
FIFTH ANNUAL INTERNATIONAL COMMERCIAL ARBITRATION LECTURE

THE ARBITRATOR'S DELIBERATION*

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INTRODUCTION

Deliberation is one of the most important tasks in any arbitral procedure. It is therefore important to define the term “deliberation.” According to the Oxford Dictionary, this term indicates the process of carefully considering or discussing something. The term deliberation is broad; it does not indicate any specific stage of the proceedings.

* This lecture is an adaptation of an article presented by the lecturer in the GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION: LIBER AMICORUM IN HONOUR OF ROBERT BRINER 221 (Gerald Aksen ed., 2005).

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Thus, concerning arbitrator's deliberation, it would be wrong to think that only the final award should be the subject of deliberation. The Tribunal's obligation of deliberation is not limited to the issue of an award. In fact, most of the time the Arbitral Tribunal is obliged to take several procedural decisions before the case is ready to be decided.¹ These decisions are also subject to deliberation no matter if they qualify as an award or merely as an act of procedural administration.

Except in cases where the parties have conferred upon the President the power to act alone, the decisions of the Arbitral Tribunal are always preceded by a deliberation of its members. In practice, it rarely occurs that a President is authorized to decide alone, except to grant extensions of time or to rule on minor issues, especially during the hearing. Even when the parties grant such power to the President, they will often specify that this faculty has to be exercised after consulting the co-arbitrators, which itself amounts to requiring some form of deliberation. The above confirms that deliberation begins when the Arbitral Tribunal comes into action because, most of the time, the Arbitral Tribunal cannot act without previous deliberation.

It is worth questioning the nature of deliberation. Initially, it has been suggested that deliberations were a right of the parties derived from their right to be heard and their right to equal treatment.² As it has been rightly pointed out, this view seems incompatible with the requirement of independence of the arbitrators.³

It has also been suggested that the arbitrator's duty of deliberation is based on international public policy.⁴ This is undoubtedly the case,

1. I.e. Decisions on jurisdiction, admissibility or prescription of the parties' claims, the validity of the contract, the principle of responsibility. The question of whether or not these decisions have to be considered as simply preliminary decisions or as arbitral awards properly speaking is discussed in comparative law. Cf. PIERRE LALIVE, JEAN-FRANÇOIS PLOUDRET, & CLAUDE REYMOND, *LE DRIOT DE L'ARBITRAGE ET INTERNATIONAL EN SUISSE* 406-07 (1989). However, the fact that these decisions have to be subject to deliberation is widely accepted.

2. JEAN-FRANÇOIS PLOUDRET & SEBASTIEN BESSON, *DRIOT COMPARE DE L'ARBITRAGE INTERNATIONAL* 689 (2002). It is not certain that these two authors share the same opinion on this subject.

3. In this sense, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 746 (Emmanuel Gaillard & John Savage eds., 1999).

4. In this sense, M. DE BOISSÉSON, *LE DROIT FRANÇAIS DE L'ARBITRAGE*

not, as has been put forward by some commentators that the only purpose of deliberations is the observation of the rights of defense,⁵ but rather because in the absence of deliberation, the decision would not be taken by the Tribunal but by one or two individuals abusing of the power conferred to them as members of the Tribunal.⁶

In practice, the arbitrator's deliberation is closely linked to the partiality or impartiality of the members of the Arbitral Tribunal. Unfortunately, partial arbitrators are more common than one might anticipate and, although they tend to be the exception, in particular with the progress of a true arbitral culture, when arbitrators deliberate, they must be conscious of this harsh reality to avoid disillusion of the Tribunal at the time of deliberation.⁷

