear: deliberation is not tied to consensus. As Sunstein and Hastie argue, deliberations should provide a group (e.g. arbitrators) as much information as possible. Discussion should be encouraged. Better and more information allows the higher cost of arbitration to be translated into deeper analysis and a well sustained decision. A fair and accurate decision does not necessarily have to be unanimous.

High-level discussion, however, should not drive to anarchy. As Levy explains, the chairman is responsible for structuring, overseeing and coordinating the deliberation procedure. Hence, he should act as a concertmaster to coordinate the exchange of ideas. Specifically, the chairman

should:

- Be an inquisitive and quiet leader. Social psychology shows that members of the group might remain silent not to contradict the opinion of those with a higher hierarchical position. Therefore, chairmen should promote the presentation of the ideas of their co- arbitrators, before issuing their opinion. This lowers the chances of an arbitrator failing to disclose relevant information only because it does not coincide with the chairman's opinion.

- Prime critical thinking. When the majority of the group has taken an argumentative line and the goal is to achieve consensus, the third arbitrator might be predisposed to withhold opposing information, in order to avoid reputational damage. Chairmen should try changing the rules of the game, by assigning priority to information sharing, allowing a deeper analysis even when the majority of the group has taken an initial position.

- Assign roles. To incentive unbiased discussion, the chairman could assign arbitrators to prepare a specific position depending on their specialty. Then, the other members of the group could adopt the role of the devil's advocate, assuming an opposing position. This technique allows the chairman to ensure that each arbitrator feels confident enough to shape her ideas and to disclose opposing opinions.

Lesson No. 2: treat deliberation with respect

The deliberative procedure is shaped by the **principle of collegiality**. Each of the steps of the deliberation should be interpreted in such a way as to guarantee the right of the arbitrators to have the opportunity to express their opinion on the construction of the award.

Collegiality was breached in the *Puma Case.* Two arbitrators held the final part of the deliberation while the third one was away in Madrid.

Such issue should have been fixed easily. As held in *Sefri v. Komgrap*, a phone call, an email or a videoconference would have been enough to give Mr. Gastón the opportunity to express his ideas in relation to the final draft of the award and protect the principle of collegiality.

The result was a lack of opportunity by one of the arbitrators to convey his opinion on the final draft of the award. As stated in *Guangying Garment v. Eurasia*, excluding an arbitrator from the deliberation process breaches the collegiality principle. Furthermore, an arbitral award without deliberation breaches the defense and the right to be heard rights of the party that appointed the excluded arbitrator, (*Société des télécommunications internationals du Cameroun v. SA France Télécom*), and such decision does not qualify as an award (*Goller v. Liberty Mutual Insurance*).

Beyond the form, what really matters is that each arbitrator is given the opportunity to express his or her opinion. The formalities of the deliberative procedure shall be flexible, adapting themselves to the arbitrators and not the other way round.

In order for tribunals to respect such procedure, arbitrator practitioners might find the following tips useful:

- Set time aside to meet your co-arbitrators. The amount of shared information when deliberating depends on the trust that exists between the arbitrators. Therefore, the chairman should arrange a

meeting as soon as possible.

- Begin deliberation as soon as possible. Deliberation should begin – gradually – upon the reception of the written submissions of both parties. In this regard, Rivkin recommends that the arbitrators could travel and meet for the procedural conference to conduct a preliminary discussion. However, preliminary discussions should be protected with disclaimers to avoid any impression of bias (*"I would like to hear more about this at the hearing because maybe I could change my position").*

- Reed Retreat. Arbitrators should meet one day before the hearings to discuss the case and how it should proceed. This allows the arbitrators to focus their attention and clear preliminary discussions out of the way.

- Allow deliberation time during breaks and after the hearing. Approximately four breaks occur during each hearing day. Arbitrators should use these pauses to discuss the evidence they have just witnessed and to deepen their understanding of the case. Moreover, arbitrators should never set the return flight for the same day on which the hearings end. The best time to deliberate is immediately after the hearings are over. At that moment, the evidence presented will still be fresh in the memory of the arbitrators.

- Start writing soon. Ideas should be shaped and put into paper as soon as the tribunal has allowed a discussion. This prevents opinions from getting forgotten and allows the award to be completed in advance. It is not advisable to delay issuing an award only for style editing.

Lesson No. 3: protect yourself against toxic arbitrators

Arguably, if two arbitrators knowingly exclude a third one from the deliberation process, they could qualify as "toxic arbitrators".

As Bernandini points out, it is during the deliberations that these arbitrators show their true face. They reveal whether they are truly independent and impartial or whether they will block the participation of a member of the tribunal, disappear from the discussions, "plant" an annulment, or execute some other poisonous practice.

In such scenarios, arbitration practitioners might find these practices useful:

- Register the deliberation. Leave a record of who attended, the content of the discussions, the agreements and pending points.

While this practice is critical, our research suggests that it is not the general rule. The result of a survey of more than 155 practitioners in Latin America showed that the arbitrators registered, on average, only 1.78 out of 10 deliberations. Moreover, 54.2% of the respondents replied that they had not recorded any of their last 10 deliberations.

- Actively seek to participate in the deliberation. Send emails to your co-arbitrators. If they are not answered, consider sending formal communications, copying the arbitration center that administers the dispute. These could serve in an eventual annulment process to prove that you were excluded from the deliberations.

- If you are being excluded, consider breaking the confidentiality of the deliberations. Depending

on the specific case, one may choose to (i) send a formal communication to the co-arbitrators, (ii) notify the parties and the arbitration center that the principle of collegiality is being violated; or (iii) focus on generating evidence of such violation on the understanding that the toxic arbitrators will not change their position and that it may be more convenient for the parties to set the award aside. In any case, do not be afraid to express your opinion in a dissenting vote. Carefully consider attaching records of lack of deliberation and even evaluate your enrolment as a witness in the judicial process.

Final remarks

A tribunal is more than a mere sum of its parties. Through deliberation, they are capable to render an award with a deeper understanding of the dispute. Hence, excluding an arbitrator from the deliberation procedure betrays the will of the parties expressed in the arbitration agreement.

It is necessary to actively fight against this toxic practice. Write. Discuss. Attend conferences. Raise your voice and report toxic practices. After all, putting on a gas mask and pretending we are protected will only allow the virus to spread and generate more followers.

This entry was posted on Monday, May 29th, 2017 at 4:00 am and is filed under Arbitrator's mandate, arbitrators' conduct, Deliberations, Ethics, Liability, Set aside an arbitral award

You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.