

# Drafting the Award

*Matthias Scherer*

## **MATTHIAS SCHERER:**

We have heard from Piero Bernardini and David W. Rivkin the form of deliberations, the organisation of the deliberations so my task is to go beyond the deliberations to the stage where the arbitrators have reached a decision, or think they have reached a decision, but the award is not yet drafted. I will not deal with arbitrators who have second thoughts at that stage, although I should mention a most remarkable experience I had when after the very first deliberation one of the arbitrators sent straight away his dissenting opinion to the ICC, and at that stage the award had not been written. At least he made himself clear.

It is very important that at the deliberations decisions are actually reached. We all know the situation, especially over a good lunch or dinner, no-one is very contentious and maybe there are things left open but once you start drafting the award you realise that although you thought you came out of the deliberation with a decision it is something completely else to fine tune it and to put in a written form. The chairman should always make sure, and also the co-arbitrators, that decisions are actually taken at the deliberation.

Who should draft the award? In my view this is the task and the prerogative of the chairman although there may be exceptions, for instance if the applicable law is not one in which the chairperson is qualified. In that event he may ask one of the co-arbitrators who is qualified in that law to prepare notes or to provide further drafts of relevant sections. It is usually not advisable to have collective drafting especially if the linguistic skills of the arbitrators are not identical because then you see from the award who has written it and also who has not written the relevant sections, which may give the wrong impression to the reader.

Suggestions from the chair that a co-arbitrator should write certain sections are usually met with more enthusiasm if the arbitrators are paid by the hour rather than the normal ICC way of allotting fees which is more 40/30/30.

What about the form of the award? The deliberations are the start but you have to come up with an award which needs to meet the form at the place of arbitration. In Switzerland we have Article 189 of the PIL Act: the award shall be made in accordance with the parties'

agreements and if no such agreement exists the award is to be in writing, it has to have reasons, it has to carry a date and the signatures of the arbitrators but the signature of the chairman is sufficient. You may find and actually have to look for further guidance on the form of the award in the applicable arbitration rules and/or in the *lex arbitri* at the place of arbitration.

In the binder you will find the ICC check list for the drafting of an award which has a caption in a box that it is not mandatory, et cetera, but everyone who has written an award for the ICC recently will know that it is applied very strictly. The ICC will draw your attention to any mistake or omission you may have committed. I find it quite well done actually because even experienced arbitrators sometimes forget nuts and bolts and dots on "i"s which should be there.

As to the signature of the award, I will not speak again about the dissenting arbitrator and those who do not want to sign but about more practical aspects. Especially if there are time lines applicable one should make sure that the arbitrators are available to sign. For the award real signatures are required, not electronic ones. Absence of arbitrators due to vacations or otherwise may be a problem so the signature gathering process has to be organised at an early stage.

Is the place of signature relevant? In Switzerland it is not. There is case law on that, a Supreme Court decision of 24 March 1997, ASA Bulletin 1997, page 360: the award is deemed to be made at the place of arbitration. This is also the formula of the ICC how they want you to sign the arbitral award in order to avoid confusions because in certain *lex arbitri* there may be confusion about the place of arbitration and the place of signature and at the enforcement stage that might be a problem.

One issue that comes up quite often during the drafting of the award is whether the arbitral tribunal should speak about the law, give reasons or explain the law. Clearly the answer should be yes, and also Bernhard Berger mentioned it in his opening speech. Bernhard referred to it as an obligation (duty to apply the law). Maybe it is not an obligation but it is certainly good practice so the parties and their lawyers can understand where the tribunal was persuaded and where it was not persuaded.

A more interesting question is whether a tribunal can rely on legal authorities that were not mentioned by the parties: whether they can, whether they should, whether they must rely on such authorities. I think in Switzerland they can rely, subject only to the rule *jura novit curia*, the right to be heard, and the prohibition to take the parties by surprise, which is a very high threshold. Short of something utterly

unexpected and unforeseeable for both parties the tribunal can invoke authorities that were not mentioned or raised by the parties.

Should the tribunal do that? That also depends on the quality of the briefs, especially if the law is pleaded by counsel not qualified in the law that is applicable to the merits. Sometimes you have very basic pleadings and the arbitrators have to rely on authorities that have not been pleaded. I thought that this would be possible without problem subject to the provision of taking the parties by surprise but I was told recently that the ICC looks also whether legal authorities in the award have actually been brought up in the underlying arbitration proceedings. This is not my experience. It was a co-arbitrator who mentioned that but it is clear, especially in the common law, parties are expected to plead the case in full and legal authorities should be brought up at an early stage and it is not expected that arbitrators raise such authorities in the award on their own initiative. That may also be a cultural aspect here.