Thus, in the practice of arbitrator's deliberation one can distinguish two types: harmonious deliberation and pathologic deliberation. This distinction has mainly a pedagogical purpose. In the practice of arbitration proceedings, it is often at an advanced stage of the proceedings that the President is able to make an opinion about the impartiality or the partiality of his or her colleagues. It is undeniable that some arbitrators are known to be assistants to the party that appointed them.⁸ On the other hand, there is an elite corps of international arbitrators whose reputation and independence is established already. Jan Paulson, in a remarkable article,⁹ invited every member of the arbitrator profession to join this group. An arbitrator who usually sits with either kind of arbitrator knows what to expect from each one of them, but except for these special

INTERNE ET INTERNATIONAL 801 (1990); *see also* Phillippe Fouchard, Commentary on the Judgment of the *Cour de Cassation*, 2^e Civ., January 28, 1981, 1982 REVUE DE L'ARBITRAGE 425 (1982).

5. M. DE BOISSESON, *supra* note 4.

6. For this reason, it is hard to share the view of J.-F. Poudret and S. Besson, according to which when the arbitrator appointed by a party has no opportunity to participate in deliberations, the principle of equality of the parties is breached to the detriment of that party. Indeed, both parties have an identical right to the decision is taken by the Arbitral Tribunal conceived as a whole.

7. Compare, *inter alia*, Emmanuel Gaillard, *Les manœuvres dilatoires des parties et des arbitres dans l'arbitrage commercial international*, 1990 REVUE DE L'ARBITRAGE 756 (1990).

8. Jean-Denis Bredin, *Retour au délibéré arbitral*, in LIBER AMICORUM CLAUDE REYMOND 43-50 (2004).

9. Jean Paulsson, *Ethics, Elitism, Eligibility*, 14 J. INT'L ARB. 13 (1997).

circumstances, it is often during the procedure that arbitrators get to know each other beyond superficial relationships developed at arbitration conferences.

The result thereof is that the so-called pathologic deliberation influences the general practice of deliberation. The duration of deliberations is extremely variable and most of the time it depends on the speed with which the arbitrators verify the impartiality of their colleagues. In exceptional circumstances this verification can be immediate, and generally occurs in cases where the arbitrators have sat together before. If this is not the case, the arbitrators, and especially the President will take precautions from the beginning of the procedure in order to avoid the risks of a pathologic deliberation, at least until he or she is convinced of the uselessness of these measures.¹⁰ This observation makes even more sense as it has been asserted that deliberation begins when the tribunal comes into action.¹¹

Thus, in general terms, deliberation — the one preceding the final award and that some purists might call strictly “deliberation”— is actually the final stage of ongoing relations between the members of the Arbitral Tribunal. Depending on the partiality or impartiality of the members of the Tribunal, it can be (I) pathologic or (II) harmonious.

I. THE PATHOLOGIC DELIBERATION

A deliberation can be qualified as being “pathologic” when an arbitrator (or even two arbitrators¹²) does not make decisions based

10. Claude Reymond, *Le Président du Tribunal Arbitral*, in *ETUDES OFFERTES A PIERRE BELLET*, 465-76 (Pierre Bellet ed., 1991).

11. In this sense see ANDREAS REINER, *HANDBUCH DER ICC-SCHIEDSGERICHTSBARKEIT* 251-252 (1989); Reymond, *supra* note 10, at 478; Bredin, *supra* note 8, at 48.

12. To the extent that the President has no link with the parties, in principle it is not conceivable that he or she may adopt such an attitude. However, this situation should not be completely dismissed, given that the President can eventually take procedural measures taking into account only his or her own available time, either because he or she wishes to accelerate the procedure to get rid of it as soon as possible, or on the contrary, seeks to slow it up in favor of activities that can be considered more urgent. A case has been known where a President had insisted on a relatively late date for a hearing because he wanted to be at the place of arbitration for personal reasons at this specific date.

on an objective analysis of the issues submitted to the Tribunal but rather on a personal interest more or less disguised.

Too often, the interest of the arbitrator is to favor the party that has appointed him, either by endorsing all those party's positions or, more rarely, by suggesting creative and favorable solutions when he considers that such party is poorly advised by its counsel.

