COOPERATION AMONG ARBITRATORS IN INTERNATIONAL ARBITRATION

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Abstract

The issues dealt with in this article are as follows: 1. Collegiality of arbitrators despite possible differences in their respective roles. – 2. Deliberation as a process which extends throughout the duration of the arbitration proceedings. – 2.1. During the process of appointment of the President. – 2.2. Prior to and during the Case Management Conference. – 2.3. During the phase of submission by the parties of their briefings. – 2.4. Before and during the course of the Evidentiary Hearing. – 2.5. After the Evidentiary Hearing and before the Deliberation Meeting in its strict sense. – 2.6. During the Deliberation Meeting in its strict sense. – 2.7. "Split-the-baby" decisions. – 2.8. During the process of drafting the award. – 2.9. Majority decisions and dissent by one arbitrator. – 3. Conclusions on cooperation among arbitrators.

In a previous work, I discussed the possible conflicts among arbitrators, dealing with aspects which undoubtedly constitute the pathology of international arbitrations.[1] I will now describe the ideal way in which the relationships among arbitrators should unfold during the arbitration proceedings.

It scarcely bears stressing that arbitrators should always cooperate collegially, loyally and effectively among them. A prominent author captured this aspect very well by noting that, in arbitration proceedings, the three arbitrators "*se fondent en un groupe pour former précisement un tribunal*".[2]

I will describe the various ways in which this cooperation among arbitrators shapes itself during the different phases of the arbitration proceedings. To this purpose, I will begin by focusing on the first contacts among co-arbitrators which occur when the two first appointed co-arbitrators have to agree on the name of a President for the arbitral tribunal. Then, the various forms of cooperation among arbitrators will be analyzed with respect to the various phases of the

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1 UGO DRAETTA, INTERNAL CONFLICTS AMONG ARBITRATORS IN INTERNATIONAL ARBITRATION 47 (2006).

2 P. Tercier, *Au « club » des arbitres,* STORIES FROM THE HEARING ROOM: EXPERIENCES FROM ARBITRAL PRACTICE (ESSAYS IN HONOR OF MICHAEL E. SCHNEIDER) 180 (Domitille Baizeau and Bernd Ehle eds., 2014).

arbitration proceedings: (i) the initial procedural conference, (ii) the submission by the parties of their briefings, (iii) the organization and conduct of the Evidentiary Hearing, (iv) the activities following the Evidentiary Hearing and preceding the Deliberation Meeting, (v) the Deliberation Meeting in its strict sense and, finally, (vi) the process of drafting and signing the Final Award with the possible issuance of dissenting opinions.

At the very outset, however, it is important to observe that cooperation obviously requires effort from each one of the three arbitrators, but this effort must remain within the ambit of tasks which are not necessarily the same for all three arbitrators. These potentially different arbitrator roles will be described in the following paragraph.

I. Collegiality of arbitrators despite possible differences in their respective roles

Collegiality of arbitrators, whether party-appointed or appointed by an arbitral institution or other appointing authority, implies that they all have an equal status: no arbitrator has a position of supremacy with respect to the others, including the President.

However, since a long time both applicable arbitration rules and international arbitration practice have admitted that collegiality is consistent with the fact that certain activities can be carried out only by one of the members of the arbitral tribunal, mainly the President, either because such activities are inherent to his/her role or because they are delegated to him/her by the other members of the arbitral tribunal.[3]

It must be remembered in this respect that, despite all arbitrators' equality, the functions carried out by the President imply certain inherent responsibilities which the parties and the other arbitrators expect him/her to discharge and which are widely recognized in the practice.

These responsibilities are first of all of a procedural nature. It is up to the President to organize the arbitration proceedings in a cost and time-efficient manner, in consultation with the two co-arbitrators and the parties. In particular, the President convenes meetings and hearings, fixing time, place and agendas thereof. In addition, it is the President who chairs such meetings and hearings. This role includes the policing and disciplining powers normally attributed to any chairperson, including those of limiting the time of interventions by parties, witnesses and experts, and sanctioning possible misconduct of participants, to the point of expelling one of them from a meeting. Finally, between the hearings the President takes any necessary initiative

[3] As to how to reconcile the collegiality of the panel with the special powers of the President, *see* D. Hascher, *Principes Et Pratique De Procedure Dans L'arbitrage Commercial International, in* 279 RECUEIL DES COURS OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 142-155 (1999) with the legal literature quoted therein.

for a speedy and efficient conduct of the arbitration proceedings, such as preparing and distributing minutes of such hearings (unless a hearing transcript is provided) and, more in general, adopting minor decisions of an administrative nature, always in consultation with his/her fellow arbitrators and the parties.

The special responsibilities of the President, however, are not only of a procedural nature. From a substantive point of view, the President is the one who normally produces the first drafts of documents such as the Terms of Reference, the Provisional Timetable and the Procedural Order No. 1. The President also produces the first draft of any subsequent procedural order, as well as of the award itself, and collects and evaluates the comments made by his/her co-arbitrators to such documents, for the purpose of preparing revised drafts and, ultimately, the final text of them.

The most important prerogative of a substantive nature often enjoyed by the President is that of deciding the case alone when each of the three arbitrators has different and irreconcilable opinions as to what the outcome of the case should be – when, in other words, no majority can be reached.[4] This power is given to the President by many (but not all) rules of arbitral institutions. In these situations, the President does not act upon a delegation, even implied, by his/her fellow arbitrators or the parties, but acts in the general interest of the arbitration process, shared by parties and arbitral institutions, to arrive in any case at a final award when no majority can be reached.

Other discrete powers, not inherent to his/her role, may be delegated to the President by the other arbitrators with the consent of the parties. Such delegation, without which the President cannot act alone, is either contained in the arbitration clause or, as it is more frequently the case, in the Terms of Reference. In other cases, the delegation is given to the President on a case-by-case basis. Of course, no arbitrator can delegate the entirety of his/her powers to another arbitrator.

For example, it is the President who often alone signs the various procedural orders which need to be issued during the arbitration proceedings, including Procedural Order No. 1. Here, what is delegated to the President is only the formal communication to the parties of the procedural decision, not the decision itself, which is taken collegially.

4 *Id.* ¶ 2.6.

The powers delegated to the President by the fellow arbitrators and the parties may be more substantial, such as in the case where the President alone conducts a Case Management Conference. This is done, generally, when the travel and living expenses of arbitrators coming from remote locations do not justify their attendance in person. The other arbitrators can attend via tele-conference or video-conference or not attend at all, which implies an even wider delegation of powers to the President, who will, obviously, immediately inform the fellow arbitrators about the outcome of the meeting.

Other activities can be delegated to arbitrators other than the President. For example, it is not infrequent that the arbitrator who is closer to a site be delegated by the other two arbitrators to inspect such site, when an inspection is decided by the arbitral tribunal. Also, the taking of a particular deposition from a given witness can be occasionally delegated to a single member of the arbitral tribunal for convenience.

The aforementioned special responsibilities of the President should not constitute, however, an excuse for the possible inertia of the other co-arbitrators. They must proactively participate in the arbitral process at all times, for example by making timely and informed comments on the draft documents produced by the President, as well as, more generally, by contributing to the best of their capabilities to a swift and efficient development of the arbitration proceedings.

All the various forms of cooperation among arbitrators which will be discussed below are aimed at producing the best possible final award, which is the ultimate goal of any arbitral tribunal. Hence, this constant cooperation constitutes a continuous deliberation process which starts from the day the arbitral tribunal is constituted and ends with the signature of the draft award. The paragraphs which follow are devoted to better illustrate this concept.

II. Deliberation as a process which extends throughout the duration of the arbitration proceedings

In the civil proceedings before national courts the deliberation generally occurs within a very specific time frame, regulated by the rules of civil procedure: after the closing of the proceedings and before issuing the decision.

Arbitration is very different in this respect. The deliberation process of an arbitral tribunal, intended in a broad sense and not limited to the deliberation meeting in its strict sense, needs to be the subject of very intense cooperation among the arbitrators throughout the duration of the arbitration proceedings. This cooperation should start with the appointment of the first two co-arbitrators and the notification to the arbitral tribunal, once constituted, of the Request for

Arbitration and the Reply to such Request by the parties respectively concerned. It should then continue throughout the process of selecting the President by the two party-appointed arbitrators, the first Case Management Conference, the various exchanges of submissions between the parties, the Evidentiary Hearing, to climax with the Deliberation Meeting in its strict sense, the drafting of the award and its signature.

This is not always fully recognized, but some authors catch the point very well with words that, in my opinion, need to be quoted:

"*Par ailleurs, la complexité des cassoumis est souvent telle qu'il serait impensable – et même déraisonnable – d'attendre la fin des audiences pour commencer à échanger sur l'affaire. Il n'est donc pas choquantque les échanges entre les membres du tribunal arbitral s'effectuent au fur et à mesure de la procédure. Par conséquent, le délibéré s'étend sur toute la durée de la procédure arbitrale, du jour où le tribunal arbitral reçoit le dossier de l'institution ou des parties au jour où les arbitres signent la sentence.*[5]

Il n'est donc pas étonnant que le délibéré commence dès que le tribunal arbitral entre en action car, sauf exception, le tribunal arbitral ne peut pas agir sans délibéré préalable. Le délibéré du NCPC [French new civil procedure code], celui qui précède le prononcé de la sentence finale et que, par concession aux puristes, on pourrait appeler le délibéré stricto sensu, n'est en réalité que la phase ultime de relations entre les arbitres qui se développent et évoluent dès que le tribunal arbitral entreprend les opérations d'arbitrage et dont l'ensemble forme son délibéré."[6]

One could not agree more with these statements. Actually, there appears to be general consensus on the fact that the arbitral tribunal should at all times cooperate collegially aiming at reaching a final decision on the case at hand. This, in turn, demands continuous contacts among the arbitrators throughout the development of the arbitral proceedings, not only on procedural or preliminary issues which may possibly need an early decision, but also on the merits of the case. These contacts do not have to necessarily materialize through specifically dedicated in-person meetings (though these meetings are advisable), but can take place via conference calls, correspondence or discussions at any other opportunity that the arbitrators have to meet, for instance on the occasion of a conference or seminar.

Yet, one often witnesses cases, even of a complex nature, where the arbitrators meet for the first time at the Case Management Conference when they establish a Procedural Timetable for the

5 Alexandre De Fontmichel et al, *Vue D'ensemble Du Régime Juridique Du Délibéré Arbitral En Droit Français De L'arbitrage*, *in* 2 LES CAHIERS DE L'ARBITRAGE 208 (2014).