Another more mundane post-deliberation issue is money. *Money matters* or *money matters*; you can pronounce it any way you want. The chairperson should keep an eye on advances paid by the parties and whether there is enough money available to pay for the arbitration, which includes the arbitrators' fees, but not only those, also the court reporters, the hotels. In an arbitration where I am the only Swiss on the panel, I was recently informed by a Geneva hotel that they were not fully paid by the parties for the hearing arrangements. Luckily this problem could be resolved in time before the award was issued. The arbitral tribunal cannot in its award order the parties to pay a third party service provider just as they cannot order the parties to pay their own fees. This is also a well-known Swiss case law so this has to be done and dealt with when drafting the award.

Arbitrators should also be wary if the chairman starts telling anecdotes about co-arbitrators who have come up with outrageous figures of hours they have spent on the case because usually that is the first step in making a proposal on a different split of the fees than 40/30/30.

You should take note of these anecdotes though, so you can make use of them if you are in the chair the next time!

The ICC may, if on its face the arbitrators have spent considerably less time than others, on their own motion change the allocation of fees among on the arbitrators.

VAT is also an issue to be considered when drafting the award. There may be VAT liabilities of certain arbitrators who have to be taken care of.

Time limits for issuing the award, there are certain arbitration agreements that provide for time limits. These have to be very carefully studied by the arbitral tribunal so they can issue their award in due time. I would mention a Swiss case which is published in ASA Bulletin 2006, p. 125, where an award was enforced in Switzerland and one party said it was rendered late. This was not upheld because the party had not shown when the triggering date actually was and the triggering date was the start of the deliberations. This shows that sometimes deliberations can be an important timing factor.

The excessive length of the deliberations can be a denial of justice. There is a Swiss Supreme Court case 5P.292/2005 which addressed a number of issues under the New York Convention, including delay. The arbitration went on for seven years and the award was issued one year after the last steps in the proceedings. The Swiss Supreme Court found that this was not a denial of justice. I am currently waiting for an ICSID award which has been three years since the hearing. I would not know how this would be qualified but certainly it is not just a standard practice (in the meantime rendered: Rompetrol v Romania).

My time is up but I had one final point, service of the award, which is something the tribunal should consider. May I refer you to a very well written paper by Hans van Houtte, *The Delivery of Awards to Parties*, which is in Arbitration International 2005. Thank you.

**JULIAN LEW:**

I am not sure what the role of the moderator is. Is it to try to sum up what you have already heard? I could try to do that but not as eloquently or as completely as any of our three speakers so I am reluctant to do that. Is it to be that of a chairman, which is to express his own views over what one has heard from everybody else? I do not propose to do that either. What I would rather do is to invite your views and your ideas of what you have heard but with perhaps a little bit of guidance from me trying to channel the ideas while bringing together some of the concepts that we have heard.

Before I introduce that, can I ask you, and repeating again what you heard earlier from Michael E. Schneider, when you wish to speak please wait for the microphone because it is recorded. Many people here will know one another but for the record could you introduce yourself and your name. Could I also ask you to keep your comments short, to a maximum of two minutes, so other people will have an opportunity to participate.

There was a slight discrepancy in the way the point of deliberations was presented by both Piero and David a bit earlier. The

question of when the deliberations should commence, and I will move on from that, let me ask this question to start. If at an early stage the arbitrators have reached a view or had a discussion and they do not feel that the parties are with them, the ships crossing in the night that David identified, do you think that this would be an appropriate time for arbitrators to give an indication to the parties what the tribunal would like to hear, asking them to address specific points, perhaps even having a hearing just on a specific issue? Should they give an indication where one particular question might be determinative of the case? Of course if they deal with that in isolation one party may feel that is somewhat to their prejudice. Let me put that out to the audience and we would welcome your comments.

**CHRISTOPH LIEBSCHER:**

I am very much in favour of the approach of David. To answer your question personally, I would be cautious and in doubt ask the parties whether they agree for the tribunal to disclose part of their brains to the parties. There may be situations, as you described, of passing ships where I personally would tend to address that because I would want to make clear that we are not on the same boat yet. Otherwise, I would be pretty cautious and in general terms ask the parties' counsel whether they are fine with the arbitral tribunal sharing their views.

One question I may suggest which is in my mind is the issue of re-opening when during deliberations you may find that there is reason to do so. I would be interested in the views of the very experienced panel members if that could or should occur?