Although both situations are harmful, the first of them can be considered as mere inaction while the second, more disloyal and more destructive of the integrity of the procedure, is clearly collusion between the arbitrator and the party. In this second case, the arbitrator plays a role of informant, regularly informing that party of the facts, actions, of concerns but especially of draft decisions of the Arbitral Tribunal. Worse still, it may happen that following the party's interests, the arbitrator tries to delay the procedure purporting to have a busy schedule that prevents him or her from participating in the meetings or refusing to deliberate by correspondence or, more severely, by resigning.

These are just classic examples of what may be called 'arbitral terrorism' because the partial arbitrator who commits such excesses has no other purpose but to obstruct the arbitration.

In general terms, a pathologic deliberation entails two risks: (1) the breach of the principle of confidentiality of deliberations, and (2) the sabotage of the arbitration proceedings.

A. THE BREACH OF THE CONFIDENTIALITY OF DELIBERATIONS

As has been previously suggested, one cannot consider that the principle of equality of the parties is breached when an arbitrator appointed by one of the parties does not participate in deliberations. However, the breach of the confidentiality of deliberations in favor of one of the parties is clearly a breach of this principle, which is considered by some legislation as a general principle arising from procedural public policy.¹³ In fact, the party that has been informed by one of the arbitrators of the developments of the reasoning of the Arbitral Tribunal, of the questions arising inside the Tribunal, or of the strengths and weaknesses that arbitrators perceive from the

13. E.g., *Société Fougerolle v. Société Procofrance*, *Cour d'appel de Paris*, May 25, 1990, 1990 REVUE DE L'ARBITRAGE 892 (1990).

parties' submissions, can improperly take advantage of the received information in order to adapt its procedural strategy accordingly. Therefore, this party may improperly be advantaged over its counterparty due to these leaks in information.

When this kind of breach occurs after the closure of debates and before the issue of the award by the Arbitral Tribunal, it is equally or more harmful for the other party, since it confers on the informed party a privileged position in the search for an amicable solution to the dispute. The party informed by an insider within the Arbitral Tribunal that a certain amount is to be awarded to its counterparty will often make strong attempts to reach a settlement for an amount inferior to that which otherwise it would be condemned. This is the reason why the settlements that occur when the Tribunal has already made a decision and when the award is being drafted creates an unhealthy climate between the members of the Tribunal: two of the members inevitably suspect the third one to have participated in what can only be called fraud and unfortunately, most of the time, these suppositions are well founded.

The fear of a possible breach of the principle of confidentiality by one of the members of the Tribunal is the source of a regrettable lack of spontaneity therein. When arbitrators are unsure of the impartiality of their colleagues, each of them refrains from discussing the merits of the case before it is absolutely necessary in order to make a final decision. In some cases, the arbitrators are not obliged to discuss the merits until the moment of deliberations of the final award. At this point, everyone is forced to reveal his or her opinions and propose possible solutions relying on the arguments used in order to support each solution. At this moment, the risk of a breach of the principle of confidentiality of deliberations is no longer avoidable, but at least the principle of equality of the parties has been respected so far in the procedure. If at this point the parties engage in settlement negotiations, even if they know that the final award is being deliberated and drafted, it is each party's responsibility to assess the information provided by its counterparty and the risk of leakage by one of the members of the Tribunal.

However, the damaging effects of this lack of spontaneity in the relationships between the arbitrators will be measured in the second part of this article, where the benefits of a harmonious deliberation

are highlighted, which may only happen when complete trust exists between the members of the Tribunal.

In order to have a harmonious deliberation, the experienced arbitrators try to test the degree of impartiality of their colleagues as soon as possible, generally, from the beginning of the procedure. Thus, the President will try to test the arbitrators' impartiality, and each arbitrator will try to test his or her co-arbitrator's impartiality.