6 Y. Derains, *La Pratique Du Délibéré Arbitral*, GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION – LIBER AMICORUM IN HONOR OF ROBERT BRINER 223 (2005).

parties' submissions and then meet again – or have some kind of exchanges on the merits of the case – only at the Evidentiary Hearing which, depending on the Timetable, may take place months or years after the Case Management Conference. The situation is worse when the co-arbitrators do not even attend the Case Management Conference because the conduct of such Conference is delegated to the President: in those situations, the arbitrators meet in person only at the time of the Evidentiary Hearing. Even at that time, however, it should be considered that the Evidentiary Hearing is not per se devoted to a discussion among the arbitrators of the merits of the case and often the arbitrators do not entertain any such discussion, confining themselves to agreeing on the date of the Deliberation Meeting – frequently a very difficult exercise due to the possible distance among the arbitrators' locations and/or to their busy schedules.

I am not referring here to contacts among arbitrators which may be necessary during the arbitration proceedings to decide on preliminary or procedural issues, such as those regarding the jurisdiction, the applicable law, the seat of the arbitration, or, as often happens, the admissibility of document production requests by the parties. When these kinds of decisions are needed, however, the arbitrators very rarely meet in person, as the decisions are taken by exchanges of correspondence between the arbitrators. These exchanges normally leave little room for a discussion of the merits of the case.

I will discuss the interrelations among arbitrators which should characterize the various phases of the arbitration proceedings in greater detail below.

A. During the process of appointment of the President

The first opportunity for the two party-appointed arbitrators to cooperate is when they must jointly select the President of the arbitral tribunal. It scarcely bears stressing that such choice is strategically decisive for the efficient management of the arbitration and its outcome.

Arbitration clauses, arbitration regulations of arbitral institutions and national arbitration laws contain various provisions regarding the appointment of the third arbitrator, acting as President, in a panel composed of three arbitrators. The name of the President may be indicated in the arbitration clause itself (which rarely happens in practice) or his/her appointment may be entrusted to an appointing authority, to the joint agreement of the parties or to the two party-appointed arbitrators. The present analysis will focus not on these various appointment procedures, but only on the cases where appointing the President is the task of the two party-appointed arbitrators and an appointing authority steps in only in case of failure by the parties to reach an agreement in this respect.

It must be preliminarily remarked that, even when it is up to the parties to select the President, normally they would not do so without involving, or at least consulting, the arbitrator respectively appointed by them, so that, in the end, it is rare that the two party-appointed arbitrators are totally excluded from the process. Actually, there are some perceived advantages in having the choice of the President made by the two party-appointed arbitrators as opposed to only by the parties through a direct negotiation between them. Arbitrators, generally, know better than parties the personal characteristics of the candidates for President and can reassure the party that respectively appointed them of the competence, impartiality, availability and other qualities of the selected candidate.

Consequently, as a practical matter, the parties and the arbitrators respectively appointed by them are in close contact in the process of selecting the President. Incidentally, these contacts are among the few *ex parte* communications generally considered to be permissible. Indeed, each party should be willing to ensure that the arbitrator whom it appointed feels comfortable with working with a given President and should avoid imposing its choice of a President on a reluctant arbitrator. On the other hand, each party-appointed arbitrator should be willing to ensure that the selected President is acceptable to the party that appointed him/her.

As a consequence, normally the names of the candidates that the two party-appointed arbitrators exchange between themselves for the purpose of selecting the President have been cleared with the parties which respectively appointed them, even if the candidates' names were not suggested by such parties themselves. However, in the unlikely event of a conflict between a party and its party-appointed arbitrator regarding the name of a given candidate for appointment as President, the opinion of the party should prevail over that of its party-appointed arbitrator.

In other words, a party has a veto right with respect to the inclusion of a given name among those exchanged between the two party-appointed arbitrators for the purpose of selecting the President. Some commentators do not agree with this view, on the ground that entitling the party with such a veto power would arguably be contrary to the arbitrator's impartiality and independence.[7] Such a concern, however, seems to be misplaced: after all, arbitration is the parties' arbitration and arbitrators are the party appointed arbitrators. Unless the parties have expressly waived their right to be involved in the appointment of the President (which rarely

7 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1700 (2nd ed. 2014). In line with the position taken here, *see* T. CLAY, *Le coarbitre*, MELANGES EN L'HONNEUR DU PROFESSEUR PIERRE MAYER 142 (2015) ("*Cette proposition est conforme à l'idée, selon nous juste, selon laquelle les arbitres ne peuvent jamais s'accorder sur le choix du Président contre l'avis de la partie qui les a a choisis*").

happens in practice), they retain the last word as far as the process of selection of the President is concerned.[8]

For the purpose of my analysis, I will concentrate on the various forms of cooperation between the two party-appointed arbitrators in selecting the President, leaving aside the possible involvement of the parties in the process.

There are no written rules in this respect, not even of soft law. Very often, the process of selection is unstructured and the two party-appointed arbitrators agree straight away on the selection of an individual whom they both trust and respect.[9]

When the process is rather more organized, the practice shows a variety of procedures followed by the two party-appointed arbitrators.

First, such arbitrators normally try to agree on the general characteristics that the President should have, such as nationality, knowledge of the applicable law, particular expertize or language capabilities.

Then, the two party-appointed arbitrators often simultaneously exchange two lists, each containing the names of three candidates meeting the agreed upon requirements. If a name appears on both lists, the common name is deemed accepted. If two names are on both lists, the selection between the common names may be made by a draw. If there is no common name on the lists, then a new list is provided, and so on until the selection is made.

Another possible procedure is for each arbitrator to strike two names from the three-name list provided by the other arbitrator, while the selection of the candidate between the two remaining names is made through a draw, failing an agreement.

As in any negotiation, there is an unavoidable element of gamesmanship in the process. For tactical reasons, an arbitrator may not want to propose as his/her first choice the candidate he/she really prefers, fearing that the other arbitrator may reject such name only on the basis that it is the first choice of the proposing arbitrator. Consequently, it is not infrequent that the

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8 This conclusion seems to be shared by W.W. PARK, ARBITRATION AND INTERNATIONAL BUSINESS DISPUTES 38-40 (2nd ed. 2012), where the role of the parties in the selection of the President of the arbitral tribunal is greatly emphasized.

9 In almost fifty percent of the cases where I was personally involved, I reached agreement easily with my co-arbitrator on the selection of the President of the arbitral tribunal during the course of a short telephone call or a short meeting.

lists respectively proposed contain also implausible candidates, on which the interest of the proposing arbitrator is only feigned but whose destiny is that of being rejected.

Failure by the co-arbitrators to reach an agreement on the President will normally trigger the consequence that such President will be chosen in accordance with the rules of the institution administering the arbitration, which can at times prove to be a gamble. This fact is well known to both parties and arbitrators, so that it is not infrequent that parties and co-arbitrators prefer the certainty of a compromise candidate, with whom they are prepared to live, to throwing the choice of the President to the winds of chance.[10]

In any event, co-arbitrators involved in the process of selecting the President should bear in mind a risk inherent in such process. Where they fail to agree on any of the candidates on the respective lists, all those candidates will be, for practical purposes, "written off" when the time comes for the arbitral institution to appoint a President. It is indeed difficult for the appointing authority to choose someone as President in the knowledge that the candidates failed to secure the agreement of the co-arbitrators. This assumes, of course, that the names of the respective candidates are disclosed, officially or through a leak, to the arbitral institution. In this regard, it is preferable for the names to be exchanged between the co-arbitrators under conditions of maximum confidentiality, including the signing of a formal non-disclosure agreement. But there can never be an absolute guarantee that leaks will not occur.

A more drastic solution, as has been suggested,[11] is for the arbitration institutions to consult the co-arbitrators before appointing the President, if possible. I am not aware, however, of cases when this happens.

B. Prior to and during the Case Management Conference

Once the arbitral tribunal has been constituted, usually the first opportunity for the arbitrators to cooperate with each other is the organization of an initial procedural conference with the parties, aimed at planning, scheduling and managing the arbitration proceedings. Such event is crucial, *inter alia*, to establishing good working relations between the members of the arbitral tribunal.

In arbitrations administered by the ICC, as is well known, such conferences are called Case Management Conferences. Customarily, such conferences are aimed at securing agreement on the Terms of Reference, the Procedural Timetable and the text of a Procedural Order No. 1 to

10 GARY B. BORN, *supra* note 7, at 1700.
11 Trevor Clay, *supra* note 7, at 143, 147 (2015).

be issued by the President of the arbitral tribunal on behalf of all its members. Non ICC-administered arbitrations use different terms to identify these steps and related documents, but they all adopt a somewhat similar approach. This is consistent with the 2015 Draft revised UNCITRAL Notes on Organizing Arbitral Proceedings,[12] which state the general requirement that any arbitral tribunal must hold at the very outset a meeting or case management conference at which the tribunal is to determine the organization of the arbitral proceedings and a procedural timetable.

For the purpose of convenience, I will utilize the ICC terminology to refer to this initial phase of the arbitration proceedings in connection with all arbitrations, even when not administered by the ICC.

Normally, it is the President who, in anticipation of the Case Management Conference, produces drafts of the Terms of Reference and Procedural Order No. 1 and sends such drafts to the two co-arbitrators for comments, before submitting them to the parties.

The spectrum of the possible reactions from the co-arbitrators is very wide in practice. At one end of the spectrum are those co-arbitrators who, out of a misplaced pride of authorship, indulge in detailed comments and practically re-write the drafts submitted by the President. This attitude is infrequent but does occur, and the result often wastes time and creates an unnecessary level of animosity between the President and the co-arbitrator concerned.

At the other end of the spectrum are those co-arbitrators who tend to make no comment at all to the President's drafts. This attitude may be due to the belief that, in the end, it is the President's responsibility to produce the documents in question, combined with the fact the arbitrator involved may have little time to carefully review the drafts. In other cases, the lack of comments may be due to a misplaced attempt of *captatiobenevolentiae,* the attempt to curry the President's good will, or due to a sense of deference towards the President.

Obviously, *in medio stat virtus*.

The co-arbitrator who makes excessive comments on the drafts produced by the President should understand that everyone has his/her own style and habits and that, though undoubtedly he/she would have written the documents differently, it is pointless to bury the President beneath unnecessary paperwork, let alone to re-write the drafts.

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12 United Nations Commission on International Trade Law, *Notes on Organizing Arbitral Proceedings*, ¶¶ 11-13, U.N.Doc. A/CN.9/WG.II/WP.194 (Feb. 1-5, 2016).

