

The Psychological Aspects of Dispute Resolution: Commentary

Teresa Giovannini*

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I. INTRODUCTION

Professor Diamond has presented the scenario of ideal arbitration proceedings, where both the tribunal and counsel behave in a perfectly balanced way. The tribunal shows no interest or inclination in finding the position of one side more persuasive than that of the other. Civilized exchange is the rule and emotional outbursts do not occur. As pointed out by Professor Diamond, in such ideal proceedings: "Proceedings are well organized and efficient. The decision is correct and the litigants on both sides go away accepting that justice has been done."¹

Unfortunately, we do not live in such an ideal world.

The purpose of my comments on Professor Diamond's report is to give you some practical examples of arbitral tribunals' psychological misbehaviors, which – while clearly not constituting grounds for challenge, be it of the tribunal itself or of one of its members, or of the award itself – can seriously undermine the "value of enhanced authority and legitimacy for international arbitration".²

II. THE TRIBUNAL'S ATTITUDE

Our distinguished speaker mentioned the importance of parties' perception of the fairness of procedures in the process of accepting the final verdict. With respect thereto, Professor Diamond focused in particular on (i) perceived trust and (ii) perceived neutrality.

As to the issue of perceived trust, Professor Diamond underlined the importance for parties to "have their day in court". But this requirement sometimes leads the arbitrators to lose the distance and perceived neutrality they are supposed to keep during the entire proceedings, as shown by the following examples.

I was involved as lead counsel in a case where a claim for tort (misrepresentation) was

* Partner, Lalive & Partners, Geneva.

1. See this volume, pp. 327-342 at p. 327.

2. *Ibid.*, at p. 330.

put forth by my side. During the coffee break of one of the preliminary hearings, the chairman (a very experienced arbitrator) "confidentially" told me that I should better base my claim on a contractual basis, and explained the reasons for that approach to me.

I did what he suggested, and amended my claim with the correlative investment of time and money for the client and myself. There is no question that the chairman was acting in good faith and wanted to do me a favor, so to say.

Contrary to my expectations, I could have done without this advice. As it turned out, the case was a hopeless one and we lost it, both on extra-contractual and contractual grounds.

I gave a lot of thought to this event afterwards, trying to understand the reasons for this "advice" that was not requested from the chairman or from any of the party-appointed arbitrators. My conclusion was the following: the arbitrator – on the basis of the confidence and the mission he or she had been entrusted with – sometimes feels that he or she should show concern about the case on a personal basis. This is in my view a clear psychological trap – the need for recognition by counsel, whatever the outcome of the dispute may be. This trap must be avoided, as it causes frustration for parties and their counsel.

A similar situation arises when the "perceived neutrality" on the part of the decision-maker – the tribunal or of one of its members – is at stake. In this respect, Professor Diamond has mentioned the problem of the balance that the party-appointed arbitrators have to strike between the loyalty due to the party that selected them and the loyalty due to the law as represented by the panel as a whole and the evidence presented in the case.

The issue of the party-appointed arbitrator's loyalty towards the party that selected him or her actually gives rise to what I consider to be a clear deviation from the parties' understanding and expectations from a tribunal in which they place their trust. The most common example is when one of the party-appointed arbitrators "argues" the case in support of the position brought forward by the party that appointed him or her. In practice, and all of us have witnessed such situations, the party-appointed arbitrator puts questions to the witnesses which, far from giving the impression that the tribunal as a whole is trying to ascertain facts, clearly indicates that he or she feels duty bound to support one position rather than another.

This behavior, far from creating trust, triggers suspicion, both on the part of other arbitrators and on the side of the other party. The other arbitrators will obviously be very careful in considering this arbitrator's positions in the deliberations on the final decision, with the consequent weakening of this arbitrator's influence on the final outcome. This arbitrator's view is clearly tainted, therefore subject to careful verification by the other arbitrators. As counsel, I greatly fear this kind of intervention from an arbitrator appointed by the side I represent, and I seriously question the advantages of having the arbitrator appointed by the opposite side behaving that way. In two recent arbitration cases where I was counsel, and which were chaired by very experienced arbitrators, this attitude of clear and open support towards the party that appointed the arbitrator concerned was adopted by the opposite side's arbitrator. I remain convinced that the opposite side's position was not helped by this attitude, regardless of the outcome of the dispute. I also feel that when the party that appointed the arbitrator loses the case, the trust that the party had towards the arbitrator becomes much more undermined than it would have been without this kind of intervention.

Another example all of us surely have come across is the case where one of the party-appointed arbitrators continuously whispers in the chairperson's ear during the hearings. Professor Lalive told me of a case where such behavior was adopted by the arbitrator appointed by the opposite side, while the arbitrator nominated by his client, a government, continued behaving in a very discrete and impassive way. Pierre Lalive's client reacted very strongly to that attitude, considering – rightly or wrongly – that the chairperson was clearly inclined to consider the opposite side's arguments more favorably.