In most arbitral procedures this observation period does not last very long: usually since the first meeting of the arbitral tribunal with the parties whose purpose is to organize the procedure and, under ICC arbitration, since the signature of the terms of reference, it is possible to recognize if deliberations are going to be pathologic or harmonious. Indeed, if one of the arbitrators or both of them adopt without hesitation the procedural position of the party that has appointed them, without objectively and rationally assessing such positions, one can expect that deliberations will be pathologic. On the contrary, if the co-arbitrators make constructive proposals, taking into account the nature of the problems to be resolved, the atmosphere inside the Tribunal quickly relaxes because each of the members begin to form the impression of belonging to a homogeneous jurisdiction whose sole purpose is to join efforts in order to reach an impartial solution.

However, this first impression may not match with reality, as some partial but experienced arbitrators, perfectly distinguishing between the accessory character of certain procedural confrontations and some more important issues with effects on the merits of the case, may not adopt the position of the party who appointed them at this first stage of the proceedings and rather reserve their partiality for substantial issues. Nevertheless, this situation rarely occurs and in order to benefit from the advantages of the harmonious deliberations, their colleagues will have the natural tendency to uphold the presumption of good faith in light of the positive results of this preliminary survey. Although the risk of leaks in information is less important, it is recommended not to commence dialogue on the merits at this stage of the procedure because this information may be used to the detriment of one of the parties. If after this first part of the procedure the co-arbitrators continue to demonstrate the same degree of impartiality, the harmonious deliberation may be considered as

acquired; otherwise, it is better to bear in mind the aforementioned precautions.

B. SABOTAGE OF THE ARBITRATION PROCEEDINGS

The second risk arising from a pathologic deliberation is that the President cannot count on the participation of his or her colleagues to draft the award. In fact, if the President chooses to distribute the work among members of the Tribunal in order to allow that each arbitrator drafts one part of the award, there is a risk that the product of that work is useless. If, on the contrary, the President chooses to hold a meeting prior to discussion, which generally occurs and whose purpose is to question the co-arbitrators on their respective positions, he or she can conclude that the decisions cannot be taken by mutual agreement but by majority or only by him or herself. This situation is not dangerous *per se*. What becomes really dangerous is that, irrespective of the method used, once the positions of the arbitrators are known they then crystallize. From that moment on, the arbitration procedure is exposed to the risk mentioned above, i.e. arbitral terrorism. Indeed, although some arbitration rules allow the award to be made by majority or by the President only,¹⁴ the procedure can still be blocked by the resignation of one of the arbitrators, since the award is not completely drafted at this stage of the procedure.¹⁵ A deliberation on the final text of the award is necessary in order to complete deliberations and this necessity is, as it has been rightly pointed out,¹⁶ the “Achilles heel of the collegiate jurisdiction.”

It is recommended to every President of an Arbitral Tribunal, conscious of the possibility of having a pathologic deliberation, to set a meeting for deliberation where he or she submits a draft decision and discusses with the co-arbitrators its content page by page, discussing each point subject to a decision and submitting to vote not only the content of the decision but also the text of the document. The Minutes of this meeting must be kept showing each vote. It is

14. As is the case of ICC Arbitration Rules, Article 25(1).

15. Solutions such as that embodied in article 12 (5) of the ICC Rules, which, under some conditions, allows the two remaining arbitrators to issue the award cope with this problem.

