The Powers and Duties of an Arbitrator

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CHAPTER 20

How Far Should an Arbitrator Go to Get it Right?

Jennifer Kirby

A few years ago, I attended a meeting of international arbitration lawyers. The lawyers had gathered to hear presentations from accounting experts who regularly give opinions as to the quantum of damages in international cases. The experts, hoping to sell their services, told war stories to demonstrate their knowledge and expertise. One of these stories still sticks in my mind.

The expert described a large, complex case where an arbitral tribunal received wildly divergent quantum opinions from the parties' experts. In its award, the tribunal noted this and stated that it considered that both quantifications were wrong. Rather than attempting to arrive at an amount of damages it considered correct, however, the tribunal stated that it considered it had to choose between the two incorrect figures from the parties' experts. So it picked one. And that became its award.

Admittedly aghast, I said, 'That's absurd. The tribunal should have determined an amount of damages it considered correct. And if the arbitrators felt they didn't have enough information to do so, they should have used their broad powers under the rules to get whatever information they needed.'

Silence. Now it was the lawyers who were aghast. Finally, one of them, who appeared to voice what was in the minds of all, said that the tribunal did the right thing. To do otherwise would be to help one party at the expense of the other and that wouldn't be fair.

Gulp.

So how far should an arbitrator go to get it right?

To 'get it right' an arbitrator does not have to find The Truth. As Rusty Park has observed, 'Accuracy in arbitration means something other than absolute truth as it

might exist in the eyes of an omniscient God.'[1] Some of the questions arbitrations throw up lend themselves to clear, discrete answers – *Did the agent receive his commission?* – while others do not – *What is the appropriate discount rate?* At their worst, arbitrations can present intractable questions of perception like W.E. Hill's famous drawing of 'My Wife and My Mother-in-Law'[2] (see Figure 20.01) and require the arbitrator to decide whether it is one or the other.

Figure 20.01 My Wife and My Mother-in-Law

Still, in most cases, certain answers are better than others, even if *the* answer proves illusive. Being human, the arbitrator necessarily operates within these limits. To get it right, an arbitrator has to render an award that 'rests on a reasonable view of what happened and what the law says'.[3] And he has an obligation to do so. It's part of the job.

Parties do not submit disputes to international arbitration to get them resolved any old which way. If that's what they wanted, they could flip a coin.[4] Instead, in choosing international arbitration, parties usually choose to (1) spend significant time and money[5] (2) to tell their stories in detail[6] to (3) three independent and impartial

1. William W. Park, *Arbitrators and Accuracy*, 1(1) J. Int'l Dis. Settlement 25, 26 (2010) (explaining that, in 'examining the competing views of reality proposed by each side, arbitrators aim to get as near as reasonably possible to a correct picture of those disputed events, words, and legal norms that bear consequences for the litigants' claims and defenses').
2. Hill's drawing first appeared in *Puck* magazine on 6 Nov. 1915.
3. Park, *supra* n. 1, at 27.
4. *Ibid.* at 33.
5. *See* Robert B. Kovacs, *Efficiency in International Arbitration: An Economic Approach*, 23(1) Am. Rev. Int'l Arb. 155, n. 3 (2012) (cataloguing the 'growing chorus of discontent from the users or "consumers" of international arbitration regarding the time (and associated cost) it takes to conduct international arbitrations').
6. It is common for parties to submit comprehensive written statements of claim, defence, reply and sur-reply. Along with these, parties also typically submit several witness statements apiece, as well as scores of exhibits. And the hearing itself can often last several days, with the parties filing further written submissions thereafter.

people[7] who are (4) required to decide the dispute pursuant to applicable rules of law[8] in (5) a reasoned award that explains how they arrived at their decision.[9] Parties choose all this because they want an award that is not only final and binding but right, and that is what arbitrators should deliver. That their award cannot usually be challenged for getting it wrong only heightens their obligation to get it right.[10]

To that end, all modern international arbitration rules give arbitrators broad powers to get the factual and legal information they need to take correct decisions. Arbitrators can generally order the parties to produce documents, question witnesses, conduct site visits, inspect property, engage factual and legal experts to assist them and otherwise establish procedural rules that allow them to get material information.[11] That arbitrators *can* use these powers to reach the right result cannot be gainsaid. The question is whether they *should*.[12]

The lawyers at the meeting thought not. This may be because all of them were American and the adversarial system is deeply engrained in American legal culture. In its raw form, the adversarial system leaves it to the parties to investigate and present evidence and argument before a passive decision-maker, who merely listens to both sides and renders a decision based on what he has heard.[13] If the parties have failed to