**CRENGUTA LEAUA:**

I would like to highlight a certain possible view on the issue of the dissenting opinions. That view would bring into discussion the role of the arbitrators in specific law areas, like for instance in international public law. In this area, the opinions of the arbitrators are usually much more frequently made public than in commercial arbitration. They have a role in building certain types of arguments and they construct in time the jurisprudence. Therefore, they contribute to the legal doctrine. In these cases, I can see—and I would like also to see whether the distinguished members of the panel may have some comment on that—a thin line, between, on one hand, the secrecy of the deliberations and the point that was brought into discussion in the early phase of this conference in the morning on rather encouraging not to draft dissenting opinions than encouraging

drafting such dissenting opinions and, on the other hand, the possibility of giving to the legal community some food for thought and to show that maybe the majority opinion in a certain arbitral tribunal is not the only opinion that may be later on used by the international community in order to argue certain arguments.

Particularly in ICSID arbitrations I saw that dissenting opinions are sometimes very interesting. In time there may be a certain evolution into which one is the majority opinion and which one may be the minority opinion, like for instance the definition of the investor or others.

**DAVID LAWSON:**

I hate and hesitate to disagree with my dear colleague David W. Rivkin but I would have been a very unhappy camper if I was the respondent's counsel in the extreme case that you said.

**DAVID W. RIVKIN:**

Not if you were the claimant's counsel.

**DAVID LAWSON:**

If I understand correctly the tribunal was leaning pretty strongly to the claimant's position.

**DAVID W. RIVKIN:**

No, the other way around.

**DAVID LAWSON:**

So you are allowing the party not doing well to make their submission.

**DAVID W. RIVKIN:**

Yes.

**DAVID LAWSON:**

I misunderstood you.

**DAVID W. RIVKIN:**

To be clear, it was the claimant's position we thought would not succeed. The claimant wanted to make a submission so we gave the claimant one more opportunity to try to convince us we were wrong.

If the claimant did not succeed with its post-hearing brief, then there was no reason for the respondent also to waste time and money on a post-hearing.

**DAVID LAWSON:**

If I was respondent's counsel in that case and I was confident I might go along with it without being too upset but I have guessed wrongly how a tribunal is leaning in a case before and I would much rather have the opportunity to put my last word in whichever side I am on.

**DAVID W. RIVKIN:**

So it is clear, we were prepared to rule against the claimant. We wanted to give the claimant one more opportunity to be heard which the claimant took advantage of. What we said is if the claimant failed to convince us after that brief, then there is no need for another brief by the respondent. If the claimant raised some issues we had not considered or changed our mind, then of course we would have let the respondent have the last word so each of them would have submitted a post-hearing brief. Neither of them would have been denied the opportunity to be heard, but there is no need for the respondent to give us a brief telling us what we were already going to decide if that was the point we got to after reading the claimant's brief.

**JULIAN LEW:**

This is quite a controversial issue as to whether you should give somebody who has already had the opportunity to put their case and there are two very distinct views which is the best way to go.

**NATHALIE VOSER:**

I do not have a problem with this approach because that is how the Swiss Supreme Court would do it: if they rule in favour of a party there is no need to be heard by the party in whose favour they ruled. I have another problem, David, with what you said in terms of giving the parties the heads-up on where you stand.

We are more and more moving to an inquisitorial system which in terms of efficiency I am fully in favour because it is very efficient but it tends to blur the burden of proof. I am in favour of asking the counsel a leading question regarding legal issues because I think that regarding the law it is not about who brings in the argument if the argument is right but when it comes to issues of fact I realise more and

more arbitrators are not concerned any more about who bears the burden of proof. If you start talking to the parties "I would like to hear more about these factual issues", are you not unduly assisting the party who bears the burden of proof? Should you not more rely on what is in the file and tough luck to the parties not well represented who did not bring up the essential factual issues? I think that is a very delicate problem because it could be an unequal treatment to the party who does not bear the burden of proof.

**JULIAN LEW:**

I will take a few more comments and then ask the three panellists to comment on those issues.

**DAVID HACKING:**

In the last of these excellent ASA conferences I attended I introduced an old English proverb. I was highly complimented because speaker after speaker adopted that ancient English proverb until to the last speaker, who was a very learned and intelligent English High Court judge, who said he had never heard of it. I will, therefore, introduce to this programme, with some nervousness, another ancient English proverb. I should mention that the proverb I introduced three years ago, on the issue of whether arbitral tribunals should be seeking the truth, was: "Truth is the daughter of time". The proverb I introduce to this programme is: "Beware of the demons in the black box."

I have to say that introducing this further ancient proverb I do so with a great deal of nervousness on what Julian is going to say about it or Phillip Capper who are the three representatives from London.

