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1. The role of the "relationship" of the members of the tribunal in the rendering of the award: a personal reflection

O papel da relação dos membros do Tribunal Arbitral na prolação da sentença: uma reflexão pessoal

(Autor)

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Sumário:

Área do Direito: Arbitragem

Abstract:

This article analyses the dynamics and distribution of responsibilities between the members of the arbitral tribunal in order to reach a successful deliberation.

Resumo:

O presente artigo analisa a dinâmica e a distribuição de responsabilidades entre os membros do Tribunal Arbitral para proferir uma decisão de forma bem-sucedida.

Keywords: Arbitral award – Deliberation – Procedure
Palavra Chave: sentença arbitral – deliberação – procedimento

Introduction

The ultimate objective of arbitration[1-2] is to resolve and put an end to the parties' dispute, which is achieved by way of an arbitral award.[3] Therefore, all of the measures taken by the arbitral tribunal as a whole as of its constitution, tend towards this goal. Such measures are usually known, regulated and detailed: for example, the first contact with the parties, the review of the written file, the issuance of procedural orders for the regulation of the proceedings and the supervision of the oral hearing. There is, nonetheless, no standard solution, guidelines or model process in reaching this goal and the situation has at times been called a "black box", particularly in relation to arbitrators' deliberations. This absence is primarily due to two reasons: first, arbitration is ordinarily a private affair; and second, its participants can and do organise the process as they see fit, with the exception of, most times, the form and structure of the award.[4]

There is, therefore, certain interest in describing some of the measures as I have experienced them as president of arbitral tribunals and as I (as well as many of my colleagues) have considered them to prove effective.[5] At this point, one must keep well in mind that the entire process all the way up to the rendering of the award, is not a "one man show". Indeed, there are often more than one decision-makers and, separate to the *ad hoc* steps usually taken to reach their decision, their relationship in each of such step is key and determinative of the quality of the final decision.

Accordingly, I will endeavour to briefly describe the process of rendering the award by focusing on the relationship of its makers, the members of the arbitral tribunal. I will do so by examining three topics: (1) the distribution of responsibility among the members of the arbitral tribunal, (2) the main stages of the proceedings prior to and up to the final award, and (3) some recurring problems.

1. The distribution of responsibility

Naturally, the question of the relationship and therefore of the distribution of responsibilities, is relevant only when the arbitral tribunal comprises more than one member. Indeed a sole arbitrator is alone and assumes full responsibility for everything. This solitude is sometimes difficult to carry; this is the reason why such arbitrator often engages a secretary for assistance.[6]

My (and my colleagues') experience shows that it is more comfortable to sit in a three-member arbitral tribunal: the feeling that the end result is more equitable is unavoidable,

as the decision is the product of three brains and three sets of eyes. However, this is conditional on each member playing his or her role. That is why the distribution of responsibility among the members of an arbitral tribunal is vital.

In my view, there are three important aspects when looking at its distribution: the responsibility should be (a) shared, (b) identical, and (c) organised. These features will be examined next.

A) A shared responsibility

When the system contemplates for a three-member panel, the three individuals who are chosen or designated must in principle act together for a common result. They are not asked for their individual opinions; they are required to jointly arrive at the optimal decision for the case before them. Therefore, while the legal nature of their relationship remains controversial, it is not disputed that, in order to reach this common result, each must make their own contribution, through their participation in the procedure as a whole, including the decision. As such, they enjoy a "shared responsibility". This can also be implied by a member's appointment or designation: by giving consent to the party or institution that selected him or her, each member implicitly agrees to collaborate with the other two. The extent of such "shared responsibility" is not always absolute or even clear; this is particularly the case when the determination or the division of the duties depends on the dynamics of the relationship of the members themselves, which is often also affected by how fees are fixed and allocated in a specific case.[7]

The above being said, it is true that the president of an arbitral tribunal usually enjoys certain additional responsibilities, in particular in relation to the running of the proceedings. Nevertheless, he or she remains a *primus inter pares*. He or she does not in principle have more rights than the co-arbitrators except, of course, in case of a disagreement between them.[8] The fact remains that there is a shared responsibility, meaning also that all three arbitrators are at the end fully responsible for the award.

My *first conclusion on distribution of responsibility* is, therefore, the following: enjoying a shared responsibility among the arbitrators means that the quality of an award does not only depend, as sometimes asserted, on the quality of the president; it depends also on the quality of the co-arbitrators themselves.