On the other hand, the co-arbitrator who shies away from making any comment should consider that, normally, Presidents employ drafts that are already in their hands thanks to previous practice. These drafts may, or may not, be suitable in their entirety for the case at stake. Consequently, it is a good practice for each co-arbitrator to spend adequate time carefully reviewing the drafts submitted by the President and to politely draw the latter's attention to any improvements which may possibly be needed.

I wish to quote some examples of improvements which could be usefully suggested, as the case may be, by an arbitrator with respect to the drafts produced by the President. These examples are drawn from my arbitration practice:

(a) removal of detailed standard reference to an articulated document production phase, where it is clear that the case at hand does not lend itself to much document production requests;
(b) inclusion of reference to the possibility of the reimbursement to the arbitrators of the VAT possibly due over their fees, particularly in the event that the President comes from a country where arbitrators are not obliged to charge VAT and thus may not be familiar with this issue;
(c) inclusion of a provision regarding the disposal of the arbitration file by the arbitrators after a given amount of time from issuing the award – a useful and often forgotten provision;
(d) inclusion of reference to the application of the IBA Guidelines on the Taking of Evidence in International Arbitration as a "guidance only" for the arbitral tribunal as opposed to the arbitral tribunal being bound by such Guidelines.

Of course, these are meant to be only examples aimed at giving a general idea of comments which could prove useful to, and therefore hopefully would be welcomed by a President, and which, at the same time, would be found to be neither overly excessive nor burdensome.

Since the Case Management Conference is generally the first opportunity for the members of the arbitral tribunal to meet, it would be highly advisable for all of them to attend such conference. Indeed, this is generally the case. During the Case Management Conference the arbitrators get to know each other, can establish personal relations and can begin to exchange opinions as to the general aspects of the dispute they have to decide. These contacts may prove extremely useful in the course of the subsequent phases of the arbitral proceedings.

However, as noted before, sometimes only the President attends the Case Management Conference in-person, while the other two members of the arbitral tribunal are connected via teleconference or are not connected at all. In the latter case, the President will conduct the Case Management Conference also on behalf of his/her fellow arbitrators and, once the conference has taken place, informs them about its outcome.

This happens, generally, when the arbitrators have their offices in different and remote locations, so that the concern for reducing arbitration costs (travel and living expenses of arbitrators coming from such remote locations) may prevail over the benefits to the process from the personal interaction among all the arbitrators such as may be established at an in-person meeting. It can be a difficult call at times.

C. During the phase of submission by the parties of their briefings

After the Case Management Conference, additional procedural meetings should be held at subsequent stages of the arbitral proceedings to set the stage for such proceedings and to ensure their efficiency. This is specifically recommended by the 2015 Draft revised UNCITRAL Notes on Organizing Arbitral Proceedings.[13] These meetings will constitute additional opportunities for cooperation among the members of the arbitral tribunal.

However, apart from addressing preliminary or procedural issues, the arbitrators should begin by discussing the specific elements regarding the merits of the case unfolded by the parties in their first submissions. In particular, the arbitrators may find it appropriate to invite one or both of the parties to clarify, in their subsequent submissions, some of the arguments they have made or to specifically address some aspects of the dispute which appear to be crucial to the arbitral tribunal, but on which the parties have thus far shed no light.

A couple of specific anecdotes may better illustrate this situation.

In an ICC case where I was co-arbitrator, the claimant relied on the ambiguous wording of a clause of the contract in question to allege that the respondent was committed to sell to the claimant, in addition to the main equipment, a certain quantity of spare parts. The claimant's position was also supported by a pre-contractual exchange of correspondence between the parties that, allegedly, established the parties' common intention that the seller should sell the spare parts in question, quite apart from the abovementioned contract clause. The respondent's

[13] *Id.* ¶14.

position was that neither the contract clause nor the previous exchange of correspondence could be construed as implying an obligation by the respondent to sell any spare parts.

The members of the arbitral tribunal, commenting in a conference call among them following the first round of submissions by the parties, noticed that the contract contained an "Entire Agreement" boiler plate clause among its final provisions,[14] which had not been mentioned by either party in their briefings and which could have possibly deprived the previous exchange of correspondence mentioned by the claimant of legal relevance. After discussing the matter, the arbitrators decided to write a letter to the parties asking them to take a position, in their future submissions, with respect to the possible relevance for the dispute of the "Entire Agreement" clause.

Both parties did so, with the claimant explaining that the "Entire Agreement" clause was irrelevant as the contract clause invoked was sufficient, in its opinion, to determine the existence of the respondent's obligation to sell the spare parts, while on the other hand the respondent maintained that such obligation could possibly derive only from the prior exchange of correspondence, which was irrelevant according to the "Entire Agreement" clause. The arbitral tribunal, in the course of various contacts among its members, unanimously agreed with the respondent. In particular, the arbitral tribunal considered that (i) the contract clause invoked by the claimant was insufficient to establish the respondent's obligation to sell the spare parts, and (ii) reliance by the claimant on the previous exchange of correspondence could not be allowed based on the existence of the "Entire Agreement" clause.

As a consequence of this early finding, the arbitral proceedings were considerably speeded up, as the issue regarding the "Entire Agreement" clause was decisive and made most of the additional and lateral arguments subsequently raised by the parties immaterial in the eyes of the arbitral tribunal. The decision-making process was swift and the award was rendered even ahead of time. This would not have been possible, had the arbitral tribunal not raised the issue of the "Entire Agreement" clause at an early stage of the proceedings, but had waited until the Deliberation Meeting to fully consider the relevance of such issue.

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[14] A typical Entire Agreement clause is as follows: "Without prejudice to the provisions expressly set forth herein, this Agreement shall contain the entire understanding between the Parties on its subject matter and shall replace any previous understanding, exchange of correspondence or letter of intent executed by the Parties in relation to the transaction contemplated herein." On the Entire Agreement clause in international commercial arbitration, *see* G. Cordero-Moss, *Limitations on Party Autonomy in International Commercial Arbitration*, *in* 372 RECUEIL DES COURS OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 231, 231-233 (2015).

In another ICC case, where I was involved, the claimant had requested two payments from the respondent for services rendered to the latter. These two payments had the same contractual basis but originated from events which took place at different times, the second event having taken place three years after the first. The claimant maintained that both payments were due based on its interpretation of the contract between the parties, while the respondent, interpreting such contract in an opposite way, maintained that neither payment was due. In spite of the time lapse between the first and the second event, neither party mentioned in their briefings the possible impact on their respective cases of any provision of the applicable law reflecting the *rebus sic stantibus* or changed circumstances doctrines.

The arbitral tribunal discussed the matter among its members as early as during the Case Management Conference, feeling that such time lapse might have some impact on the decision regarding the claim for the second payment, in the sense of possibly leading the arbitral tribunal to dismiss it. Hence, the arbitral tribunal invited the parties to elaborate, in their forthcoming submissions, on the provisions of the applicable law possibly attributing some consequences to changes of circumstances occurring between the first and second event. However, both parties, in their first submissions, expressly and forcefully denied that any provision of the applicable law reflecting the *rebus sic stantibus* or changed circumstances doctrines could be relevant for their respective cases.

Faced with this position taken by both parties, the arbitral tribunal rendered a decision granting both claimant's claims, based on the latter's interpretation of the contract which the arbitral tribunal ended up sharing. This happened despite the fact that the arbitral tribunal, while deliberating on the case, unanimously felt that there was room for considering the possibility of granting the claimant only the first requested payment and not the second had the parties elaborated on the possible impact of changed circumstances. Incidentally, the arbitral tribunal was left with no alternative, because a different decision, namely that of admitting claimant's entitlement only with respect to the first payment on the basis of changed circumstances, would have been *ultra petita* and would have violated the due process principle, since neither party had made any pleading on the possible application of law provisions on changed circumstances to the instant case.

In both the abovementioned examples, the arbitral tribunal detected at a very early stage of the proceedings certain legal issues (namely, the application of an "Entire Agreement" clause and that of the changed circumstances doctrine) which were not discussed by the parties, but which could have been relevant for the adjudication of the case. By requesting the parties to elaborate

on these issues, the arbitral tribunal was thus placed in a position to render a reasoned decision swiftly and to avoid taking the parties by surprise by applying the "Entire Agreement" clause or the changed circumstances doctrine respectively only at the time of the final award. This approach would have been very dangerous for the integrity of the award from a due process standpoint, as the issues in question would not have been pleaded during the proceedings. In addition, by acting in a timely way on such legal issues, the arbitral tribunal conducted the proceedings in a more efficient way from a time and cost viewpoint.

Of course, following such an approach implies that the arbitrators read the submissions carefully when they are filed, without waiting for the Evidentiary Hearing to take place. The most diligent arbitrators often act in this way and jointly agree on certain courses of action to be taken on the merits of the dispute during the course of the arbitral proceedings. Experience demonstrates, however, that some co-arbitrators tend to take a more passive attitude, fully relying on initiatives by the President which may or may not be taken.[15] And yet it is the task of any individual arbitrator to draw the attention of his/her fellow arbitrators to points of merits which may need to be addressed during the course of the arbitral proceedings, without waiting for the Evidentiary Hearing or, worse, the Deliberation Meeting in its strict sense.

It has been rightfully proposed that, after the first round of written submissions and witness statements, but well before the Evidentiary Hearing, the members of the arbitral tribunal should proactively cooperate by organizing a meeting with the parties, at which parties' counsel would open their respective cases before the arbitral tribunal and outline crucial points which would require the arbitral tribunal's prompt attention.[16] Of course, the arbitrators should also have the opportunity to draw counsel's attention to crucial points of the dispute during such meeting

The advantages of such a proposal, as outlined by the proponent, are that (i) it would ensure that the whole arbitral tribunal reads into the case at an early stage; (ii) it would enable the arbitral tribunal to understand the case from that point on, benefitting the subsequent case preparation; (iii) it would enable the arbitral tribunal to have a meaningful dialogue with counsel about marginal points, unnecessary evidence and gaps in the evidence; (iv) it would facilitate the arbitral tribunal in seeking clarifications from the parties on specific points which they would then have time to consider; (v) it would give arbitrators the opportunity for an early confrontation among

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15 In this sense, *see also* Trevor Clay, *supra* note 7, at 150 ("*Trop souvent les arbitres sont exagérément passifs* […] *Le coarbitre doit être proactif dans la procédure, donner son avis sur tout, solliciter des discussions en permanence, intervenir dans les audiences, participer de près à la rédaction du projet de sentence, même s'il ne tient pas la plume en premier. Bref, le rôle du coarbitre est décisif, il est consubstantiel de la collégialité, ce qui justifie sa rémunération*").

