



Swee Yen Koh

*WongPartnership,
Singapore; Vice Chair, IBA
Arbitration Committee*



Sophie Nappert

*3 Verulam Buildings,
London*



Tilman Niedermaier

*CMS Hasche Sigle,
Munich*

Award writing tips for the young arbitrator in a changing world

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#IBAWebinars



Drafting Enforceable Awards Ten Practical Tips

SOPHIE NAPPERT

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Before You Put ~~Pen To Paper~~ Fingers to Keyboard

RULE 1

- Re-read pleadings, Skeleton
- Read Post Hearing Briefs or Submissions
 - Cases zig-zag between initial pleading and post hearing submissions

RULE 2

- If there is a transcript – READ IT
- If there is no transcript, make sure you re-read your notes carefully and complete them
 - Evidence is the key to your findings
 - First “decanting”

Once You Start Writing

RULE 3

- Get into the facts
 - Dramatis Personae; Chronology of the proceedings; Chronology of the case; Contractual provisions

RULE 4

- Draw up a list of issues
 - Cover what the Parties raise – No More, No Less
 - Infra/Ultra Petita

Now For The Hard Part

RULE 5

- Draw up the Parties' respective cases on each issue
 - Second “decanting”

RULE 6

- Consider the law and apply it
 - Jura Novit Curia

Your Decision

RULE 7

- Answer each issue on your list - GIVE REASONS
 - Beware dodging difficult decisions
 - Write for the parties
 - Remain relevant and concise
 - The discretion trap

RULE 8

- Dispositif
 - Be precise in terms of rulings, numbers and dates
 - Close all brackets
 - Overall bracket

After You (Think You) Are Finished

RULE 9

- **THINK AGAIN**
 - Sleep on it
 - Third (and Fourth) decant

RULE 10

- **Insist on having your draft award reviewed**
 - By co-arbitrators (INSIST) and/or institution
 - Language
 - Sense
 - Reasoning
 - Calculations

Other Issues

- The use (and abuse) of discretion
- Dissents
- Quantum, Interest and Costs
- The Tribunal assistant

The Discretion Trap - Contributory Fault

- 1600. The Tribunal notes that it is not any contribution by the injured party to the damage which it has suffered which will trigger a finding of contributory fault. The contribution must be material and significant. In this regard, the Tribunal has a wide margin of discretion in apportioning fault.
- 1633. As the Tribunal noted earlier in this chapter, an award of damages may be reduced if the victim of the wrongful act of the respondent State also committed a fault which contributed to the prejudice it suffered and for which the trier of facts, in the exercise of its discretion, considers the claiming party should bear some responsibility.

The Discretion Trap – Contributory Fault (2)

- 1634. In the view of the Tribunal, Claimants should pay a price for Yukos' abuse of the low-tax regions by some of its trading entities, including its questionable use of the Cyprus-Russia DTA, which contributed in a material way to the prejudice which they subsequently suffered at the hands of the Russian Federation.
- 1636. The Tribunal agrees with the ICSID Annulment Committee in the *MTD v. Chile* case that “the role of the two parties contributing to the loss [is] [. . .] only with difficulty commensurable and the Tribunal [has] a corresponding margin of estimation.” However, the Tribunal, as other tribunals have done, must reach a decision and it has done so on the basis of all the evidence which it has reviewed.

The Discretion Trap – Contributory Fault (3)

- 1637. Having considered and weighed all the arguments which the Parties have presented to it in respect of this issue **the Tribunal, in the exercise of its wide discretion, finds that**, as a result of the material and significant mis-conduct by Claimants and by Yukos (which they controlled), **Claimants have contributed to the extent of 25 percent to the prejudice which they suffered as a result of Respondent's destruction of Yukos.** The resulting apportionment of responsibility as between Claimants and Respondent, namely 25 percent and 75 percent, **is fair and reasonable in the circumstances of the present case.**

The Discretion Trap - Interest

- 1677. As we saw earlier, the ECT, the relevant legal instrument, **envisages an award of interest** in an arbitral award. In addition, the Treaty decrees mandatory payment of interest “at a commercial rate established on a market basis” in the case of a lawful arbitration [sic].
- 1678. **Neither the Treaty nor the ILC Articles on State Responsibility provide specific rules regarding how interest should be determined.** In addition, as the Tribunal has found, **the practice of past tribunals is varied and inconsistent and does not provide clear guidance.** Thus, as is well established, the Tribunal has a **wide margin of discretion** to determine the rate of interest applicable and whether it should be simple or compound.

