

Personal Views on How Arbitral Tribunals Operate and Reach Their Decisions

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In International arbitration, there are more often than not three arbitrators of different nationalities, cultures, education and background. In most cases and under most arbitration rules, it is the duty of the arbitral tribunal, and in the first place its chairman, to prepare a case management scheme for the conduct of the arbitration on which the tribunal is appointed. In my view, case management should involve as a starting point a face to face preliminary meeting with the parties very soon after receiving the case file. At this gathering, besides meeting the parties, the arbitrators would have the first real opportunity to discuss with each other the issues facing them in detail. Extracting those issues at an early stage is the primary task of the tribunal and in this connection I would say the first step to deliberation session between the arbitrators may take place. Hence, it is extremely important, in my view, to have a face to face preliminary meeting rather than an audio or video conference, particularly if the members of the arbitral tribunal had not previously met. These deliberations would give the chairman a good insight into the stature and metal of the other members of the tribunal.

Whilst it may be too early at the stage of the preliminary meeting to start thinking about the decisions that the arbitrators would have to make in order to resolve the issues between the parties and how they should be decided, it is not too early to plan and pave the way for how to approach these issues and the methodology by which the decisions may be accomplished. So, when should arbitrators start thinking about the actual decisions they have to make and when do their deliberations regarding these decisions, or otherwise, start?

Generally speaking, the arbitrators are required to deliberate by mandatory law; by custom; and by the expectation of the parties. Not to do so, would usually result in non-recognition and annulment of the award. Furthermore, the deliberations of the tribunal are confidential and should not be divulged to the parties or to others.

However, before going any further, it is worthwhile to consider the meaning of "deliberation". What is deliberation? Should deliberation take place at a face-to-face meeting between the arbitrators in the place of arbitration or could it be done by correspondence, or even through telephone discussions? If the deliberations take place through correspondence, how thorough should that correspondence

be, particularly if one of the arbitrators takes a different view to the other two? Should the chairman record every decision taken and forward it to the co-arbitrators for approval immediately after such a decision is taken? These questions arise from bitter experiences where surprising events have taken place.

As an example of one of these situations, one of the co-arbitrators in a case where I was the chairman in an international arbitration adopted the position of an additional advocate of the views of his appointing party. The deliberations became extremely difficult and the discussions that had taken place between the members of the arbitral tribunal were not in fact deliberations and that none was held by the tribunal. The award was not honoured and its recognition and enforcement came ultimately before the courts in Egypt ending fortunately in a very uncomfortable situation for that co-arbitrator. The competent Court held against his contention and stated as follows:¹

The phrases that have been used by the Arbitrator who is objecting to the Award on the basis that he was not involved in the Tribunal's deliberations is in fact evidence of his having been involved in those deliberations with the other members of the Tribunal. He has knowledge of the deliberations and it seems he has expressed his views on the law to the Tribunal.²

It is worth mentioning in this connection that the arbitration law in various jurisdictions require specific conditions for deliberation. For example in Egypt, under Article 40 of the Egyptian Arbitration Law, the award of an arbitral tribunal composed of more than one arbitrator should be issued by a majority of opinions after deliberations conducted in the manner determined by the arbitral tribunal, unless the parties otherwise agree. The important words here are "after deliberations" as they are capable of different interpretations.³

In another incident in Egypt, the scene turned out to be rather ugly in a different way through a co-arbitrator resorting to frustrating and delaying techniques by becoming unavailable to attend

¹ Cairo Appeal Court, Decision No. 94, Case No. 37, Commercial, 29th March 2006, relating to CRCICA Case no. 175/2000. It is of note that the Cairo Court of Appeal in reaching its Decision, referred to and relied upon the decision of a French Court in *Intelcam v. French Telecom*, 16th January 2003, Rev. arb. 2004, pp. 369-389.

² The quoted text is the writer's translation from the Arabic text of the judgment.

³ An important aspect of the Egyptian Arbitration law is the difference between Article 40 of the Egyptian Law and Article 29 of the UNCITRAL Model Law, from which it stems, relating to decision-making by a panel of arbitrators.

deliberation and decision making sessions, thus preventing the process of deliberation from taking place. Fortunately, that was in an institutional arbitration where the attempts were capable of being recorded and presented to the administering institution.

Having said that the first deliberation session should take place at the preliminary meeting, the invitation to deliberate and the conduct of the deliberation is the responsibility of the chairman. It is expected that during the arbitration process, and before the hearing, many procedural issues would arise which would need to be discussed by the members of the arbitral tribunal who should deliberate by e-mail exchanging their views, sometimes with the chairman offering the first view and others by the chairman asking the views of the co-arbitrators first. However, if the issue is of serious consequences, then such deliberation might have to take place by telephone and/or at a physical meeting of the tribunal, particularly if the problem is of intricate and complex nature. It is extremely important for the co-arbitrators to express their views and offer their help during these deliberations as such exchanges would develop a useful relationship between the members of the arbitral tribunal. However, it is also important for the chairman to be prepared to accept and adopt a better view than his/her own and forget vanity.