7. School of International Arbitration, Queen Mary, University of London & White & Case, *2010 International Arbitration Survey: Choices in International Arbitration* 25 (2010) (finding that '73% of respondents [had] a general preference as to the number of arbitrators, of which 87% [preferred] three arbitrators'); *see also 2014 ICC Statistical Report*, 1 ICC Dispute Resolution Bull. 7, 12 (2015) (indicating that over 60% of cases are heard by three-member arbitral tribunals). Whether having three arbitrators instead of one actually leads to more accurate decisions is an open question. Jennifer Kirby, *With Arbitrators, Less Can Be More: Why the Conventional Wisdom on the Benefits of Having Three Arbitrators May Be Overrated*, 26(3) J. Int'l Arb. 337 (2009).
8. *See*, e.g., ICC Arbitration Rules (as of 1 Jan. 2012) ('ICC Rules'), Art. 21(1); International Centre for Dispute Resolution (ICDR) International Arbitration Rules (as of 1 Jun. 2014) ('ICDR Rules'), Art. 31(1); LCIA Arbitration Rules (as of 1 Oct. 2014) ('LCIA Rules'), Art. 22.3; Arbitration Institute of the Stockholm Chamber of Commerce Arbitration Rules (2010) ('SCC Rules'), Art. 22(1); Arbitration Rules of the Singapore International Arbitration Centre (as of 1 Apr. 2013) ('SIAC Rules'), Art. 27.1; UNCITRAL Arbitration Rules (as revised in 2010) ('UNCITRAL Rules'), Art. 35(1). If parties were not concerned about having their disputes correctly decided at law, they could 'give someone a blank check to decide "in equity" without reference to law' (Park, *supra* n. 1, at 33), but parties rarely do this.
9. ICC Rules, Art. 31(2); ICDR Rules, Art. 30(1); LCIA Rules, Art. 26.2; SCC Rules, Art. 36(1); UNCITRAL Rules, Art. 34(3). And parties who elect ICC arbitration further choose to have the ICC Court scrutinize both the form and substance of the award before it is notified to the parties. ICC Rules, Art. 33. The value of the scrutiny process cannot be overstated. *See* Gustav Flecke-Giammarco, *The ICC Scrutiny Process and Enhanced Enforceability of Arbitral Awards*, 24(3) J. Arb. Stud. 47, 56–69 (2014).
10. Jennifer Kirby, *What Is an Award, Anyway?*, 31(4) J. Int'l Arb. 475, 478–480 (2014).
11. *See*, e.g., ICC Rules, Arts 19, 22, 25; ICDR Rules, Arts 20, 21, 25; LCIA Rules, Arts 14, 21–22; SCC Rules, Arts 19, 29; SIAC Rules, Arts 16, 23–24; UNCITRAL Rules, Arts 17, 27, 29.
12. Phillip Landolt, *Arbitrators' Initiatives to Obtain Factual and Legal Evidence*, 28(2) Arb. Int'l 173, 175 (2012) (doubting that 'in most cases the parties seek an award corresponding to any objective standard of correctness of fact and law beyond what the parties themselves submit').
13. Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64(2) Ind. L.J. 301, 302 (1989).

give the decision-maker the information he needs to render a correct decision, it is right and proper for him to render an incorrect one.[14]

American 'baseball arbitration' – so called because it is used to resolve disputes over the salaries of professional baseball players – embraces this approach to dispute resolution whole hog. In baseball arbitration, each side submits a proposed monetary award to the tribunal. After hearing the parties, the tribunal must choose one of the proposed awards without modification. Structured this way, each party has an incentive to submit a reasonable proposed award in the hope that the tribunal will select it. But it also leaves the parties room to be as wrong as they want to be. If no party submits a reasonable proposed award, the tribunal still has to choose one and issue an award that is unreasonable on its face.[15] While this may suit enthusiasts of the adversarial system, it has yet to catch on as a method for resolving international commercial disputes.[16]

As its name suggests the adversarial system is not an end in itself. It is rather a system that is designed to get at the truth and produce fair outcomes. The extent to which it actually does this – and does it with reasonable efficiency – is debatable.[17] Whatever its merits, however, the adversarial system is not the system parties sign up for when they agree to resolve disputes through international arbitration. What parties sign up for is a system that gives arbitrators broad powers to get the information they consider they need to take their decisions. That an arbitrator's exercise of those powers may run counter to the adversarial system is accordingly neither here nor there.