16 Neil Kaplan, *If It Ain't Broke, Don't Change It,* 80(2) ARB. 172, 175 (2014).

themselves on the crucial aspects of the dispute; (vi) it would improve the chances of reaching a speedier award by disposing of some issues at an early stage; and (vii) by bringing the parties together for an early discussion of the case, it would enhance the chances that the parties reach a settlement.

Needless to say, acting in this way requires a spirit of proactive cooperation among arbitrators, lacking which arbitrators would, by mere *inertia*, end up meeting only at the Evidentiary Hearing, thus discarding all the advantages illustrated above.

D. Before and during the course of the Evidentiary Hearing

Before the Evidentiary Hearing it is highly advisable that the arbitrators meet or have a conference call not only to establish the agenda for the Hearing, but mainly to exchange notes or thoughts on how the proceedings have developed up to that point and how they should develop. This should include exchanges of lists of questions which each arbitrator may wish to ask the parties, the witnesses or the experts. It is common for diligent arbitrators to prepare a list of such questions in advance; it is less common that these lists are shared with the other co-arbitrators in advance of the Evidentiary Hearing. Yet, this would be very useful for avoiding duplicate questions and for better coordination among the members of the arbitral tribunal, in the interest of a speedy and efficient conduct of the Evidentiary Hearing.

When the Evidentiary Hearing starts, an apparently trivial issue may arise among arbitrators as to the seating arrangements. The almost constant practice that may be observed is that, when hearing rooms are arranged in the shape of a horseshoe, each co-arbitrator sits in such a position as to be as far away as possible from the representatives of the party who appointed him/her. For instance, if a claimant sits on the right hand side from the arbitral tribunal's perspective, the co-arbitrator appointed by the claimant should sit on the left side of the President.

The rationale behind this unwritten rule is cosmetic: the reason being that a co-arbitrator should not sit too close to the party who appointed him/her to make any possible *ex parte* communication more difficult. This seems to be a widely accepted set-up and one followed in practice. It is, therefore, somewhat surprising to encounter views expressing the opposite that

the practice is, instead, for the claimant to always sit on the left hand side from the arbitral tribunal's perspective, and the respondent on the right.[17]

After the Evidentiary Hearing has started, it would be extremely advisable for the arbitrators to discuss among themselves the merits of the case during the breaks of such Evidentiary Hearing, sharing preliminary considerations regarding the soundness of the parties' arguments or the reliability of the witnesses or experts who have been questioned during the day.

Most importantly, it would be advisable that at the very end of the Evidentiary Hearing, and without waiting for the Deliberation Meeting in its strict sense to take place, the arbitrators reserve adequate time to begin deliberation on the merits of the case on a preliminary basis. Indeed, after the Evidentiary Hearing, the arguments submitted by both parties and the depositions rendered are fresh in the minds of the arbitrators and an extra day, for example, could be usefully spent on the subject. The need to wait for the transcript of the Hearing seems to be no valid excuse, as the notes taken by the arbitrators could be used for such preliminary deliberation.

Yet, the tendency of the arbitrators, especially after an exhausting Evidentiary Hearing, is to rush back to their respective locations. In most cases arbitrators have pre-arranged their flight schedules, with the result that they often spend the last day of the Evidentiary Hearing by looking at their watches, worried that they might miss the return flight that they already booked. Return flights, it should go without saying, should be reserved in such a way as to allow the flexibility to remain at least an extra day for mutual discussion of the arbitrators' respective impressions after the Evidentiary Hearing. Even better, the President should expressly contemplate such extra time when establishing the agenda of the Evidentiary Hearing.

A recent ICC arbitration case deserves mention here. The President had already provided for an extra day after a week-long Evidentiary Hearing in order to start the deliberation process. This proved to be extremely useful. It became clear immediately that the arbitrators would be able to reach unanimity on most of the outstanding issues of the case, even if each co-arbitrator had to make some minor concession in the interests of reaching that unanimous decision. This was a remarkable result that was reached very quickly. Only on one issue of moderate importance did the differences of opinion between the two co-arbitrators appear to be irreconcilable and the

17 *See* C. Borris, *Symbols, Customs and Other Curiosities in the Hearing Room*, *in*, STORIES FROM THE HEARING ROOM: EXPERIENCES FROM ARBITRAL PRACTICE – ESSAYS IN HONOR OF MICHAEL E. SCHNEIDER 31 (B. Ehle & D. Baizeau eds., 2015).

President did not hesitate to clearly express his own opinion by siding with one of the co-arbitrators. In any event, after the Evidentiary Hearing, and for the sake of the record, the President asked the two co-arbitrators to crystalize their respective positions in writing on the still unresolved issue so that no post-Evidentiary Hearing Deliberation Meeting in its strict sense was needed at all. The process was exemplary. It allowed the President to issue the draft award in short time, which simply mentioned the dissent of one of the co-arbitrators on the specific point upon which he had strong reservations. All deliberation processes would do well to follow that President's model.

Another case developed even more smoothly. The case involved several claims by the claimant relating to the same contract. After a week-long Evidentiary Meeting during which each claim was discussed in depth by counsel for the parties, witnesses and experts, the members of the arbitral tribunal gathered in the small room reserved to them at the hearing facilities. The President looked at his fellow arbitrators and quietly asked the arbitrator appointed by the claimant to communicate his impressions. He answered by saying that, in spite of his efforts to find a basis, he saw none for accepting any of the claimant's claims. The other arbitrator concurred and so did the President. True, the case was an easy one, but what is remarkable was that there was absolutely no game playing by the arbitrator appointed by the claimant. The President wasted no time in asking the right question and got the right answer. If this was a Deliberation Meeting, which it appears to have been, it lasted five minutes, perhaps the shortest there has been.

In both the abovementioned cases, the President exploited the time available to the arbitrators both during and after the Evidentiary Hearing very effectively, received the necessary inputs from his fellow arbitrators and was able therefore to proceed swiftly with the drafting of the award with no need for a Deliberation Meeting in its strict sense.

E. <u>After the Evidentiary Hearing and before the Deliberation Meeting in its strict sense</u>

Once the Evidentiary Hearing is over, often the arbitrators agree on a date for holding the Deliberation Meeting in its strict sense and end up meeting again only at that meeting. They barely have any kind of contact before such meeting with regard to reviewing the merits of the case.

Yet, many useful forms of cooperation among arbitrators could (and should) take place after the conclusion of the Evidentiary Hearing and before the Deliberation Meeting.

For example, the President, with the assistance of the two co-arbitrators, should undertake initiatives aimed at the efficient preparation of the Deliberation Meeting well in advance of the same with a view to ensuring that its conduct be as speedy and productive as possible.

As a matter of fact, starting a Deliberation Meeting without the arbitrators having shared their respective positions on the merits of the case is not a satisfactory approach as it invariably leads to an unnecessarily prolonged Deliberation Meeting or, most likely, to the need for several consecutive Deliberation Meetings. This is obviously due to the fact that the arbitrators may be taken by surprise by discovering the position of their fellow arbitrators only at the Deliberation Meeting, which may as a consequence take more time than needed to elaborate or refine their respective positions. Unnecessary delays would then be the logical consequence of this approach.

The steps that the President may take in this respect prior to the Deliberation Meeting are manifold.

What the President usually does is ask the two co-arbitrators to express their respective positions on the merits of the case in writing, prior to the Deliberation Meeting. While this move is better than doing nothing at all, it nonetheless has some pitfalls.

The risk in this approach is that the two co-arbitrators may express their positions in a totally uncoordinated way, each one concentrating on different issues or, in any case, on issues that may turn out to be immaterial for the resolution on the case. In one ICC case both parties devoted many pages of their submissions, compiled with the support of legal opinions from outside specialized counsel, to an issue which appeared important to them, concerning the *res judicata* implications. The two co-arbitrators, when asked by the President to express their opinion on the case, felt consequently obliged to expand on the issue of *res judicata* in their writings. It turned out, at the Deliberation Meeting, that the issue was largely immaterial for the resolution of the case, as all co-arbitrators agreed in the end. The process resulted in a considerable waste of time.

In another situation, the two co-arbitrators concentrated only on the issues which appeared important to them and on which they had a strong opinion. Such issues, however, were not the same in the two writings, so the President ended up having only a partial view on the positions of the two co-arbitrators.

A much better approach is for the President, even when he/she has already formed a clear idea as to the direction in which the final decision should go, to send the co-arbitrators, prior to the

Deliberation Meeting, a schematic outline of what in his/her view are the key issues to be decided. This is often referred to as a "decision tree."[18]

This decision tree identifies, in logical sequence, the decisions to be taken on the merits of the case, starting with those of a preliminary nature. Each decision is followed by a binary list of consequences, depending on whether the decision is positive or negative, and so on for all the sub-decisions. To take one example, in one dispute concerning allegedly defective machinery, the first decision to be taken was whether the results of the Performance Tests had been positive or negative. If they were found to be positive, the result would be that the supplier had no liability. If they were found to be negative, the decision tree would then bifurcate once more, to ascertain the reason why the results of the Performance Tests were negative, and in particular whether and to what extent such causes could be attributed to the supplier, and so on, following the same process.

In another case, the issue was about an accident caused by the explosion of a boiler in a factory. The decision tree identified the first issue to be decided as that of the possible disconnection of the safety devices. The second issue, in case the disconnection was ascertained, was that of identifying which of the parties may have disconnected the device. The third issue was that of determining whether the disconnection was the exclusive cause of the accident, or whether other concurring causes determined the explosion. Then the issue was that of identifying such concurrent causes, and so on.

Once the process has been structured in this way in advance, the co-arbitrators can come to the Deliberation Meeting better prepared and focused on the issues to discuss, so that the deliberation can speedily proceed to examine the various issues in their logical sequence. The President can choose whether to present his or her own position on the merits of each of such issues at the start, or let the co-arbitrators speak first. That choice will depend on the personal style of the President.

These or similar initiatives by the President would greatly contribute to the conduct of an efficient Deliberation Meeting, where all the arbitrators would come prepared to address the issues which really matter for the resolution of the case.

At the Deliberation Meeting the foundations are usually laid down for the President to draft the final award, or, better, the reasoning for the dispositive part of the final award. As a matter of

[18] For my Italian colleagues: "*griglia di decisioni*".

fact, however, all awards, in addition to such reasoning and dispositive part, also consist of an initial section outlining the history of the arbitral proceedings and summarizing the positions of the parties (with higher or lesser degree of details).