16. Cf. Dominique Hascher, *Principes et pratique de procédure dans l'arbitrage commercial international*, 179 RCADI 51, 162 (1999).

true that these procedures constitute extra work for the President but collegiality must not be sacrificed for efficiency. For this reason, the interest to reach a decision shall not prevail over the duty of deliberation. The confrontation of ideas, even with a partial arbitrator, is always beneficial. Most times, it gives the President an opportunity to reinforce the motivation he or she wished to adopt in view of opposite considerations. Sometimes, the deliberation led to the change of his or her initial position on certain points, especially when one of the co-arbitrators is truly independent; that is to say, in most cases. More importantly, the President must not forget that in a complex case, a co-arbitrator, even if partial, can be right about some points and at the same time refuse to acknowledge that the party that appointed him or her has no valid grounds behind other points. For this reason, deliberation must not be underestimated, but the President has to be aware of its limits. When the two co-arbitrators are partial, which is quite rare, deliberations result in different majorities concerning each claim, because each arbitrator will make the decision that most favors the party that appointed him or her. In these cases, the President shall decide alone, when it is so allowed by the arbitration rules applicable to the case. Nevertheless, this is quite exceptional, because the President will try to persuade the co-arbitrators in order to make a collegiate decision.

Whatever the case is, the point is not to conclude the deliberation session without having an agreed draft of the award that is the result of the vote of the members of the Tribunal. When the complexity of the case requires devoting several days for deliberation, the President must not hesitate to do so in order to have, at the end of deliberation, a draft of the award that has been completely voted by all members of the Tribunal. When this is done, the terrorist arbitrators are considerably limited in their attempts to jeopardize the procedure.

II. THE HARMONIOUS DELIBERATION

In general terms, one can say that harmony exists whenever there is an absolute trust between the members of the Arbitral Tribunal. This trust is simply the consequence of the impartiality of the members of the Tribunal. When the members of the Tribunal are absolutely impartial, harmony flows naturally.

Once (1) it has been determined that a deliberation can be

qualified as being harmonious, (2) one should concentrate on the risks of this kind of deliberation, and (3) finally address the issue of the deliberation by the sole arbitrator.

A. THE DEFINITION AND FORM OF HARMONIOUS DELIBERATION

It is not easy to define harmonious deliberation because no two harmonious deliberations are ever the same. When the members of the Arbitral Tribunal know each other and appreciate each other, the harmony is gained from the time the Tribunal is established. In this case, the arbitrators do not hesitate to share their views of the case over telephone conversations or whenever they meet, whether in arbitral proceedings or in other circumstances. These exchanges are extremely rich because they allow each member's views to form and become stronger. However, without being overly formalistic, the President must nevertheless make sure that any significant comment on the conduct of the proceedings and *a fortiori* on the merits of the case expressed in an informal conversation between two members of the Tribunal is immediately shared with the third member. Besides this particular situation, harmony within the Arbitral Tribunal develops gradually, just as the sound of an orchestra is formed only after each musician plays a few isolated musical syllables to tune his or her instrument to that of others.

However, harmony should not be confused with unison. In international matters, arbitrators often belong to different legal traditions. One consequence of this is that each arbitrator may have different views not only on the conduct of the proceedings but also in the analysis of contractual provisions. In addition, arbitrators may have a different perception of business relationships or of human relations. Moreover, a harmonious deliberation is not a deliberation dominated by a permanent unanimity: it is not necessary that the members of the Tribunal belong to the same legal system to have the same conception about the conduct of the proceedings or about the solution of the dispute. There are confrontations even under harmonious deliberation, sometimes very difficult confrontations. But the difference between pathologic and harmonious deliberation is that in the latter, the differences of opinions between the arbitrators are the result of personal convictions by each of them and not simply the reflection of the position of the parties. It would be wrong to believe that harmonious deliberation always leads to agreements

between the members of the Tribunal, although in most cases the award is unanimous. Indeed, this unanimity may be just a façade, because it may be that the decision has been taken by majority, but the dissenting arbitrator may consider that it is not useful to inform the parties of his or her disagreement. This situation suggests that harmonious deliberations may also entail some risks.