Therefore, I move to congratulate David W. Rivkin on his bravery because he started his address to us that the black box should be as open as possible and I thoroughly agree with his views about the dialogue between the tribunal and counsel.

**PIERRE-ANDRÉ MORAND:**

I would raise again the matter of the dissenting opinion. It is always an unpleasant situation where in a decision by arbitrators there is one of them feeling obliged to express a dissenting view. I feel that there is another way to deal with this situation. It is said there could be a footnote on the dissenting opinion but in most cases a footnote is too short to express the view of a dissenting arbitrator. A practical way would be to include the views of the dissenting arbitrator in the

award starting by saying the arbitral tribunal has considered a situation, which is the dissenting opinion of this arbitrator, and in the end saying finally it did not adopt these views so the dissenting opinion is, in fact, included in the award.

**KIRSTIN DODGE:**

I wanted to raise some questions to David W. Rivkin about the idea of having main deliberations immediately post the oral hearing. I worry that it overemphasises witness evidence as opposed to the documentary evidence. I worry that arbitrators do not come to the oral cross-examination hearing really having studied the file. I would be curious of the feedback from the panel members and the experiences in that regard because this entirely determines, from an advocate's perspective, what you want to be doing at the oral hearing. Does that mean we are moving to week long or two-week hearings with full opening arguments, with full closing arguments, with Livenote? Of course we think as advocates that cross-examination matters but it will not necessarily be obvious until you pull the documents together with the testimony, compared to witness statements and you pull the package together. Can we do that in a week, in two days or should we even try? I am totally open but it depends on how prepared the arbitrators are and if that is going to be the main and last opportunity.

**ANDREAS REINER:**

Honestly, I would be reluctant, particularly in a rather fact-driven case, to start deliberating immediately after the hearing. I think you need time to reflect on what you have heard. You may want to go through the transcript of the hearing. I think it does not give the right impression to the parties. Is it not part of the right to be heard of the parties to have an opportunity to present their case and to say what they take out of the evidence that has been presented?

I can understand your approach if the case is very law driven. On legal issues which you may have read and considered beforehand, you can deliberate immediately thereafter. But, when you have had a hearing of three, four or five days are you really in a position to immediately jump to a conclusion on factual issues? Even if you tell the parties, "I have, of course, an open mind. You submit your post-hearing brief. I can change my mind and then I will ask the other party as well", I think the impression that is left with the parties may be pretty unfortunate. It depends on the circumstances but as a general rule I would avoid that type of situation.

Secondly, I do agree that there is very often a lack of communication between the arbitrators and the parties. It is a very delicate issue. In a certain number of cases I have tried to persuade the parties when we put together the time line of the arbitration and I said should we not meet after the first round of submissions and see what we think about that case, what are the legal issues, what are the factual issues? I fully agree with the danger of whether you get involved in burden of proof issues but I did not encounter a great enthusiasm from the parties. In fact, you have a case that goes on for perhaps a year, sometimes more, with four submissions and then only you meet for the first time with the arbitrators.

The question is would it not be more efficient if you leave some time for the arbitrators after the first round of submissions so that they can get together. I think it would make sense for them to meet in person. You cannot do it by telephone or by written exchange of views.

When you start deliberations early on, which I think is perfectly fine, what do you do with that? It only makes sense if it helps you to properly prepare the hearing by putting together a list of questions that you want to put to the parties or the experts and to the witnesses, otherwise starting discussing a case without drawing any benefit from that I think that is just nonsense. The only possibility is that you fix your mind without any benefit to the case. Why do that?

I am certainly not saying that the co-arbitrator was right in making sure that that party would raise that issue but I can sense a sort of frustration. Why would arbitrators say in an internal meeting “why do they not make this or that argument?” Either the arbitrators raise the issue openly with the parties to allow the parties to understand and address the point, or not. I do not see the purpose of a tribunal making a point internally and then say nothing to the parties.

**RABAB YASEEN:**

Considering the potential bias issue we heard from the panel, I would like to ask Matthias how comfortable he would be—as Chairman of the arbitral tribunal unfamiliar with the applicable law—to rely on feedback from a party-appointed co-arbitrator?

**JULIAN LEW:**

I do not want to keep anybody from their coffee or networking or catching up with old friends, but before we do that I ask our three panellists if they would like to come back. Several very interesting

questions have come up but three in particular that have reverberated: one is the dissenting opinions; the other is this question of when you should be deliberating and what to do; and the other is the importance of the post-hearing brief.