In this connection, prior to the Deliberation Meeting it is frequent and appropriate for the President to share with the co-arbitrators – and ask for comments – such first part of the draft award, containing the narrative of the respective positions of the parties and the development of the arbitration proceedings. Sometimes the co-arbitrators pay little attention to such part of the award and do not offer their adequate contribution to the efforts made by the President in producing the initial draft. This is a mistake. First of all, as a matter of courtesy, an arbitrator who makes meaningful comments on the draft of the narrative part of the award prepared by the President shows due appreciation for the latter's work. More importantly, all arbitrators should pay attention to such narrative part of the award because of its substantial legal implications. Indeed, a properly drafted narrative part shields the award from the potential risk of being challenged on the basis, among others, that the arbitrators (i) have not adequately considered some of the parties' positions, or (ii) have not conducted the proceedings with full respect of due process.

It stands to reason that every President would be happy to receive back from his/her co-arbitrators a detailed and diligent set of mark-ups on his/her draft narrative part of the award. The task of the President in preparing this draft should not be underestimated. It requires considerable effort on his/her part and any intelligent observation by his/her co-arbitrators, as opposed to a negligent silence, would certainly be highly appreciated and, to a certain extent, prove rewarding.

On the other end, it does not appear advisable that prior to the Deliberation Meeting and without prior warning, the President should hit the co-arbitrators with a draft of the complete award, including the reasoning and dispositive part. Actually, even when the President has a firm opinion as to the decision which should be taken by the arbitral tribunal in the case in question, he/she would be best advised to prudently keep such opinion to himself/herself until the Deliberation Meeting unfolds.

Indeed, unless the final outcome of the decision to be taken has been substantially agreed on during the previous contacts among the arbitrators, the disclosure by the President of his/her position prior to any Deliberation Meeting may take the co-arbitrators by surprise.

The most serious risk a President takes by producing a draft award before the Deliberation Meeting is that of possibly not knowing, at the time of the drafting, the positions that the co-arbitrators intend to assume. Once these have been expressed, the President might be forced to revise the draft, either because, based on the comments made by the co-arbitrators, he/she discovers that such draft was badly constructed, or because of the need to seek a unanimous award. In either case, the result is one or more subsequent draft awards containing more or less substantial changes, in each of which the President would further depart from the original draft award to align himself/herself with the position of at least one of the co-arbitrators, which is either intrinsically more justified or has been presented with better negotiating skills. In one extreme ICC case, a president drafted a final award prematurely, and ended by making nine successive drafts with substantial modifications before a unanimous decision was finally achieved. The consequence in either case is that of a President who loses credibility in the eyes of the co-arbitrators.

F. During the Deliberation Meeting in its strict sense

Except when only a sole arbitrator is involved in arbitration, the critical moment where the cooperation among arbitrators reaches its climax is the Deliberation Meeting in its strict sense.

In part because of the confidentiality of arbitral deliberations, arbitral decision-making largely remains *terra incognita*[19] and deserves a "look into the Black Box," as one prominent arbitrator put it.[20]

The Deliberation Meeting is normally held after the parties have exchanged their final submissions and the proceedings have been or are about to be closed. It is the time when the arbitrators finalize and exchange their opinions on the merits of the case and hopefully arrive at an agreement on the terms of the award to be drafted. Actually the deliberation, even if not unanimous, is the phase of greatest cooperation among the three arbitrators, with all working together in harmony, with the aim of achieving the best possible decision and doing justice to the parties. When that happens, as it often does, deliberation can be a pleasant and gratifying experience for the arbitrators. They all come out of the process with the feeling of having accomplished a rewarding professional task.

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19 B. Berger, *Rights and Obligations of Arbitrators in the Deliberations*, 31(2) ASA BULLETIN 245 (2013).

20 In this sense, *see* M. E. Schneider, *President's Message: Arbitral Decision Making – A Look into the Black Box*, 30(3) ASA BULLETIN 509-511(2012).

Deliberation, however, is also the point at which possible irreconcilable differences among the arbitrators become apparent as we will shortly discuss, which can then lead one of the co-arbitrators to append a dissenting opinion to the award.

There are no rules in national arbitration laws or regulations of arbitral institutions as to how deliberations should be conducted. Arbitrators are free to structure Deliberation Meetings in detail or to conduct them in a totally unstructured manner.[21] Such meetings may be protracted and/or held in several sessions, or they can be very short. Deliberation Meetings in their strict sense may even not formally take place at all, when arbitrators have made up their minds in a collegial manner at earlier stages of the arbitration proceedings.

Some rules do, however, exist. With respect to the deliberation meant as a process and not as a specific meeting, each arbitrator has a right to be involved (or at least to have the opportunity of being involved) in such a process, in the sense that he/she cannot be excluded by his/her co-arbitrators from an equal and reasonable participation in the decision-making process. But such participation entails a double-pronged duty for each arbitrator with one prong a positive duty to be active in the process – as a part of his/her obligations of diligence[22] – and the other a negative duty not to unduly obstruct the decision-making process.

The dynamics underlying the Deliberation Meeting are extremely complex and interesting both from a practical and an intellectual point of view. During this phase arbitrators are required to possess high level negotiating skills, as it would be naïve to deny that the Deliberation Meeting often amounts to a negotiation – not negotiation in the pejorative sense of "horse trading", but in the more noble sense of the term, that of a quest for a unanimously acceptable solution that does the greatest possible service to justice.[23]

Above all, it is a negotiation between the President and the co-arbitrators, aimed at reaching a consensus. At the same time it is a negotiation between the two co-arbitrators themselves, aimed at determining how far they are prepared to sacrifice their own convictions about the case and align themselves with the position towards which the President is edging. The better their negotiating skills, the better the results achieved by arbitrators in deliberations. Those skills are generally more highly developed in someone who has pursued a career as a business lawyer, for example, than in a person from an exclusively academic background.

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21 In favor of the absolute informality of the deliberation process, *see* Alexandre De Fontmichel et al, *supra* note 5.

22 On this and other aspects of the deliberation, see the comprehensive analysis by B. Berger, *supra* note 19, at 244.

23 I suspect that it is to this pejorative sense of a negotiation that a prominent author refers when saying that "*un délibérén'est pas unenégotiation*"; *see* Y. Derains, *supra* note 6, at 232.

Certainly the essential prerequisite for a satisfactory outcome of the deliberation, as with any negotiation, is absolute mastery of the subject matter. For arbitrators, be they the President or co-arbitrators, this means having carefully read all the parties' submissions and their annexes. Coming to the deliberation inadequately prepared can be embarrassing, but worse, it can result in having to bow to the position of the arbitrator who has done his/her homework better. In general, lack of preparation by an arbitrator becomes immediately apparent to the other, better prepared arbitrators, with obvious repercussions on the reputation of the arbitrator concerned.

Once during a deliberation, an ill-prepared co-arbitrator discovered, on the spur of the moment, a letter in the file of documents that seemed to him to conclusively refute a position that had been expressed earlier. Brandishing that letter triumphantly in front of the President, he was then obliged to apologize when it was pointed out to him that it was dated one year after the events in question, and was thus completely irrelevant – a fact that the co-arbitrator had not had time to record. That somewhat glaring error inevitably coloured the atmosphere of the deliberation, and cast a shadow over the co-arbitrator's credibility.

In practice, the basic imperative for arbitrators in a deliberation is to achieve – and maintain – a high level of credibility, as indeed is the case in any negotiation. Credibility is a very peculiar quality: it takes a lot of time and effort to build up, but can be lost in an instant. Moreover, once lost it is virtually impossible to rebuild. Taking a hasty and entrenched stand in opposition to a given argument, resulting in the need to make an undignified climb down, is not the sort of conduct likely to enhance an arbitrator's regard.

Again echoing what happens in every negotiation, arbitrators in a deliberation should, generally speaking, discipline themselves to listen before rushing to speak, know how not to throw away their best cards, but play them at the right moment, in a word, to adopt all the techniques refined over time by every good negotiator. Also these are aspects of the cooperation between arbitrators.

The President, evidently, has a key role in the deliberation. In almost all cases, he/she will be able to rally at least one of the co-arbitrators to his or her position, thus enabling an award to be issued, even if only by majority. If no majority can be achieved, because each of the three arbitrators has an irreconcilable different personal opinion as to what the outcome of the case should be, whether or not the President can issue an award alone will depend on the rules of the arbitral institution administering the arbitration, or on the national law. As already mentioned, many arbitration rules of arbitral institutions provide that the President may decide the case on

his/her own, if no majority can be achieved.[24] Other arbitration rules, which do not contemplate the possibility for the President to issue the award alone,[25] necessarily require a majority for an award.

This second type of arbitration rules can generate dynamics in a deliberation that can prove quite perverse.[26]

To simplify the case in point, let us assume that the claimant is claiming 100 units but the respondent contends that nothing at all is due. By the closing of the proceedings, the President is convinced that the respondent owes the claimant 50 and is ready to draft an award to that effect. However, during the deliberations it becomes apparent that the co-arbitrator appointed by the claimant is not ready to subscribe to any award granting the claimant less than 100, while the co-arbitrator appointed by the respondent is not prepared to subscribe to an award that gives the claimant anything at all.

This situation obviously leads to a stalemate. On the one hand, an award necessarily must be issued; otherwise there can be legal consequences for the arbitrators. On the other hand, no majority appears possible unless the President aligns himself or herself with one of the co-arbitrators.

The most probable – and unpleasant – outcome of this situation is *horse trading* between the President and the co-arbitrators, aimed at identifying which of the solutions least unacceptable for the President will make it possible to reach a majority award.

This is why arbitration clauses that, expressly or by reference to appropriate arbitration institution rules give the President the possibility to issue the award on his own, if no majority can be reached, are greatly preferable, as few arbitrators would have the desire to find themselves in such a situation.

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24 *See*, for example, the 2012 ICC Rules (Art. 31.1), the 2014 LCIA Rules (Art. 26.5), the 2013 VIAC Rules (Art. 35.1), the 2012 Swiss Arbitration Rules (Art. 31.1), the 2007 DIAC Arbitration Rules (Art. 37.3), the 2010 SCC Rules (Art. 35.1) and the WIPO Arbitration Rules (Art. 61). On majority awards and awards by the presiding arbitrator, *see* GARY BORN, *supra* note 7, at 3048.

25 *See*, for example, the 2010 UNCITRAL Arbitration Rules (Art. 33), the 2010 CAM Rules (Art. 30.1), the 1998 DIS Rules (Art. 34.1) and the IAA Arbitration Rules (Rule 31). The UNCITRAL Model Law on International Commercial Arbitration (Art. 29) also takes the approach of not contemplating the possibility of an award decided by the President alone, as, consequently, do a number of national laws which have adopted it.