I am firmly convinced that trust in an arbitrator is not synonymous with the expectation of a partisan attitude. In our capacity as arbitrators, we are entrusted – and the word is chosen on purpose – with this role because of our supposed or actual skills and capacities to lead a fair trial. But, judges we are, and judges we must remain. There is no room for arguing a case, this is not what we are hired for. There is no room for partiality, there is no room for expression of personal considerations or feelings. We must remain open to any possible decision until the very end of the proceedings, when all the facts are gathered, and not give the parties any indications in connection thereto before the final award is rendered. Attitudes of physical proximity – as the one I mentioned of the arbitrator whispering to the chairperson – must be carefully avoided and the chairperson must unequivocally discipline arbitrators in breach thereof.

III. THE OUTCOME OF THE DISPUTE AND HOW IT IS PRESENTED TO THE PARTIES

Beyond these examples of personal attitudes of arbitrators, the way the tribunal examines the facts of the case and reflects this thorough examination in the award are clearly crucial for “the party's satisfaction with the verdict and willingness to accept the legitimacy of the decision ... and the fairness and legitimacy of the institution”.³ Unfortunately, as shown by the following example, this is not always the case.

I was counsel in a case where a fishing company had ordered six fishing boats worth US\$ 3 million each. The first four were actually delivered by the shipyard with so many defects that the fishing company decided to rescind the contract. As it happens, the remaining two boats were never delivered, and did not even receive the “release” upon completion of their construction by the relevant port authorities. At the time of the proceedings, the shipyard was bankrupt.

In the award, the tribunal held that the fishing company had to pay for what it had received, namely the six boats. End of discussion. The same result could have been reached by saying that the rescission was not justified, that the fishing company was responsible for not having required the shipyard to deliver the two remaining boats, for example. The tribunal's statement that the company had to pay for what it received simply showed that the tribunal had not paid attention to the fact that the two boats not only were never delivered, but in addition, had never been in a state to be delivered and – due to the construction company's bankruptcy – could never be delivered in the future.

3. *Ibid.*, at p. 329.

Such superficial and clearly erroneous arbitral awards destroy any trust parties can have in a particular panel, but more importantly, also destroy the parties' trust in arbitration as a valid and serious alternative dispute resolution mechanism. I remember the client's reaction when reading the award: he simply said that the award was of such a mediocre level that even a district court in his country (it was a North African country) would have been frightened to render a decision of the kind. In addition, such a decision could have been appealed, while the award was clearly not appealable. For sure, this fishing company will never resort to arbitration again.

Conversely, however, I have had the opportunity to feel how much trust the following behavior can give the parties and their counsel. In a recent case relating to the dissolution of a joint venture, the tribunal, after the closing of the proceedings, issued an Order by which it gave its tentative "inclination" regarding the outcome of the dispute and – simultaneously – put some additional questions to the parties. Albeit deprived of any reasoning, the tribunal answered each substantive issue raised by both parties in that Order, reserving any modifications of its final judgment depending upon the parties' answers to the questions put.

This Order actually gave the parties the possibility to see – before the final award was issued – that any and all issues raised were duly taken into consideration by the tribunal and also to realize that the tribunal had actually understood the core of the dispute. Indeed, the losing party tried – through the answers required by the tribunal – to redress the situation through what it considered its strongest arguments. In that case, it was in vain. But clearly, the losing party had been given a "voice" in a very efficient process.

Professor Diamond also mentioned the "decision-making process".⁴ Besides the arbitrators' cultural backgrounds, prior experiences and personal associations referred to by our speaker, the decision-making process also gives rise to behavior patterns which can ruin the other arbitrators' trust. For example, there are arbitrators who, when they see that the point of view they are defending, is not being adhered to by the other members of the tribunal, systematically threaten not to sign the award or to issue a dissenting opinion. This situation is clearly unfair and surely incompatible with the balance an ideal tribunal must keep, namely – as underlined by Professor Diamond – a tribunal without either interest or inclination to find the position of one side more persuasive than that of the other.⁵ This must be reflected not only in the hearings but also in the deliberations themselves.

IV. CONCLUSION

The little time allocated to me does not allow me to give further examples of the difficulty of achieving the "ideal tribunal" or the "ideal proceedings". But the organizers of this session dedicated to The Psychological Aspects of Dispute Resolution were right in holding that the knowledge of the law, be it procedural or substantial, and compliance

4. *Ibid.*, at p. 342

5. *Ibid.*

with it by the parties and the tribunal, is not sufficient to create trust in arbitration as a valid alternative dispute resolution mechanism. Trust and perceived neutrality require adequate psychological behaviors. These are not among the least of all of our interests and challenges, particularly as arbitrators.

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