**PIERO BERNARDINI:**

I may answer to a couple of questions on dissenting opinions. Leaving aside the problem of the consistency of dissenting opinion with the secrecy of the deliberation, I would try to draw a distinction between investment treaty arbitration and commercial arbitration. In commercial arbitration my experience is in the sense that the arbitrator who wishes to file and actually files a dissenting opinion most of the time is led by the desire to show to the party who has appointed him that he has done his best and the fault is of that poor majority who has taken a very wrong decision. I would not push too far the other consideration, namely that of offering some arguments to that party to attack the award.

I must say I never find myself in a minority position. I do not know why, not necessarily because I am a very convincing lawyer! I would favour a solution according to which the award should clearly state that on a certain decision only the majority was in agreement and there was evidently one minority arbitrator without having a dissenting opinion. As we know, neither the ICC Court nor any other institution considers a dissenting opinion at any point in time as something which might affect the value of the tribunal's work.

Investment treaty arbitration might be different. There is experience, which in a way is drawn from the International Court of Justice, of dissenting or concurring opinion as a means of advancing the law. Considering the authority of the arbitrator at that level a dissenting opinion may really help in better understanding the development of the law. In my experience as an arbitrator in investment treaty arbitration even seeing parties in their pleadings referring to dissenting opinions as a kind of authority to support their individual positions.

**DAVID W. RIVKIN:**

Thanks for all the comments. I certainly agree with what Christoph said about asking for the permission of the parties if you are going to give some preliminary views. I do not think simply asking questions and focussing the parties in their presentation raises the same issue, but if you are really going to give some preliminary views,

you need to do that. That is one of the advantages to having the arbitrators talk about the issues at an early stage. I have had cases where I have acted in a very Swiss German way and, at an appropriate time during a hearing or at the close of the hearing before briefing, have asked the parties if the Tribunal could give some preliminary views that we thought might help work towards a settlement. The parties have always accepted the suggestion, and have found the comments to be useful. That approach can be helpful, but you have to be careful to do it with the permission of the parties.

I completely agree with Nathalie's comment on the burden of proof. I do not think there is necessarily a conflict between raising issues or focusing the parties and ignoring the burden of proof that one party has. I think it has to be done carefully.

In terms of the immediate deliberation and the points that were made, I am assuming that the arbitrators have read the relevant documents before the hearing and that the arbitrators now have effectively sat through two phases of the hearing: one written and one oral. By saying I think it is important to meet immediately does not mean that you necessarily have to come to a final decision that day but meeting immediately, understanding where there is agreement and where you may need to go back and look at the documents again, look at the testimony again, look at the law again, so that you can then continue your deliberations, is very helpful. Simply waiting some period of time is not going to help that process because then, when you get back together, you still have to do that a second time. I do think the parties have a right to a prompt award as well.

I simply adopt what Piero said on dissenting opinions.

#### **MATTHIAS SCHERER:**

Nathalie's point about the burden of proof and giving hints from the tribunal, I think that can be a problem. The problem is different if you act as counsel or as arbitrator. As counsel I share these concerns; as an arbitrator may be less because as an arbitrator one has to draft the award. For me it is difficult to say "Tough luck, they have not seen it. Burden of proof." I think some decisions have to be made but I never thought of that and I think I will do so more in the future.

As to the question whether I feel comfortable with another arbitrator writing part of the law if I am not familiar with it, no I am not. I would try to find out more about it especially if he is biased. Usually biased arbitrators focus on the bias and not on being good at providing law and then will probably want to focus on the contract rather than on the law.

Andreas Reiner's comment about not deliberating after the hearing I share sometimes, sometimes not. If the tribunal is well prepared, as it should be but one should not assume that they are, they come out in the hearing already with some ideas about what the relevant issues are. This was Kirstin Dodge's concerns about the overemphasis on witness statements. The arbitrators should always be familiar with the main factual issues and, if they are, I think after the hearing can be a good moment to deliberate but I think it is a case-by-case decision. Especially if there are biased arbitrators and you can feel that, I think it is not good to deliberate. It is better let them go, take their planes and do it afterwards.

**JULIAN LEW:**

In the traditional English way I would say that I have listened to what the panel has had to say, I have plenty I would like to add but nothing I am going to add. I would like to commend ASA and Bernhard Berger for this subject. The way the discussion has gone shows how important and interesting it is. On that basis I hope we have if not opened at least put a little hole into the black box of the way some people think.

Finally, I would like to thank our three panellists who have really enlightened us greatly today and got this conference off to a firm start. I wish you well for the rest of today's deliberations.

[Coffee break at 11.00 am until 11.34 am]