26 The problems created by the situations where the President cannot take a decision alone, when no majority can be reached, are illustrated very well by D. Hascher, *Principes Et Pratique De Procedure Dans L'arbitrage Commercial International* 279, *in* RECUEIL DES COURS OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 159-160 (1999).

They do not desire such situations because the ultimate aim of a President is not to issue a majority award, but rather to seek the greatest possible degree of consensus among the co-arbitrators. If each arbitrator behaves in a cooperative, reasonable and balanced way, such consensus is not difficult to achieve, while dissenting opinions or awards in which it is stated that the decision on one or more of the points at issue was taken by majority are the exception, rather than the rule.

The attitude to be adopted by party-appointed co-arbitrators wishing to act collegially and cooperatively in the Deliberation Meeting also presents some very sensitive aspects, both in terms of propriety and of the need to ensure that the arguments of the appointing parties are at least given due consideration.

These two aspects are interlinked.

At times, one may witness deplorable conduct by a co-arbitrator who in the deliberation assumes the role of an extra advocate for his/her appointing party, uncritically defending the party's arguments with a pleading stance. The other two arbitrators obviously will find no need for such behavior, as it can often rebound on the co-arbitrator in question, leaving a very bad impression on the President.[27] Regrettably some co-arbitrators have been known to go so far as to openly lament the "loss of the arbitration," being unwilling to accept that the party who appointed them may lose its case. But arbitrators do not "win" or "lose" arbitrations. They are simply judges, along with their fellow arbitrators. The attitude is obviously, symptomatic of a misguided conception of the arbitrator's role: one must accept that at least one party shall lose its case. To act in such a manner is to act contrary to one's duty as an arbitrator which is that of loyal cooperation with the other arbitrators.

The best tactic for a co-arbitrator during a deliberation is not to state his/her opinion first (unless the President asks for it) but to see how the discussion develops so as to better calibrate his/her interventions. That, moreover, is one of the first rules of any negotiation. One esteemed,

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27 A prominent author, criticizing the attitude of certain co-arbitrators to act as "hired guns" for the parties that appointed them, advocates the solution according to which all arbitrators should be hired by the arbitration institution involved: J PAULSSON, *Moral Hazard in International Dispute Resolution*, (2010) 25 ICSID REV. 339. This solution, however, appears to be too draconian, as it would undermine each party's legitimate right to have an arbitrator of its choice to make sure that its arguments are adequately conveyed to and understood by the arbitral tribunal. In fact, each party-appointed arbitrator, though remaining independent and impartial, has views on legal, commercial and cultural issues which make him/her particularly responsive to his/her nominating party. Such party legitimately expects that its party-appointed arbitrator will emphasize these views during the deliberation process, which is what an arbitrator should do and which normally happens.

experienced negotiator aptly expressed that there are three golden rules for a negotiator, to: (a) listen, (b) listen and (c) listen.

If the President is the first to set out the direction of his/her thinking and this fails to satisfy one of the co-arbitrators, the latter must formulate his/her objections with a view of securing a sound decision, one that takes into account the arguments of the appointing party but does not espouse that party's interests at any price. To that end, the objections of a truly cooperative arbitrator should wherever possible be based on objective factors, such as a provision of law that has not been given due weight or a document, the implications of which have not been fully considered – all in a spirit of collegiality and of pursuing avoidance of conflict. Naturally, as discussed before, the better prepared the co-arbitrator on the submissions and documents filed by the parties, the greater the chances of shifting the President away from his/her original position, if it was unfavourable to that co-arbitrator's appointing party.

Some Presidents are open-minded and confident in their own abilities, and have no difficulty in admitting that they have made a mistake and therefore in changing their mind. However there are other Presidents with a disproportionate ego, who regard any modification of their own views as an unacceptable capitulation. Here, the negotiating skills of a good co-arbitrator will come into their own: avoiding frontal attacks on a President of this latter type, seizing every opportunity for (honest) flattery, and suggesting ideas in such a way that the President adopts them as his/her own. But all this is obvious and elementary negotiating psychology.

Then, if the co-arbitrator is forced to break cover, perhaps because the President has invited him/her to be the first to state a view as the arbitrator appointed by the claimant, he/she must be careful to pitch that opinion at a level different from that of party's counsel, and to not hesitate in stressing the weak points in the appointing party's position. In this way, such an arbitrator will gain credibility when it comes to arguing the more important aspects of that party's case. Judging correctly when to be forthright has its advantage too. When faced, for example, with a claimant who clearly is making an artificially inflated claim for damages merely to test the waters, for the arbitrator to directly state that the claim is clearly excessive, can win the trust of the President when the time comes to decide on liability.

Sometimes the co-arbitrator in question sees that his/her arguments are failing and has to decide what strategy to pursue. Certainly, a misguided strategy would be laying down an ultimatum by stating that such a co-arbitrator would never accept a certain position that is unfavourable to the

appointing party and therefore that any award that he/she finds unsatisfactory could only be issued by majority, to the point of announcing in advance the issuing of a dissenting opinion.

This kind of attitude is somewhat childish and betrays a lack of negotiating ability, in addition to a lack of the required spirit of cooperation and collegiality. Obviously, there is no reason why the award cannot be made by a majority, with the co-arbitrator in question in fact having to produce a dissenting opinion – but why announce it in advance? The way the discussions progress could well give the co-arbitrator reason to row back from that decision later. Bluff rarely pays off in such situations, and, in general, the President will refuse to be intimidated by threats of that kind. The best thing the co-arbitrator can do in such a case, unless he/she wants to admit defeat and surrender, is to strive to recover some ground, even in terms of the allocation of costs and fees, and to decide only at the end, calmly and cool-headedly, whether he/she really feels unable in all conscience to sign the award and feels obliged to issue a dissenting opinion.

A co-arbitrator may firmly believe that the case is a simple one, since it may appear obvious to him/her that the arguments of the party that appointed him/her clearly prevail over the arguments of the opposing party. In such a situation, if the President leans towards the position of such co-arbitrator, despite the objections raised by the other co-arbitrator, one thing that the former should avoid doing is to exaggerate in emphasizing how clear-cut the case is and how there could be no reasonable doubt about the prevalence of the arguments raised by the party that appointed him/her. This attitude, in addition to being useless, may be counterproductive from a psychological viewpoint for the following reasons: (i) the President is already leaning towards the position of the party appointing the co-arbitrator in question so no effort should be made to have the President change his/her mind; (ii) the other co-arbitrator may not appreciate the fact that the position he/she advocates is considered totally unreasonable by his/her fellow co-arbitrator and may take unnecessary antagonistic attitudes; (iii) most importantly, the President may not appreciate the fact that the co-arbitrator in question considers the role of the President downgraded to that of having to admit the obvious. In those situations, that co-arbitrator would be best advised to express his/her opinion, by showing at the same time full appreciation and consideration for the contrary views of his/her fellow co-arbitrator. These appear to be obvious directives of elementary psychology.

I should like to conclude with some final reflections on the behaviour of co-arbitrators during the deliberations.

The first concerns the case of the President who uncritically, or even perhaps viscerally, espouses the arguments of one of the parties, favouring them in a way that is emotional and patently irrational. Obviously, such a situation creates a number of problems for the other party-appointed arbitrator, while in general the arbitrator appointed by the party favoured by the President will complacently acquiesce. In the deliberation, that co-arbitrator will remain silent, happy to be the fortunate spectator of a duel between the President and the other co-arbitrator. In fact, such irrational behaviour by the President is also damaging to the co-arbitrator whose party gains from it, since it strikes at the very essence of the arbitral function. Before I end my career in arbitration, I would like to see for once, one co-arbitrator who, against the interests of his/her appointing party, joins with the other co-arbitrator to oppose a President who takes such an irrational position. The truth is that I have yet to meet a President who showed an irrational tendency to favour the party appointing me (and I am not sure I want to), and I have therefore never had the occasion to test my own intellectual honesty. The prevailing narrative in my own experience as a co-arbitrator, which I am bound to put down to a series of fortuitous coincidences, is that of having, all too often, to fight a desperate uphill battle – thankfully nearly always successful – to convince a series of Presidents to modify the original content of their draft awards that tended against the convictions I had expressed during the deliberation. I make no secret of thinking that my luck must be due for a change.

One final consideration has to do with the behaviour of the co-arbitrator who, once the deliberations have been concluded and the decisions have been taken, goes home and, perhaps after meeting with the lawyers for the appointing party, which itself is both illegal and unethical, discloses to the other arbitrators that those decisions were unsatisfactory and, moreover, returns to the charge, in more or less explicit messages to the President and the other co-arbitrator, giving a whole series of reasons, often repeating ones that have already been put forward and considered, as to why the deliberations should have produced a different conclusion. Except in cases where elements come to light that were in fact disregarded during the deliberations, a President with a firm grasp of the situation will not encourage such attempts. As a result, the other co-arbitrator, before launching into equally explicit counter-arguments, would do well to ask the President whether he/she wants a reply. But not all Presidents have such a firm grasp, and one often witnesses the unedifying spectacle of a sort of extension of the deliberation by exchanges of letters, or even an actual repetition of the deliberation itself, for no good reason. This is a frustrating exercise that serves no other function than to unduly prolong the arbitration.

G. "Split-the-baby" decisions

As I have previously observed, arbitrators during the Deliberation Meeting have to work together in harmony, with the aim of achieving the best possible decision and doing justice to the parties. However, the quest for a unanimously acceptable solution should not be pushed to the point of pursuing a unanimous decision at all costs. The arbitrators' duty is that of rendering a fair decision, even when this can be achieved only on a majority basis, and not that of pleasing each other.[28]

The cases referred to here are cases where, in the Deliberation Meeting, faced with the difficulty of reconciling the different positions, the arbitrators, especially the President, can be led to "split the baby", namely to take a line that is halfway between the respective positions of the parties. Doubts on the genuineness of this approach arise when it is not fully justified by the circumstances of the case.

This may happen for a whole variety of reasons none of which, in my view, should be shared. In the best scenario, it might appear to the President that this kind of solution is the only way to achieve unanimity on the award. In the worst one, it might be the product of laziness on the part of the arbitrators, in particular the President, in addressing the merits of the claims and counterclaims, or of the President's lack of "courage to decide." This attitude is typical of Presidents who, in wishing not to disappoint anyone, end up displeasing everyone.