This is not to say that an arbitral tribunal would be right to use its powers to run the proceedings in an inquisitorial fashion. Parties generally want and expect to investigate the facts, research the law, select and develop the arguments they wish to make and present their cases to the tribunal as they see fit.[18] As a consequence, in

14. For avoidance of doubt, to the extent the tribunal in the opening anecdote thought that it would act outside the scope of its mission (*ultra petita*) if it awarded damages in an amount that neither party had advocated, it was mistaken. An arbitrator may award damages in an amount that neither party advocated, provided the amount awarded is not more than the amount sought.
15. Jeff Monhait, *Baseball Arbitration: An ADR Success*, 4 Harv. J. Sports & Entm't L. 105, 119–120, 132–133, 140 (2013).
16. This could be changing, however. *See* ICDR Final Offer Arbitration Supplementary Rules (Also referred to as Baseball or Last Best Offer Arbitration Supplementary Rules) (effective 1 Jan. 2015). For now, though, in an effort to avoid the sorts of unreasonable decisions baseball arbitration permits, many arbitral rules provide that awards are to be made by majority or, where there is no majority, by the chairman alone. ICC Rules, Art. 31(1); LCIA Rules, Art. 26.5; SCC Rules, Art. 35(1); SIAC Rules, Art. 28.5. Absent such a provision, co-arbitrators can stake out extreme positions (e.g., on the quantum of damages) and force the chairman to choose between them to make a majority and issue an award. With the power to decide alone, the chairman remains at liberty to decide the case correctly. And, knowing this, the co-arbitrators are less likely to engage in partisan conduct. Yves Derains & Eric A. Schwartz, *A Guide to the ICC Rules of Arbitration* 306–307 (2d ed. 2005). *But cf.* ICDR Rules, Art. 29(2) (requiring that awards be by majority); UNCITRAL Rules, Art. 33(1) (same).
17. Sward, *supra* n. 13, at 355 (finding that, even in the United States, '[a]dversarial ideology has failed' and the judicial system 'is transforming itself into a more inquisitorial, less individualistic methodology').
18. Landolt, *supra* n. 12, at 211 (noting that if 'parties are not submitting certain factual evidence, not making certain legal arguments, or not relying on certain legal authorities, they may have a legitimate reason not to do so').

practice, a tribunal should usually exercise its powers to seek further information at the margins – to clarify factual and legal issues the parties have raised and fill gaps in the record the parties have already fleshed out. And it should usually only do so when it considers it necessary to correctly resolve the dispute the parties have submitted.[19] An international arbitration is generally not an occasion for arbitrators to indulge idle curiosity or investigate novel theories of recovery or defence that no party has raised.[20] Their aim should be to narrow the scope of the parties' problems, not broaden it.

Even this restrained approach can draw objections, however. In one of my cases as sole arbitrator, the parties' submissions failed to provide me all of the material provisions of the applicable law. The claimant, who was not represented by counsel, had provided me none. The respondent had provided me an obviously curated set of provisions that, taken out of all context, appeared to go in its favour. When I asked the parties to submit the missing provisions, the respondent objected that I had to make due with the provisions it had already provided. To request anything further, it contended, would help the claimant and therefore violate due process.

Arbitrators should generally not seek to help one party over another, even to 'level the playing field'.[21] Seeking to help one party over another is arguably inconsistent with an arbitrator's due process obligation to treat the parties equally and may well invite accusations of bias. But an arbitrator should not be deterred from seeking the information he needs to correctly resolve a case just because that information may weigh in favour of one of the parties' positions. In requesting such information, the arbitrator is not seeking to help one party over another. He's trying to reach the right result. The right result will necessarily go in favour of one party and against the other, but that fact alone does not convert an arbitrator's request for further information into a due process violation.[22]

Still, the line an arbitrator has to walk can sometimes be fine. The claimant bears the burden of proving its claims. If it fails to produce sufficient evidence to do so, it will often be most appropriate for the arbitrator to simply dismiss the claims. But the burden of proof is a blunt instrument, and it is not always entirely clear how it should

19. *Ibid.* at 199–214 (advocating that arbitrators exercise restraint where their powers to seek further information are concerned).
20. One potential exception concerns issues of international public policy. An arbitrator should be alert to such issues and raise them with the parties if necessary to ensure that his award is not set aside on public policy grounds. International Law Association (ILA), *Report on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration* ('ILA Report') 21 (2008) (considering that, when a dispute may implicate mandatory public policy norms, an arbitrator has 'more freedom to probe, to set the agenda, and to drive the development of the legal analysis'); ILA Resolution No. 6/2008 ('ILA Resolution'), Recommendation 13. But it is important not to get carried away. Awards that implicate international public policy are rare, and court decisions setting awards aside on public policy grounds are even rarer. As a consequence, it is seldom helpful for an arbitrator to go running after public policy issues the parties have not raised.
21. *But see* Landolt, *supra* n. 12, at 217–218 (considering that it may be appropriate for an arbitrator to take a more proactive role in seeking information where a party is financially unable to put on its case or does not appear at all).
22. *Ibid.* at 191–192 (noting than an arbitrator does not fail to treat the parties equally in requesting further information – even information that affects the outcome – provided he would have requested the information no matter which party benefitted).