The Discretion Trap – Interest (2)

- 1684. The Tribunal observes that many investor-state tribunals have adopted this “investment alternatives approach”, using rates of U.S. debt instruments even when the claimant was not a U.S. investor.
- 1685. The Tribunal, in the exercise of its discretion, has concluded that it would be appropriate to award to Claimants interest on a rate based on ten-year U.S. Treasury bond rates.

The Awards

- *Hulley Enterprises Limited (Cyprus) v The Russian Federation*, UNCITRAL, PCA Case No. AA 226
- *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No. AA 227
- *Veteran Petroleum Limited (Cyprus) v The Russian Federation*, UNCITRAL, PCA Case No. AA 228
- Final Awards, 18 July 2014

Contemporary and Emerging Issues in Award Writing

TILMAN NIEDERMAIER

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Article 31 UNCITRAL ML

1. The award shall be **made in writing** and shall be **signed** by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.
2. The award shall **state the reasons** upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.
3. The award shall state its **date** and the **place of arbitration** as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.
4. After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be **delivered to each party**.

Article 189 PILA

1. The arbitral award shall be rendered **in conformity with the rules of procedure and in the form agreed upon by the parties.**
2. In the absence of such an agreement, the arbitral award shall be made by a majority, or, in the absence of a majority, by the chairman alone. The award shall be **in writing, supported by reasons, dated and signed.** The signature of the chairman is sufficient.

Article 32 UNCITRAL Arbitration Rules

1. In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards.
2. The award shall be made **in writing** and shall be final and binding on the parties. The parties undertake to carry out the award without delay.
3. The arbitral tribunal shall **state the reasons upon which the award is based**, unless the parties have agreed that no reasons are to be given.
4. An award shall be **signed** by the arbitrators and it shall contain the date on which and the place where the award was made. Where there are three arbitrators and one of them fails to sign, the award shall state the reason for the absence of the signature.
5. The award may be made **public only with the consent of both parties**.
6. Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal.
7. If the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the tribunal shall comply with this requirement within the period of time required by law.

Article 32(2) ICC Rules

The award shall **state the reasons** upon which it is based.

ICC Note to the Parties and Arbitral Tribunals, paragraphs 40 et seq.

- ICC awards made from 1 January 2019 **may** be published.
- The Secretariat will inform parties at the time of notification of awards, that the award may be published **in its entirety** no less than two years after notification. Parties are able to agree to publication in a shorter or longer time period.
- Any party may, at any time before publication, object to publication or require that the published version of an award be anonymised or pseudonymised.
- If a party objects to publication or requires that the award be anonymised or pseudonymised, the award **will either not be published, or will be published in a restricted format.**

Article 26.2 LCIA Rules

The Arbitral Tribunal shall make any award in writing and, unless all parties agree in writing otherwise, shall state the reasons upon which such award is based. The award shall also state the date when the award is made and the seat of the arbitration; and it shall be signed by the Arbitral Tribunal or those of its members assenting to it. **Unless the parties agree otherwise, or the Arbitral Tribunal or LCIA Court directs otherwise, any award may be signed electronically and/or in counterparts and assembled into a single instrument.**

ICC Note to the Parties and Arbitral Tribunals, paragraphs 164:

Subject to any requirements of mandatory law that may be applicable, the parties may agree (1) that any award be signed by the members of the arbitral tribunal in counterparts, and/or (2) that all such counterparts be assembled in a single electronic file and notified to the parties by the Secretariat by email or any other means of telecommunication that provides a record of the sending thereof, pursuant to Article 35.



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