At other times the arbitrators come to these fifty-fifty solutions through a distorted sense of what they claim is "equity." Obviously, the arbitrators can decide according to equity only within the limits agreed by the parties or provided by the applicable law, for instance in setting the level of damages. Those cases apart, a decision based on equity offers excellent grounds for having the award set aside … and awards have been successfully challenged on those grounds.

In reality, it is always possible that such a decision in the end might be the right one, but it is generally not the case. When a decision of this kind is not justified, a majority decision is infinitely preferable.

Diligent arbitrators must remember that if the parties had wanted a split-the baby solution, they could have settled, considering that such solutions are typical of agreements reached between the parties wishing to put their business interests first and avoid arbitration.

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[28] Y. Derains, *supra* note 6, at 232.

If the parties have resorted to arbitration, it is usually precisely because that sort of solution is unacceptable to one or both of them. The parties must bear substantial costs in order to obtain an arbitral award, and the arbitrators also receive fees that might seem inadequate to some, but which are, after all, compensation for services they did not have to agree to perform.

The parties to arbitrations have the right to expect a genuine decision from the arbitrators, and the arbitrators have the obligation to provide one. In other words, the arbitrators must have the "courage to decide." This is a self-evident truth.

That said, one realistically cannot overlook the fact that some of these split-the-baby solutions (by which I mean decisions that do not faithfully reflect the rights and wrongs of the parties' respective cases) can take the form of a decision by the arbitral tribunal to apportion the costs and fees of the proceedings between the parties, where this is not determined in the arbitration clause itself. As is well known, various techniques might be used when making this allocation, but the arbitral tribunal usually enjoys a broad measure of discretion. Sometimes, though (and personal experience can confirm this), in order to persuade a co-arbitrator to back away from his/her position in the deliberations and join in a unanimous award, the arbitral tribunal decides to depart from the perfectly normal and legitimate rule that "costs follow the event" and apportion the costs and fees of the arbitration more favourably to the party that appointed that co-arbitrator, and differently from what it would have otherwise done.

The reasons that can be used to justify such a decision (the fact that one party was uncooperative, or the time spent by the arbitrators in dealing with and rejecting obviously unfounded claims, and so on) are almost unlimited and, as previously stated, the arbitral tribunal has broad discretion. No one should be shocked by such decisions, given that they sit perfectly with the climate of negotiation that often prevails in deliberations, and have previously referred to before.[29]

H. During the process of drafting the award

What is absolutely essential for the Deliberation Meeting is that it lead to final decisions on the various issues introduced in the proceedings, and that it reach this stage unanimously or, should this prove to be impossible, by simple majority. It is a good idea to document such decisions immediately, for example by marking them on a whiteboard or by using some other device,

[29] On the various criteria for cost allocation, *see* the ICC Commission Report, *Decisions on Costs in International Arbitration,* 2 ICC Dispute Resolution Bulletin 2015. At pages 14-16, this Report identifies cases where the improper conduct or bad faith of the parties affect the cost allocation process.

immediately followed by the minutes of the meeting drawn up by the President setting out the conclusions reached.[30]

Such records are rarely kept in practice, either because the President does not have time or, more likely, because the President is reluctant to have the decision set in stone and wants to preserve a margin of flexibility for the future.

That said, it is only on the basis of conclusions clearly reached in deliberations, and documented in a timely manner, that the President can proceed to draft the award, safe from objections from the co-arbitrators, at least in principle, and to avoid the deliberation being reopened later "on paper," *i.e.* by exchange of correspondence, which nonetheless happens quite frequently.

Deliberations that end with only vague conclusions are extremely harmful, as each of the arbitrators will interpret them in his/her own way. The same objection applies to minutes of the deliberation meetings that record only the opinions expressed by the individual arbitrators. The result, in such cases, is that when the President produces the draft award this will take at least one of the co-arbitrators by surprise, and that the person will react with criticism and arguments that, in turn, provoke a similar reaction from the other co-arbitrator. Sometimes the entire deliberation must be repeated. Furthermore, such protracted renegotiations do nothing to enhance the credibility of the President.

It is normally up to the President to produce the draft award to his/her fellow arbitrators. In some cases, each arbitrator, as opposed to the entire draft coming from the President, drafts discrete portions of the award.

It is worth remembering that it is a good idea for the President to produce a draft award within a reasonably short time after the Deliberation Meeting, not only to comply with the President's duty of diligence, but also for practical reasons. In this respect, a notorious ICC case in which the President took more than two years after the deliberation to issue a draft award is worth noting. The result was that, since the deliberation's results had not been clearly documented, everyone had forgotten what they were. The draft award thus triggered a series of veritable briefings by the dissatisfied co-arbitrator (and, subsequently, briefings in reply by the other co-arbitrator) that resulted in substantial modifications to the original draft and in further delays that could have been avoided. Obviously, the President's reputation did not come out of it very well.

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30 The need to conclude the Deliberation Meeting with a vote on every pending issue, no matter how much time the meeting would require, is rightfully emphasized by Y. Derains, *supra* note 6, at 230.

If everything proceeds as described so far, the co-arbitrators should not be taken by surprise when receiving the draft award prepared by the President. Thus, when producing their comments, usually in a mark-up form, they will confine themselves to the identification of possible formal or (more or less serious) substantial mistakes, having in mind, however, that everyone has his/her own style and the purpose of this phase of cooperation among arbitrators is not one to re-write the draft out of a misplaced pride of authorship. This means, by the way, that in case of disagreement over some of the amendments suggested by a co-arbitrator on the draft award, the final word rests always with the President.

I. Majority decisions and dissent of one arbitrator

One possible result of the cooperation among arbitrators during the deliberation phase is the disagreement of a co-arbitrator with the other two fellow arbitrators as to the decision to be taken.

This is not a pathological situation. The very reason for a three-member arbitration panel is to provide for the possibility of a debate and a confrontation of ideas among three individuals, which could not take place in the case of a sole arbitrator. It is, therefore, inherent in the process, and physiological in arbitration, that unanimity may not be reached and that a decision may have to be taken by majority, with one of the arbitrators being in disagreement with the other two. This does not detract from the necessary spirit of cooperation and collegiality among arbitrators during the deliberation process.

As a prominent commentator rightfully observed: "*L'harmoniene se confond pas avec l'unisson*".[31] A majority decision is not necessarily a pathological one and actually, the contrary is generally true.

The fact, indeed, that the award must be reasoned almost inevitably implies that the arbitrator who believes that his/her two other fellow arbitrators are making a seriously wrong decision, which is inconsistent with the law and/or the evidentiary record, has to state this concern and articulate the reasons for his/her dissent, as a part of his/her adjudicative mandate.

Of course, the spirit of cooperation and collegiality required among arbitrators, even in case of dissent by one of them, necessarily implies that the latter may decide to go along with the other two arbitrators if he/she believes that the strength of his/her position is not such as to justify the failure to reach an unanimous decisions. When this is not the case, however, in expressing his dissent an arbitrator renders a service to the institution of arbitration, in that the process will very

[31] Y. Derains, *supra* note 6, at 231.

likely result in an award of better quality with more diligent and focused attention on crucial issues. As a prominent author stated in this respect, "*in most cases, dissents or disagreements coupled with the possibility of a dissenting opinion result in more nuanced or qualified majority (or unanimous) awards that deal with the parties' dispute in a more careful or balanced manner.*"[32] This is both consistent with the spirit of cooperation among arbitrators in the deliberation phase and at the same time enhances, rather than detracts from, the credibility of the arbitral institution.

The minority arbitrator can choose among various ways to express his/her dissent by: (i) not signing the award at all, (ii) signing the award noting his/her dissent next to his/her signature, (iii) signing the award, but requesting that his/her dissent be expressly mentioned in the reasoning of the award, in more or less detail, next to the portions of the award on which the dissent exists, or (iv) writing a dissenting opinion with or without signing the award.

Not signing the award without giving any explanation is a rather brutal expression of dissent. It would be better to sign the award and express in writing, next to the signature, a general dissent or a dissent on specific points.

The expression of dissent which is mostly closely consistent with the arbitrators' obligations of collegiality and open mindedness is to have the reasons for the dissent inserted in the portions of the award's reasoning from which the dissent arises. This frequently happens in practice.

When this is not possible or desirable, then an arbitrator can draft a separate dissenting opinion and ask that it be sent to the parties together with the award. Considering that the right of an arbitrator to issue a dissenting opinion is part of his/her adjudicative mandate in the light of the requirement that the award be reasoned, neither the other arbitrators nor the arbitral institution involved can legitimately reject the arbitrator's request that the parties be notified of his dissenting opinion.[33] In fact, not being privy to such dissenting opinion deprives the parties of their right to an important element of the arbitral process, that of presenting their case and, at the same time, hearing the reasons for the arbitral tribunal's decision. It is improper, instead, for the dissenting arbitrator to directly notify the parties of his/her dissenting opinion, as this would be an impermissible *ex parte* communication, unless the arbitral institution involved unreasonably denies such communication.

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32 GARY B. BORN, *supra* note 7, at 3060.

33 The ICC regularly communicates dissenting opinions to the parties, except when the other members of the arbitral tribunal notify the ICC of a risk to the safety of the award (this, however, never happened in practice). The VIAC practice is different.

Dissenting opinions are, however, not part of the award and are not scrutinized by the arbitral institution in those cases, such as in the case of the ICC, where the arbitral institution has such a power of scrutiny. Other than its communication to the parties, the dissenting opinion has no legal relevance *per se*.

The admissibility of dissenting opinions is well established in international arbitration practice,[34] in spite of some earlier objections that they would violate the confidentiality of the deliberation process by revealing elements that should remain within the *internacorporis* of the arbitral tribunal, in particular the fact that the decision was not unanimous.[35]

However, there are limitations of a legal (and ethical) nature to the admissibility of dissenting opinions, all deriving from the fact that the possible dissent does not exonerate an arbitrator from the duties of impartiality, independence, collegiality and diligence which he/she owes to the parties and fellow arbitrators.