The main deliberations would obviously take place and would be necessary during and most definitely after the hearing. The deliberations during the hearing would take place as the evidence is adduced; and discussions should be held between the arbitrators regarding the matters that need to be ventilated. Deliberations would also take place immediately after the hearing in order to establish the procedure for future deliberations and how they should take place and how to proceed with deciding the substantive issues. This would normally lead to establishing how to prepare the next draft(s) of the award; and later after the post-hearing submissions are received; and how to reach the necessary decisions.

If the tribunal has not established a collegiate working relationship and a way to cooperate,⁴ the chairman would have to proceed carefully and formally, particularly if one of the arbitrators chooses to act in an improper manner.

In general terms, how to deliberate will depend on the type of issue facing the Tribunal and on whether there are major differences between the members of the Tribunal. This is particularly important at the early stages of the arbitration which would normally determine how the relationship between the arbitrators would develop.

⁴ This problem could be the fault of the chairman or the other members of the tribunal.

Deliberation will in some cases test the ability of the chairman and sometimes exhaust his/her patience. However, whatever happens, the thread between the chairman and the co-arbitrators should not be stretched beyond repair nor cut off completely. In normal happier circumstances, deliberation should generate the appropriate and the most suitable answer to the issue being discussed. Constructive deliberation should work as an interaction between the minds of the arbitrators and result in the most appropriate way forward just like when charged clouds collide producing lightening that could show the way forward in an illuminated manner.

It is essential for a successful deliberation between the members of the arbitral tribunal for the chairman to know and understand the cases pleaded by the Parties. Whilst this is essential for the chairman, it is sometimes not easy to ensure that the co-arbitrators are so well prepared. In many instances, co-arbitrators arrive to the hearing with no files and having done little or no preparation of reading the case files.

If the chairman's view is shared by one of the two co-arbitrators, a majority award can then be issued, but if there is no consensus on a particular solution, then the arbitration rules used will have a major influence on how the award will be shaped. Under the ICC Rules, it is the Chairman's position that will prevail whereas under the Rules of the Cairo Regional Centre for International Commercial Arbitration, the Chairman will have to rally with him one of the other arbitrators since a majority award is a necessity. This is a very unpleasant situation to be in for the whole case.

Depending on the circumstances of the case; the quality of the co-arbitrators; the issues encountered; the extent of trust held by the chairman towards his two co-arbitrators; and the degree of cooperation between the members of the arbitral tribunal, the first draft of the whole award should be prepared by the chairman. However, in all cases, it would be of great benefit if the chairman prepares the first draft of the structure of the award and the factual chapters that relate to the factual elements of the case, taking care of the requirements of the applicable arbitration law and other legal provisions:⁵

⁵ An example of such requirements is Article 203 of the law of Arbitration in Dubai, which stipulates that "the subject of the dispute must be specified in the arbitration deed ..."; or Article 208.3 of that law that requires in a case of more than a sole arbitrator that "... they must jointly carry out the investigation procedures and each must sign the minutes."; or Article 212.4 of that law which requires that "... the award must be issued in the United Arab Emirates; ..."; or Article 212.5 of that law which requires that the award "... must be written along with the dissenting opinion and must specifically include a copy of the arbitration agreement,"; or Article 216.a requiring a valid arbitration deed, etc.

- background and essential details of the Contract in question, including the arbitration clause or agreement;
- the appointment of the tribunal;
- the preliminary meeting and the steps taken to agree on a provisional timetable;
- the procedure adopted and the procedural orders rendered;
- the submissions of the Parties leading to the hearing; and
- all the other factual matters that took place prior to the hearing,

and present that draft to the other members of the tribunal at the commencement of the hearing for the start of their deliberations.

Besides the fact that such a discipline would allow the chairman to be up to date with the progress of the case, it is helpful to present to the co-arbitrators that draft before the hearing which would help to identify the questions that need to be investigated and dealt with during the hearing. However, it is imperative in my view for the chairman to refrain from setting down any pre-conceived views on the basis of preliminary thinking of how the issues in the case might be resolved or decided. It is therefore important for the chairman to simply set down in this first draft of the award the factual parts of the award without any analysis of the issues involved.

Of course, it is always the preference to have a unanimous award, which requires much patience and hard work, but if this proves to be impossible, then a majority award will have to do provided that all the members of the arbitral tribunal are independent, impartial and neutral with views that are honestly held. Whilst it is expected that a co-arbitrator would endeavour to have the contentions of the party that appointed him/her properly aired and considered during the proceedings, it is not permissible for the co-arbitrator to act as an advocate, since to do so would discredit the whole process.