B) An identical responsibility

Contrary to what is sometimes repeated, the three arbitrators assume the *same* responsibility. It is important to distinguish this type of responsibility with the sharing of identical specific tasks. With "same responsibility" I do not mean the latter. Instead, I mean that each arbitrator is responsible for the smooth running of the procedure and more fundamentally, for the quality of the award. And as mentioned before, while the president of the arbitral tribunal is in principle the one who directs the proceedings and leads the deliberations, he or she is a *primus inter pares*, meaning that he or she does so under the control and with the participation of his or her co-arbitrators.

Therefore, if each member of the arbitral tribunal enjoys a shared responsibility on all measures and specifically, the end result, each of them has an "identical responsibility". This is also relevant in particular for the arbitrators nominated or appointed by a party. A party appointed or nominated arbitrator does not represent this party in the arbitral tribunal. While it is generally accepted that such arbitrator, as the famous *arbitre de partie*, must ensure that all arguments of the appointing party have been presented and discussed by the arbitral tribunal, he or she is bound like his or her colleagues to the same

duties of independence and impartiality.

My *second conclusion on distribution of responsibility* is, accordingly, the following: each arbitrator has an identical responsibility in relation to the running of the procedure and the quality of the award, which implies that they have the same duty of independence and impartiality.

C) An organised responsibility

The fact that all members of an arbitral tribunal have a shared and identical responsibility does not mean that they must undertake the same specific tasks during the procedure and in relation to the preparation of the award. Everyone cannot do everything. It is either impossible or to say the least cost and time inefficient for everyone involved. Therefore, and as in most situations, the roles need to be divided.

This division does not concern the power to decide, which must be borne by all three. It concerns instead of the organisation of certain steps or certain activities, notably in connection with *inter alia* the drafting of the award, the decision on the requests for the production of documents when they are numerous and the tackling of specific topics on which one of the arbitrators may be more familiar with (or even specialised). Accordingly, the nature of the dispute and the competences of each member of the arbitral tribunal play an important part in the division. The rule is, nonetheless, that on this occasion, the president has priority in the tasks that will be undertaken, particularly in the control of the deliberations, the preparation of the analysis of the case and the drafting of the award.

Therefore, it is the prerogative of any arbitral tribunal to organise itself as it wishes, and particularly in a manner that will make the proceedings as efficient as possible. And often, how responsibility will be organised depends on the personality of the president who should be in a position to manage the dynamic of the panel and engage his or her colleagues accordingly. This is a skill that can only be acquired with practice.

At this point, it is important to briefly mention the role that the secretary of the arbitral tribunal in this respect. After a consultation with the parties, the arbitral tribunal and, specifically, the president may engage a secretary whose mission must be well-defined. It is often necessary, in particular in large cases, with long and complex submissions. In such cases, the members of the arbitral tribunal should be permitted to delegate some tasks to a secretary, so long as there *are not linked to decisions*, such as the analysis of certain questions or even the final drafting of the award. Therefore the secretary does not represent a “fourth arbitrator” that affects the relationship of the members of the arbitral tribunal and impacts the decision and quality of the award. The issue has, nevertheless, been controversial for a long time, in particular because of apparent or actual abuses, but seems to have been clarified by practise and case law.

My *third conclusion on distribution of responsibility* is, therefore, the following: the arbitral tribunal must be organised under the direction of the president.

2. The main steps

Moving on to the procedure itself, it is important to note that every human decision is the result of a procedure that comprises certain main steps. Some are very simple and do not require much thought. Other are more complex and necessitate that they are more defined. In the case of arbitration, the entire process up to the rendering of the award consists of examination, analysis, continuous thought, consultation among the members and drafting. Even though they may seem successive, such steps often overlap as they are

all part of the overall proceedings.

At this point, I would like to focus on the three characteristics that should define the proceedings and guide its main steps: (a) the progressive deliberation, (b) the organised deliberation, and (c) the successful deliberation. These steps are examined next.

A) A progressive deliberation

If the final decision is to be taken by the arbitrators after the closing of the proceedings, it is required that they prepare progressively as of the opening of such proceedings. It is for this reason that the process of deliberation must be progressive.

