President's Message

Drafting an Award: For Whom? Why?

In my law firm, I am responsible for our young lawyers' continuous education course on drafting skills. The most important message that I convey is that, before writing the first word of any text, we must ask ourselves four key questions: (1) For whom am I drafting? (2) Why am I drafting? (3) What do I plan to draft? (4) How will I draft it? The answers to these four questions will determine practically everything about the final product.

In recent conferences, seminars and deliberations I have heard many things, some positive, others less, about the way arbitral awards are drafted. Practitioners and users sometimes complain of awards that are overlong on procedural history but anaemic on reasons. Others bemoan awards containing judgmental passages that refer specifically (and negatively) to the behaviour or statements of individuals even where is not necessary to support the tribunal's conclusions. Still others tell of awards that read like showcases of the encyclopaedic legal erudition of their authors – and which take far too long to produce –, whereas what the parties are expecting (and prepared to pay for) is a ruling resolving the dispute with succinct grounds enabling the parties (especially the losing party) to understand the outcome, all in a reasonably short timeframe.

All of this reminds me of the "four key questions", in particular the first two: *for whom* and *why* are awards drafted?

For whom? The obvious answer is: for the parties, of course. That is true enough, but too simplistic. Do the parties truly expect or need the procedural history? And do both parties need the same things or in the same level of detail? At a recent ASA Arbitration Practice Seminar, one participant put it very neatly: the operative part of the award is for the winner, the reasons for the loser and the procedural history for the courts that might have to decide on setting aside the award. There is much truth in this, and the remark deserves to be taken farther.

Let us first take the winning party – and let us assume that there is a clear winner. It is true that the operative part will usually be the most important feature of the award, since this is what that party was fighting for all along. However, the winner, if well advised, will also take a close look at the reasons and, just as importantly, the procedural history, since a vulnerable award is highly unwelcome for the winning party given the huge potential in terms of wasted time, money and management energy it entails. Also, in certain contexts, the reasons can be just as important as the outcome. This is

typically the case where (as for example in sports arbitration) the arbitral award will likely have a normative effect on others.

As for the losing party, to state that the award must enable it understand why it lost is to state the obvious. What is more difficult is to draft an award in such a manner that the losing party might even accept defeat.[1] This dictates two general approaches. First, it is important to go out of one's way to show that the losing party's arguments were listened to, considered and understood. Second – and this is more subtle –, the award must avoid anything that could be viewed as being insensitive or inflammatory. This includes eschewing adjectives and turns of phrase that may be considered innocuous or amusing by some but offensive by others, be it the parties, their officers, witnesses, experts or counsel. In this respect, the co-arbitrator appointed by the losing party has a crucial role to play in the drafting of the award, especially if he or she has the same cultural background as that party.

Finally, let us consider the courts and, upstream from the courts, the arbitral institution if the rules of that institution provide for scrutiny of the award. One must have the institution in mind, if only because doing things in an award that are certain to provoke comments is to invite delay. As for the courts, by drafting sound awards, arbitrators are actually acting in the interest of the arbitral process as such, since effectiveness of the award is one of the reasons why parties arbitrate in the first place. Conversely, low-quality awards represent a serious menace to arbitration as such, for not all judges are entirely arbitration-friendly and shoddy awards can fuel negative preconceptions.

What of third parties? In many contexts, the circle of readers of the award will be considerably broader than the parties to the actual proceedings. The example of sports arbitration has already been cited above. The same remark applies, for instance, in treaty arbitration.

This brings us directly to the second question: *why* is one drafting the award? Is it simply to put an end to the dispute between the parties to the proceedings, or is it for a broader public? Will the award be taken, rightly or wrongly, as an example or even as a precedent by others? The answer to this question is relatively simple in sports arbitration or, say, in ICSID arbitration. Here the function of the award goes well beyond the simple resolution of the dispute between the parties before the tribunal.

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[1] I am acutely aware of the rather naïve character of that proposition, but some people are incorrigible optimists.

The question is far more subtle in commercial arbitration between commercial parties. Here, the basic duty of the arbitrator is to render a decision that adjudicates the parties' prayers for relief as expeditiously as possible, and in such a manner that the grounds for the decision are understandable for the parties. These considerations militate for a lean, sometimes even bare-bones award. This is hardly original (and that is putting it mildly).

However, things are not always that simple and two examples illustrate the subtleties here.

The first example is that of the commercial arbitration in which one of the parties is an individual; that person loses the case. Imagine that the individual made statements at the hearing that were both highly relevant from a legal perspective and very damaging to his or her case. Let us assume that, apart from these statements, the file contains many other established facts that lead to the arbitrators' findings without any need to refer to the self-damaging statements made by the individual at the hearing. If one is drafting a decision as if one were drafting a judgment, i.e. with a view to casting light on all that could be relevant to future decisions in the same fact pattern, one would tend to be complete and state that the findings are based also on the individual's statements at the hearing. However, is it really necessary for the arbitrators explicitly to cite the individual's statements at the hearing if the rest of the record justifies their findings? Would this not be rubbing salt into the wound, thus making the unfavourable award more difficult to accept?

Another example is where the serious misconduct of a party (or its officials) is likely, but neither fully established nor relevant for the resolution of the case. Here, arbitrators would be well advised to exercise restraint. Intemperate comments in awards on the actions of persons in relation to the dispute have the unfortunate habit of coming home to roost unexpectedly. I personally know of one case in which an arbitral tribunal saw fit to characterise as "probable criminal offences" the actions of the principals of a company. The company was party to the arbitration, the principals were not. The arbitral tribunal made these comments despite the fact that there was no need for this in the award since the actions of the principals were irrelevant to the substance of the matter; all the more whether these actions were criminal offences. The problem was that the award was later cited as evidence in criminal and civil proceedings brought against the principals before Swiss courts.

And then there is the monument to oneself. Some arbitrators succumb to the temptation to be (or appear to be) as thorough and learned as possible; they appear to have drafted their decision with an eye on posterity, or perhaps more "humbly" on collections of awards to be cited by future generations as

a shining example. All of this may be exhilarating. However, vanity is invariably poor counsel. Let us not forget that pride is a deadly sin – in certain classifications the deadliest of all (Petrus Binsfeldius associated it with Lucifer).

So allow me to finish on a humble exhortation to arbitrators: focus on the primary mission of the tribunal, remember for whom and why one is drafting the award. Do all that is necessary to achieve that goal, but no more. That is without any doubt the soundest reflex.

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SAVE THE DATE

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16-18 January 2015, Badenweiler, Germany

ASA Annual Conference
The Arbitrators' Initiative: When, Why and How Should It Be Used?
6 February 2015, Geneva

For more information see www.arbitration-ch.org