In particular, the dissenting opinion should be confined to the identification of the points of law or fact on which the dissent is based and should not:

i. reveal the positions taken by the fellow arbitrators during the deliberation process or in prior drafts of the award, or other elements of such process which should remain confidential, as this would constitute a violation of the confidentiality obligation incumbent upon arbitrators;
ii. unduly obstruct or delay the deliberation process, as this would be contrary to the arbitrator's duty of diligence;
iii. contain personal attacks or offensive remarks with respect to the fellow arbitrators, as this would constitute a violation of the duty of collegiality of the arbitral tribunal;
iv. be instrumental at creating the basis for, or facilitating the possible refusal by a national court to enforce the award or the successful challenge of the award, such as by insisting on procedural errors which should be rather invoked by a party seeking to challenge the award or oppose its enforcement; this would be indeed contrary to the obligation of

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34 *See* A. Dimolitsa, *Are Genuine Dissenting Opinions of Any Real Use?*, *in* ICC PUBLICATION NO. 772E, INTERNATIONAL ARBITRATION UNDER REVIEW – ESSAYS IN HONOR OF JOHN BEECHEY 137 (Alexis Mourre et al eds., 2015). However, *see also* Berger, *supra* note 19, who maintains that dissenting opinions should be allowed only in exceptional circumstances, such as when the dissenting arbitrator, acting in good faith, considers it his/her duty to disclose "any material misconduct or fraud on the part of his fellow arbitrators" (IBA Rules of Ethics, art. 9) or to inform the parties of any serious procedural errors, which in his/her opinion have occurred during the deliberation, and which would otherwise have remained undiscovered.

35 The criticism of the dissenting opinions based on their alleged breach of confidentiality in arbitration is rebutted by G. B. BORN, *supra* note 7, at 3056-3057. *See also* Alexandre De Fontmichel, *supra* note 5.

collegiality which imposes the duty to accept the award as such even upon the dissenting arbitrator; and

v. be based only on an uncritical and biased defense of the position of the party that appointed the dissenting arbitrator, exclusively aimed at maintaining good relationships with such party, as this would be contrary to his/her duty of impartiality.

With respect to the last of the abovementioned points, a caveat should be introduced. It is true that normally a dissenting opinion will come from a party-appointed arbitrator, who does not agree with an award unfavourable to the party that appointed him/her (yet there are instances where the dissenting opinion was issued by a President who did not agree on the terms of an award on which there was consensus between the two co-arbitrators).[36] This fact is not *per se* objectionable. The system according to which, in a three-member arbitration panel, each party appoints an arbitrator and the two so appointed nominate the President is precisely aimed at ensuring that each party-appointed arbitrator, though remaining independent and impartial, has views on legal, commercial and cultural issues which make him/her particularly responsive to his/her nominating party. Such party legitimately expects that its party-appointed arbitrator will emphasize these views during the deliberation process, which is what an arbitrator should do and which normally happens. Of course, the limit is set by the duty of independence and impartiality incumbent upon all arbitrators, including those appointed by the parties. It should not be surprising, or deemed objectionable, therefore, that most of the dissenting opinions come from party-appointed arbitrators who disagree with decisions unfavourable to their appointing party.

The timing of the dissenting opinions is one of their most sensitive aspects. In normal circumstances, the dissenting arbitrator will have expressed his arguments to his/her fellow arbitrators during the deliberations process, well before issuing such opinion. In instances like this the dissent, when issued together with the award, will not take the co-arbitrators by surprise. Actually, it will provide the other two arbitrators with an additional chance to reconsider, in writing, the reasoning of the dissenting arbitrator, which may well result in an award being changed or at least better articulated.

Unfortunately, this is not always the case and all too often one witnesses dissenting opinions issued only at the last minute and totally unexpected by the other arbitrators. Issuing such last minute dissenting opinions is not, first of all, in line with the spirit of cooperation, loyalty and collegiality which should characterize the relationships among arbitrators. More importantly,

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[36] The cases are quoted by GARY B. BORN, *supra* note 7, at 3059, 3061.

such dissenting opinions would not give any time to the other co-arbitrators to possibly change their mind. They reveal that their only underlying motivation is not changing a majority award to reach unanimity, but impressing the appointing party with the efforts of the dissenting arbitrator to influence the deliberation process in a spirit of absolute partiality.

Dissenting opinions in investment treaty arbitrations deserve a special mention. They are more common and more widely accepted than in commercial arbitration, due to the fact that investment treaty arbitrations are governed by public international law and it is commonly believed, with some notable exceptions,[37] that dissenting opinions contribute to the development of public international law consistently with the provisions of Art. 38(1)(d) of the Statute of the International Court of Justice.[38] It is no surprise that under the ICSID system, unlike in commercial arbitrations, the possibility of a dissenting opinion is expressly foreseen.[39]

Let me repeat, as a means of concluding on this subject, that a co-arbitrator's possible dissent is perfectly consistent with the spirit of cooperation among arbitrators that has been discussed in this chapter.

However, the collegial work of the arbitrators does not necessarily mean that they must agree on all the issues to be decided. Although unanimity is highly desirable, many awards are issued by majority and, in some cases, the arbitrator who is placed in a position of minority may decide to issue a dissenting opinion.

This does not conflict with arbitrators working collegially. Actually, dissenting opinions may be good for the institution of arbitration, as I explained earlier.

There can certainly be dissenting opinions which are totally improper and which should be condemned. However, there can also be dissenting opinions that are irreproachable, highly articulate and written in all good faith and conscience by a co-arbitrator who genuinely does not wish his/her name or reputation to be associated with a wrong decision and wants nothing more than to point out his/her different views, consistently with the requirement that the award be reasoned. Such dissenting opinions may require that the dissenting co-arbitrator put in as much work as the President puts into drafting what might turn out to be a substantively flawed award.

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37 Albert Jan Van Den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, *in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 824-831 (Mahnoush H. Arsanjani et al eds., 2008).

38 *See*, for a detailed analysis, R. G. Volterra, *Dissenting and Separate Opinions in Investment Treaty Arbitration – Revisiting the Debate*, 1 LES CAHIERS DE L'ARBITRAGE 59 (2014).

39 Rule 47(3) of the ICSID Arbitration Rules states that: "*Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent*."

In such cases, the dissenting co-arbitrator does a good service to arbitration as an institution.[40] By the same token, a clearly preposterous and dishonest dissenting opinion can only strengthen the credibility of the majority award.

III. Conclusions on cooperation among arbitrators

To conclude on the subject of the necessary cooperation among arbitrators, my observations can be summarized as follows.

Though arbitrators must act collegially, this does not mean that their respective roles are necessarily the same. In particular, the President has certain unique responsibilities which are inherent to his/her role. Other tasks can be delegated to the President (or to another member of the arbitral tribunal) by the other two arbitrators with the consent of the parties.

Deliberation among arbitrators is not a single specific event which takes place at the end of the arbitration proceedings, but is a process which extends throughout the entire duration of the proceedings from their very beginning up to the delivery of the award. It requires a continuous cooperation among arbitrators.

Such cooperation starts with the contacts between the two arbitrators appointed by the parties at the outset, for nomination of the President. The techniques for such nomination present certain interesting aspects, as well as certain risks which need to be managed.

Once the arbitral tribunal is properly constituted, arbitrators must begin to work together immediately to organize the initial procedural meetings such as the Case Management Conference. This organization includes the drafting and execution of important documents such as the Terms of Reference, Procedural Order No. 1 and Preliminary Timetable. Although the initiative for preparing drafts of such documents rests with the President, a diligent and intelligent contribution is required by all the three arbitrators.

During the phase of submissions by the parties of their briefings and based on the timely analysis of such briefings, the cooperation among arbitrators should be aimed at identifying, as soon as possible, the issues that should be immediately clarified by the parties. The early identification of

[40] Recently A. Dimolitsa, *Are Genuine Dissenting Opinions of Any Real Use?*, *in* ICC Publication No. 772E, *INTERNATIONAL ARBITRATION UNDER REVIEW* – ESSAYS IN HONOR OF JOHN BEECHEY 137 (Alexis Mourre et al eds., 2015), made the point that dissenting opinions are not of any real use in in international commercial arbitration and may possibly have some very limited use only in investment arbitrations. However I maintain that dissenting opinions cannot be evaluated based on whether or not they are of some use, but based on whether or not they are an inherent feature of a decision-making process of a three-member arbitral panel which has to render a reasoned award.

such issues and the prompt expression of the parties' position on them will greatly facilitate the arbitrators' task in leading the entire arbitration process to a speedier and more efficient conclusion.

Before the Evidentiary Hearing, as recommended earlier, arbitrators should work together in preparing a coordinated set of questions to be addressed to the parties, witnesses and experts. During the Evidentiary Hearing, arbitrators should seize any opportunity to discuss particular aspects of the merits of the case among themselves and, ideally, should not leave the meeting before having had some exchange of views as to the possible outcome of the case.

After the Evidentiary Meeting, it is the task of the arbitrators, particularly the President, to prepare the Deliberation Meeting in its strict sense adequately, so that it may unfold in a productive and efficient way. One possible tool is for the President to prepare a decision tree on which the co-arbitrators could express their views in advance of the Deliberation Meeting.

Properly deliberating is both a duty and a right of each arbitrator. The Deliberation Meeting is the point where the entire arbitration proceedings reach their climax. It is there that the spirit of cooperation among arbitrators undergoes its most crucial test. Arbitrators must possess absolute mastery of the various aspects of the case and extensive negotiating skills. Basically, they must behave in such a way as not to lose their credibility. Party-appointed arbitrators have to ensure that the arguments of their respective appointing party are adequately taken into consideration, but have always to remain impartial and not behave as extra-advocates for such party. Presidents must walk a fine line between displaying all possible efforts to reach unanimity and preserving the need for a just and fair decision. This implies, in particular, that "split-the-baby" decisions, when not warranted by the circumstances of the case, should be avoided. Had the parties wanted this type of decision, they could have reached it themselves without resorting to arbitration.

The Deliberation Meeting should be concluded with a complete and clear decision on the case, which should be appropriately recorded in an adequate manner. It is only based on such a clear decision that the President can start preparing the draft of the final award. Deliberation Meetings which end in a vague way will only cause protracted deliberation, several drafts of possible awards and tensions among arbitrators. On the other end, when receiving the draft award from the President, the co-arbitrators must make their comments in a constructive way, avoiding undue pride of authorship.

Finally, it must be stressed that collegiality does not necessarily imply unanimity. The dissent by an arbitrator is consistent with the notion of collegiality and, actually, inherent in the adjudicative

mandate of such arbitrator. Indeed, as the award must be reasoned, the dissent by an arbitrator is a necessary part of the reasoning. The dissenting arbitrator would be best advised to insert the reasoning for his/her dissent in the body of the award, but the arbitrator cannot be prevented from issuing a dissenting opinion.

The dissenting opinion should be, however, respectful of the duties of confidentiality, diligence, collegiality and impartiality of the dissenting arbitrator. Moreover, it should not take the other arbitrators by surprise, so that they would not have time, if necessary, to modify their decision. In other words, dissenting opinions should be a legitimate way for an arbitrator to express in good faith his/her diverging position and should not be used as an instrument to impress the appointing party or, worse, to offer grounds for possible challenges of the award.