It is recalled that the proceedings begin with the exchange of briefs, where the case is presented in fact and in law. It is probable and normal that the case will, throughout the process, partly evolve, however its basis will remain the same. The proceedings end with the signing and the notification of the award. During the interim – a period of months if not years – the arbitrators will carry out their examinations, analyses and study of the file and will discuss among themselves. Their discussions will intensify until the final version of the award. Naturally, these discussions are vital for the purposes of developing a common opinion: nevertheless, one must not underestimate the importance of the informal discussions that take place between them, in particular during breaks or lunches. These are also ways of a progressive deliberation.

The duration of the proceedings, however, sometimes makes this step difficult to meet. The first brief and the post-hearing briefs are often too remote from each another. If the arbitrators are not cautious enough to take notes and discuss throughout the proceedings, they may ignore for example what has been presented at the outset which may be important or which may change, as we often see, in later stages. Accordingly, it is important that the arbitral tribunal should not wait for the post-hearing briefs to take notes and deliberate. It has to initiate such process earlier than that. This is all the more necessary when there are special issues that can only be identified in the interim and that risk of remaining unresolved once the proceedings have been closed.

My *first conclusion on the main steps* is, therefore, that the proceedings should be subject to a progressive deliberation among the members of the arbitral tribunal.

B) A spread-out deliberation

Notwithstanding a progressive deliberation, the proceedings must also be subject to an organised deliberation, in that they must follow the main steps, each of which should end with a specific document.

The *first step* is the analysis of the written submissions. This always permits the drafting of a working document, usually prepared by the president of the arbitral tribunal, with the assistance of a secretary (if any). This document may already contain the basis for discussion on the decisions to be taken: it describes the facts in a chronological order, on the basis of the written briefs, exhibits, witness statements and expert reports, without deciding; it summarises the procedure; it proposes a tentative order of the issues and it describes the parties' positions. While such working document clarifies the issues, but does not relieve the arbitrators of their own duty to always be prepared, particularly for the hearing. Following the hearing and the deliberations, this working document may be transformed into a final award.

The *second step* is evidently the hearing. It is usually the case that, by the time of the hearing, the opinions of the members of the arbitral tribunal are not yet set or clear. A

good avenue, but often a difficult one to impose, is for the president to hold a meeting with the co-arbitrators before the hearing (the so-called "Reed Retreat") for a first exchange of views. This meeting might point to the important issues and thus guide the questions to be asked to counsel, the witnesses and the experts during the hearing.

It is, therefore, possible that discussions take place before and during the hearing, even though it is at the end of the hearing, that the arbitral tribunal takes time for a first deliberation. By this point, the president should already be in a position to get a sense of the direction of the decisions. During the deliberation, a mutual agreement may be reached on some points for which the decisions can be drafted immediately thereafter. Some issues may need further clarification, and this can be sought for in view of the post-hearing briefs. It is advisable to summarise the result of this step in a skeleton, containing the main conclusions.

The *third step*, which is linked with the post-hearing briefs, is the first draft of the final award. It will be prepared on the basis of what has been agreed between the members of the arbitral tribunal. This draft will then be analysed by each arbitrator by way of an individual thorough review. A decision on any outstanding matters may be taken without any further meeting. However, it is more common (and sometimes advisable) that the arbitral tribunal needs additional meetings and/or conference calls to reach an agreement.

On the basis of these discussions, a final draft is issued. One usually forgets, that the final award is not the president's work describing the position of "the arbitral tribunal". It is indeed and without mistake the joint achievement of all three members of such arbitral tribunal. That is why it is important and crucial that, in this final step, each co-arbitrator participates in this phase by making proposals and concrete comments on the drafting.

My *second conclusion on the main steps* is, accordingly, that an organised deliberation among the members of the arbitral tribunal should take place throughout the proceedings.

C) A successful deliberation

The deliberation necessarily ends with the adoption of the final award. As pointed out above, the award is not only a reflection of what has been discussed; it is the final decision maintained by the three arbitrators themselves. This means that it cannot be a compromise. That is why it should, and most times is, the result of a successful deliberation.

Contrary to what might sometimes be alleged, the arbitration procedure does not systematically end with solutions that allocate responsibility equally between the parties. Serious statistical analyses were recently carried out and showed that this is in fact not the case. What is accurate to state is that, if it is convinced, the arbitral tribunal, can and must entirely dismiss the claim of one of the parties. It is true that, when there is a dispute that justifies nuanced positions, a compromise may be reached: but this does not dispense with the requirement that the final decision has to be rendered based on the facts and the law.