cut. While the claimant bears the burden of proving its claims, each party generally bears the burden of proving the facts it relies upon to support its claim or defence.[23] This can lead to finger pointing as to where the relevant burden lies. And it usually lies nowhere where questions of law are concerned.[24]

This is because the content of the law applicable to the merits of the dispute is not normally considered a fact that a party must prove.[25] But neither is it something the arbitrator necessarily knows. Indeed, he frequently does not know it.[26] He must apply it, however.[27] And that implies that he has an obligation to learn it.[28] In most cases, he can satisfy that obligation by reading the parties' submissions. But where this is not the

23. *See*, e.g., UNCITRAL Rules, Art. 27(1) (providing that '[e]ach party shall have the burden of proving the facts relied on to support its claim or defence').
24. Landolt, *supra* n. 12, at 221 (noting that '[i]n arbitration there is no rational basis for placing a burden of proof on any party as to the ascertainment of the law').
25. International arbitration avoids debates about whether the content of the applicable law should be treated as a question of fact or law and adopts a pragmatic approach. In this regard, it is for the parties to establish the content of the law applicable to the merits. But the arbitrator has the power, though not the obligation, to conduct his own research. If he does so, he should give the parties an opportunity to comment on the results. And if the content of the applicable law is not established with respect to a specific issue, the arbitrator may apply to such issue any rule of law he deems appropriate. Gabrielle Kaufmann-Kohler, *The Governing Law: Fact or Law? – A Transnational Rule on Establishing Its Content*, *Best Practices in International Arbitration*, ASA Special Series No. 26 79, 84 (2006); ILA Report, *supra* n. 20, at 22 (considering that arbitrators 'should inquire about the applicable law within the general parameters of the arbitration defined by the parties and, considering costs, time and relevance of issues, may conduct their own research, provided the parties are given an opportunity to be heard on material that goes meaningfully beyond the parties' submissions'); ILA Resolution, *supra* n. 20, Recommendations 5–8, 11, 15. It bears emphasizing that, where an arbitrator does his own research, it is mission critical that he give the parties an opportunity to comment on the results. Failing to do so may well leave the award open to set aside on due process grounds. *See*, e.g., *Engel Austria GmbH v. Don Trade*, Cour d'appel [CA] [regional Court of Appeal], Paris, pôle 1, ch. 1, 3 Dec. 2009, case no. 08/13618 (setting aside an award that turned on an issue of Austrian law, where the award stated that the parties had not had an opportunity to address the issue).
26. While it may be appropriate under the principle *jura novit curia* to presume that national judges know the law of their respective jurisdictions, there is no reason to presume that an arbitrator knows the law applicable to the merits of the parties' dispute. *See* Gabrielle Kaufmann-Kohler, *The Arbitrator and the Law: Does He/She Know It? Apply It? How? And a Few More Questions*, 21(4) Arb. Int'l 631 (2005) (noting that she has resolved disputes under Argentinean, Colombian, English, Egyptian, French, German, Greek, Hungarian, Korean, Lebanese, Liberian, Moroccan, Polish, Portuguese, Sudanese, Thai, Tunisian, Turkish and Venezuelan law – none of which she knows). *But see* Bernhard Berger & Franz Kellerhals, *International and Domestic Arbitration in Switzerland* 373–375 (2d ed. 2006) (explaining that the *jura novit curia* principle applies to arbitrations seated in Switzerland).
27. *See supra* n. 8.
28. ILA Report, *supra* n. 20, at 6 (noting that, in cases to be decided at law, 'arbitrators are duty bound to apply the relevant law' and therefore often 'must become educated in a law that they may not be expert in and may never before have even considered'). Despite this, most arbitral rules do not expressly empower arbitrators to seek information about the content of the applicable law. The LCIA Rules are a notable exception. LCIA Rules, Art. 22.1(iii) (empowering the arbitral tribunal to 'conduct such enquiries as may appear … necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying relevant issues and ascertaining relevant facts and the law(s) or rules of law applicable to the Arbitration Agreement, the arbitration and the merits of the parties' dispute'). That this power falls within the broad powers arbitral rules generally grant arbitrators (*see supra*

case, he should not throw up his hands and render an award he considers wrong, but rather seek the information he needs to decide the case correctly.

Doing this often requires tact, skill and some modicum of courage. A tribunal that decides a case based wholly on the parties' submissions – no matter how misguided or incomplete – usually runs little to no risk that its award will be set aside. The arbitrator's duty to get it right is not an enforceable one. Some arbitrators doubtless take comfort in this. Here's to one who doesn't.

n. 11), however, cannot be gainsaid. ILA Report, *supra* n. 20, at 16 (noting that the determination of the contents of the applicable law is 'by and large procedural and thus governed by [the] broad discretionary powers of arbitral tribunals' that give them freedom that is 'largely unfettered').