President's Message

Arbitral Decision Making – a Look into the Black Box

The purpose of an arbitration is to settle a dispute; in many cases this requires one or more decisions on the merits as well as procedural decisions. The subject is important; but, surprisingly, as REDFERN and HUNTER observe: "… in all that is written and said about arbitration – and nowadays a great deal is written and said – there is very little about how a tribunal of arbitrators goes about reaching its decision".[1]

Commentaries occasionally discuss the subject of arbitrators' deliberations from a legal perspective, addressing questions such as the duty to deliberate, the required majority, confidentiality and other legal issues; even some court decisions have dealt with these issues. But the question of how arbitral tribunals' decisions are reached – the process itself – is shrouded in darkness. The little that is known about arbitral decision-making remains anecdotal, primarily based on the authors' personal experience. This is the case even in the revealing and most useful chapter on "The Dynamics of Deliberation" in Ugo DRAETTA'S recent book.[2]

One and perhaps the principal cause for this is the confidentiality of the deliberations. While confidentiality in arbitration is controversial in many of its aspects, there is practically unanimity in considering that the arbitrators' deliberations must remain confidential. The confidentiality of arbitral deliberations is not questioned even in Switzerland where some of the state courts, including the Federal Supreme Court, have a tradition of public deliberations.[3]

Another reason why there is so little known on the matter probably is the great diversity of situations in which it takes place. Tribunals are set up specifically for each case and their members, especially in international cases, differ in their personal experience, their preferences and sensitivities and in the agenda they have for dealing with the case.

In these circumstances there should be little to say in general terms beyond the specific experience of each arbitrator in specific cases. This may also be the reason why guideline producers have not (yet) extended their helpful activity to this subject.

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1 *REDFERN and HUNTER on International Arbitration*, 5th ed., 2009, para. 9.153.

2 Ugo DRAETTA, *Behind the Scenes in International Arbitration*, Juris, 2011.

3 The Federal Act on the Federal Supreme Court (*Tribunal Fédéral*) of 2005, Article 59, provides that as a matter of principle the hearings and the following deliberations of the Court are public.

Nevertheless, the subject is of great importance and interest for all of those involved in the arbitral process: for the parties whose cases are decided behind closed doors; for counsel who may wish to know how their efforts in presenting their case are appreciated by and influential – or not – on the arbitrators; and, last but not least, for the arbitrators themselves, the new ones seeking to find their way in an unfamiliar process and the more experienced ones who may nonetheless wish to know how others dealt with the great variety of circumstances which arise along the way to reaching arbitral decisions.

ASA has therefore decided to make arbitral decision-making the subject of its next annual conference on 1 February 2013. The purpose of this conference is to gather experience from arbitral practice, to learn about the diversity of situations that can arise and the solutions found, and to discuss some controversial issues that arise in this context.

One of the principal subjects of the conference will be that of approaches and practices in arbitral deliberations. Such practices are likely to be most developed in arbitral bodies set up for a plurality of cases with recurrent deliberations in the same composition, as for instance the Iran-US Claims Tribunal. In this respect there may be similarities with the practice in some courts, as for instance the "*Beratungskultur*" at the Swiss Federal Supreme Court, observed by Markus FELBER.[4]

In arbitration proceedings where the tribunal is usually set up specifically for a case, established practices or a "culture" of deliberations are unlikely to develop. Nevertheless, individual arbitrators have their preferences and may apply their own methods developed through experience. A variety of questions arise in this context: when and how are the opinions formed? When do arbitrators start thinking about the decision they have to make and when do their deliberations start? How do they approach the issues they have to decide? Should there be an exchange with the parties about the decision-making process and should the parties be given an opportunity to review all or parts of the decision before it becomes final, as it is the practiced in Scotland[5] and by the panels in the dispute settlement procedures of the World Trade Organisation. More generally, what are the factors which influence the decisions and the process by which they are reached?

An essential feature of arbitral decision-making is the tension that may be caused by having arbitrators appointed by one or the other party and

[4] "Bedrohte bundesgerichtliche Beratungskultur, Wertvolle helvetische Rechtstradition ein Opfer der Arbeitslast?" In: NZZ, 11 August 1994, p. 11.; Gerichtsberatungskultur auf dem Sterbebett, Wertvolle helvetische Rechtstradition ernsthaft bedroht In: NZZ, 22 March 2002, p. 13.

[5] Now confirmed by Rule 55 of the 2010 Scottish Arbitration Act which provides that, before making an award, the tribunal may send a draft to the parties and then must consider the representations which it receives from them.

remembering which party appointed them. It seems that usually, in such cases, the arbitrators do cooperate in reaching the right decision, but they differ in the way they go about it; and there are cases of open bias and outright obstruction. Some authors suggest that the problem can be solved by depriving the parties of their right to each nominate or appoint "their" arbitrator. That may or may not be a good idea; but as long as parties continue to consider the right to appoint their arbitrator as an essential feature of arbitration, these proposals do not solve the problem. The important question therefore is how the tribunal can operate and reach decisions when its members have different agenda.

A third important aspect which the conference will consider concerns the assistance which arbitral tribunals may use and how that may impact the process. When appointing the arbitral tribunal, the parties expect that their dispute will be decided by the tribunal itself. However, the size and complexity of many of the disputes that now are submitted to arbitration is such that sometimes it is difficult, if not impossible, for a tribunal composed of one or three arbitrators to deal with them adequately. Different approaches have been adopted or recommended: document production masters, assessors, legal assistants to tribunals composed of non-legal experts, such as engineers. Some institutions provide assistance in the drafting of the decisions to ensure style and consistency among decisions, or provide support from technical experts, a practice which has found a particularly interesting form at the UNCC. The role of the administrative secretary in the work of an arbitral tribunal also must be considered in this context.

These are some of the issues which the next ASA annual conference will seek to address. For the preparation of this event, we also depend on our members and their agreeing to share their experience. We therefore invite all our members to communicate to us their experience in the field and any materials they have available. We do not expect long treatises; short notes on any of the subjects mentioned in this message and others relating to arbitral decision-making are most welcome, in particular those concerning personal experiences in deliberations, methods used, problems faced and solutions found.

Please write to bernhard.berger@kellerhals.ch and atokeser@lalive.ch. We intend to include all relevant communications in the conference materials, unless the author expressly asks us not to.

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