My *third conclusion on the main steps* is, accordingly, that the proceedings must end with a successful deliberation which implies that all three members of the arbitral tribunal strive to find the optimal solution of the dispute before them.

3. Some recurring problems

The description that I have provided may reflect what happens, although with a lot of

nuances, in reality. Naturally, proceeding with such distribution of responsibility and taking the above-mentioned steps – which are defined by an entire process of deliberation – does not exclude certain recurring problems; these problems have to do with the relationship among arbitrators and may prove in some case to be very serious and extremely disruptive.

I will, therefore, address in a next and final step three of such problems as I have experienced them through my career as president of arbitral tribunals. These are the so-called (a) passivity, (b) prejudices, and (c) divergences.

A)The passivity

The first problem concerns the situation when one of the arbitrators, or sometimes both, do not seriously participate in the proceedings themselves. They largely rely on the president, who has to assume the entire workload. In my career, I have indeed witnessed such disappointing situations.

One example is when arbitrators are slow to react or do not react at all until the end of the process, when the draft award is almost complete. The only solution in such a case is to try and fix time limits for reacting and noting that, if there is no reaction from their side by the expiry of such time limit, the proposed solution will be adopted. This has often proven useful for the purposes of keeping the process in movement but is not the optimal solution in all cases; indeed, there may be instances where it may be inappropriate as the issues to be decided are delicate, requiring more than just an electronic consultation.

Another example is when some arbitrators, having received the draft award, immediately answer that they agree with it, creating the impression that they could not have seriously devoted the time needed to carefully review the document. This is a difficult problem to tackle; one suggestion may be to explicitly require the arbitrators to devote ample time and conduct a thorough review (to be evidenced in track changes in the document itself) of both the formatting and substance of the draft award.

Moreover, it may be the case that some arbitrators delegate their entire review of the file and working document to their internal collaborator without making any effort to prepare themselves in order to have useful discussions and contributions; one can easily sense this it during the deliberations. In such cases, the deliberation is necessarily distorted because it is unbalanced. The president, who should normally rely on his or her co-arbitrators, feels isolated and sometimes insecure as the latter appear to assume no responsibility (let alone the ones described above). Again, this is a difficult problem to address and one should not be put in a situation where they do not have confidence in their colleagues, particularly if such colleagues where entrusted to resolve the dispute by the parties themselves. A proposal could be that specific topics in the working document could be allocated to each member of the arbitral tribunal even before the deliberations in order to ensure that they are engaged during the process of deliberation.

The aforementioned problems in relation to the passivity of arbitrators are often increased by the manner in which some arbitration proceedings develop, often on account of the choices made by the parties. For example, the extensiveness of the submissions, the complexity of the problems and the enormity of the material submitted to the arbitrators often discourage even the most diligent arbitrators, let alone the passive ones.

It is, therefore, a “two way street”. On the one hand, parties should strive to agree on a proceeding that as efficient as possible for the arbitrators. On the other, the president should in such situations take on a forceful role that seeks to ensure that the proceedings from the outset take place in the manner that was discussed before.

B) The prejudices

As the award is the result of the contribution of all three arbitrators, it is not appropriate that one of them assumes an excessive role in the process or that he or she maintains an exaggerated unilateral position. This is what one would call the overall problem of "prejudices".

For example, I have heard that some presidents submit to their co-arbitrators an almost final draft that has been prepared soon after, if not before, the hearing. As mentioned before – and this is of the utmost importance – while the president has indeed some sort of influence, the debate itself must be open to all.

Another example is of course is the recurring problem of the "partial arbitrator", who takes a set position from the outset, usually that of the party that has appointed or nominated him or her. The result is of course not satisfactory. Fortunately, this problem can be spotted early in the proceedings: the arbitrator who expresses a firm conviction at the first meeting, loses all credit in the eyes of the other members of the tribunal, and of the president in particular.

The opposition of a prejudiced arbitrator can take extreme forms, close to what is sometimes called "terrorism". For example, such arbitrator makes everything possible to interrupt the process, without any possibility of him or her being excluded from the arbitral tribunal. I have witnessed some situations in which an arbitrator refused to deliberate because he or she considered that the other arbitrators were about to take a position he or she could not approve. When faced with such difficult and unfortunate situation, there is no other solution than for the president to try to speak with his or her colleagues hoping that reason was only momentarily lost, then to inform the institution if there is one, but for the rest to continue the deliberation. This special situation must be mentioned in the award itself.