B. RISKS OF HARMONIOUS DELIBERATION

When the decision is taken by majority despite the disagreement of one of the members of the Tribunal, the fact that this arbitrator does not wish to publicly express his or her opposition to the solution adopted by the majority of the arbitral tribunal does not pose a problem in itself. Moreover, this is consistent with the tradition of some countries where the Tribunal is considered as an entity rather than a sum of individuals. However, this interest not to reveal to the parties the differences of opinions among the arbitrators should not be transformed, in the name of harmony, into a desire to find at any price a solution that will satisfy all the members of the Tribunal. Indeed, arbitrators shall make the decision imposed by the law or by fairness, if they are to act as *amiables compositeurs*. This duty must prevail over any other concern. The arbitrators' duty is to render justice and not to please one and other. If two arbitrators are unable to convince the third of the validity of the solution proposed by them and the error of his or her position, the majority must prevail and no haggling to reach unanimity is acceptable. The deliberation is not a negotiation.

Contrary to pathologic deliberation, the harmonious deliberation does not require the President to take special precautions regarding the procedure for making a collegiate decision. In most cases, this procedure is defined during the proceedings. As noted, the position of each member of the Arbitral Tribunal is outlined during informal discussions, and they develop with the reading of the parties' submissions and especially during the hearing of some witnesses and, sometimes, of experts. During the proceedings, the arbitrators have discussed the key issues raised by the case and, at the end of the proceedings; they are superficially familiar with the other's respective viewpoints. On this basis, and after a discussion in which the positions of each arbitrator is confirmed and deepened, the President may then easily propose to the co-arbitrators a working

method that can vary according to various elements: identity or diversity of viewpoints inside the Tribunal, workload of each of the members, interest of either of them in a particular issue, etc. In a complex case, the President may establish a list of questions that each arbitrator may answer or split between them the drafting of the award. However, it is more common, and probably more desirable so as to have a unity of style, that the President prepares a draft of the award alone, even if one or several notes of the co-arbitrators are incorporated later into the original draft. In these cases, a further meeting is rarely necessary because refining the text of the award may be carried out by correspondence or during a conference call.

C. THE DELIBERATION BY THE SOLE ARBITRATOR

These few reflections on arbitrator's deliberation cannot be concluded without talking of the most harmonious, but especially the most difficult form of deliberation: the deliberation by the sole arbitrator. If the deliberation is the conscious and thoughtful examination of the case before deciding whether to perform or not an act conceived as possible, there is no doubt that the sole arbitrator, in his or her solitude, deliberates. However, caution should bear borne here also as this process involves its own dangers. The absence of confrontation does not only entail the risk of prejudging but also the risk of being superficial. Indeed, the member of an Arbitral Tribunal who has to convince the other members of the validity of his or her analysis is obliged to examine all aspects of the case to find the evidence and arguments that support his or her position. The sole arbitrator must act in the same way in order to properly fulfill its mission; the problem is that it is only the desire to act in this way that will force him or her to do so. The sole arbitrator must adopt the perspective of each party and evaluate in light of each of them, the possibility to make an award that satisfies the law, or, where appropriate, equity. However, this task is far from being easy and the sole arbitrator should not rely too much on help from associates or relatives to fulfill this obligation. Indeed, they do not have sufficient knowledge of the case to have a totally independent view, and their view is always influenced by the sole arbitrator's view, which is necessarily based on its first impressions. For this reason, the sole arbitrator shall, under no circumstance, be tempted to escape from his or her isolation.

CONCLUSION

These observations on the deliberation of the sole arbitrator lead to the conclusion that a collegiate deliberation, whether harmonious or pathologic, must always coordinate with the personal deliberation of each member of the Arbitral Tribunal. For this reason, before confronting each arbitrator's analysis with those of his or her colleagues, an arbitrator must have his own internal deliberation and must analyze the arguments of each party with the greatest open-mindedness. Thus, the arbitrator must do so by assuming in turn that the party which he or she examines the theory is right. Once both positions have been properly analyzed he or she may make a decision, while recognizing that this decision is tentative, as an arbitrator must debate with his or her colleagues before making a final decision.