C) The divergences

The third problem, probably the most classical one, is the situation where there are divergences and the arbitrators do not manage to reach a common decision. As it has been stated, the arbitrators have to render an award (*obligation de résultat*), but they are not obliged to render a unanimous decision. In case of necessity, a majority decision suffices, or, if a majority cannot be reached, the president of the arbitral tribunal can decide alone.[9] The arbitral tribunal must have the courage to take the decision that is well-founded in facts and in law, without making excessive, if at all, compromises.

In the civil law tradition, which favours the position of the arbitral tribunal as a whole compared to the individual positions of the three arbitrators, it is usual that the divergences do not expressly appear. The arbitrator who could not convince his or her colleagues on his or her position, goes along with their choice if it seems acceptable to do so. And he or she will sign the award. Again, I should emphasise that following this route does not imply that the ultimate decision is the result of a compromise.

If the solution is not acceptable, the disagreeing arbitrator has the possibility to dissent. He or she can do it in the award itself, in direct connection with the issue at stake on which there is a divergence. It can also be done in a summarised form and the name of the dissenter does not need to be mentioned. If the dissent is too important, the dissenter has the right to refuse to sign the award or to sign it with a reference to his or her dissenting opinion.

This dissenting opinion usually consists of a few pages, but one knows of cases where it

consists of several dozens of pages, sometimes with annexes. The aim is not to criticise personally the other members of the arbitral tribunal, but to express the reason why the dissenter considers that the decision is not sustainable in fact or in law. The dissenting opinion is not part of the decision, which is rendered by the majority, but it can always be communicated to the parties. However, if the dissenting opinion appears to be contrary to some duties of the arbitral tribunal, in particular to the confidentiality of the deliberations, the president may refuse to communicate it to the parties. In that case, it is up to the dissenter him or herself to communicate his or her dissent to the parties.

4. Conclusion

Without a doubt and as often recalled, arbitration is a tailored-made process, which must be adapted to the peculiarities of each case. However, this does not mean that it must be adapted only in relation to the specific parties themselves. Instead, it must be adapted also in connection with the relationship of the members of the arbitral tribunal throughout the entire procedure. In particular, it must be conducted in such a manner that ensures that the responsibility among such members is shared, identical and organised. Further, throughout its main steps, the arbitrators must engage in a progressive, organised and ideally a successful deliberation. In the face of problems (which are of course often unpredictable and inevitable), the president, if not most of the members of the arbitral tribunal, must be ready to take on an assertive role to ensure that they carry out their mandate in the best possible manner.

The proposals made in the present contribution may appear somewhat inflexible; in some cases I believe they should be so. This is because being an arbitrator comes with huge responsibility. And in the case of appointment of a three-member tribunal, such responsibility is threefold. That is why neither of such members should ignore the importance of their relationship with the rest for the purposes of carrying out the tasks they have been mandated with.

FOOTNOTES

[1]

I would like to thank very warmly my associate, Ms Maria Athanasiou, who has assisted me in the preparation and the drafting of this text.

2

The present text is the transcription of a speech delivered at a conference on the topic "*L'Arbitrato Internazionale Percorsi E Applicazioni*" organised by the *Associazione Italiana per l'Arbitrato* (AIA) in Rome, on 6 December 2017.

3

This is, of course subject to the possibility that the parties may settle their dispute before such award.

4

See for example, various arbitration laws and arbitration rules which set out the form and contents of the arbitral award (i.e., UNCITRAL Model Law, Art. 31; UNCITRAL Rules, Art. 34). See also the recent *IBA Toolkit for Award Writing* (2016) available at [https://www.ibanet.org].

5

Accordingly, the present text does not purport to be a scientific analysis or provide formal guidelines on the issue.

6

The issue of secretaries is briefly addressed below.

7

See for example, the practice on fees and expenses followed by the ICC available at [https://iccwbo.org/media-wall/news-speeches/icc-court-releases-practices-on-fees-and-administrative-expenses/].

8

The issue of dissents is briefly addressed below.

9

Indeed this is envisioned in most arbitration rules.