

The Authority of a Truncated Arbitral Tribunal - Straight Path or Puzzle?

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The situation of a truncated arbitral tribunal may be caused by various factors. It may arise when a three-member tribunal during the course of the arbitral proceedings and before the rendering of the award does not remain the same at some point, meaning that one of the members of the tribunal dies, resigns or fails to attend the proceedings or deliberations leaving the two other members at the helm. In such a situation the questions arise: what is the authority of a truncated tribunal? Can it go ahead and render a valid award? These issues have arisen frequently before arbitral tribunals and also before national courts at the stage of enforcement of arbitral awards and they have had a rough ride at both levels. Arbitrators are often baffled with the prospect of the enforcement of their awards whilst exercising their authority as a truncated arbitral tribunal in the sense of the proverbial puzzle: 'to be or not to be, that is the question', i.e. whether or not to exercise the authority to go ahead with the arbitration and render an award. The purpose here is to examine the issues in light of modern international arbitration law and practice as well as most recent relevant domestic case law on arbitration and to recommend some pragmatic approaches for the safe course of action.

On the issue of the power of a truncated arbitral tribunal the recent trends in international arbitration law and practice seem to be a converging one (i.e. a truncated tribunal's authority to proceed), subject, however, to certain institution-specific approaches to the issue as will be clear from the following: some international arbitration rules such as the LCIA (1998), WIPO (2002), ICDR (2011), PCA and JAMS (2011) invariably allow the truncated arbitral tribunal itself to go ahead with the arbitration if the situation arises at any stage. However, these rules have provided some balancing factors for the tribunal to weigh in determining whether to proceed or not. The common ones are: (i) the stage of the arbitration; (ii) the explanation given by the non-participating arbitrator; and (iii) such other matters considered appropriate in the circumstances of the case. Some other arbitration rules such as UNCITRAL (2010), ICC (2012), Swiss Rules on International Arbitration (2012), CIETAC (2012) specifically point out the milestone that such a truncated situation will only be considered after the closure of the hearings or proceedings, meaning that the authority of the truncated tribunal may ensue after that point is reached but not before. And before that stage the defaulting arbitrator has to be replaced. Some rules such as UNCITRAL, CIETAC, Swiss, and ICC bestow the power to decide in such truncated situation on the appointing authority and not on the tribunal itself. Thus, although modern international arbitration law is in favour of the truncated tribunal to proceed, the approach is not always straightforward as there are some hurdles to overcome in the sense of maintaining the balance of the situations.

It is noteworthy that in the UNCITRAL Model Law (Arts. 14 and 15) and the ICSID Convention (Art. 56)

the truncated situation of the tribunal is dealt with differently. The mechanisms used in them underscore the continued cooperation and involvement of the members on a three-member arbitral tribunal and its non-frustration and the principles of expediency and immutability of the tribunal are encouraged. In such truncated situation the emphasis under both the regimes is to fill in the vacancy by reappointment within short-time limits, hence little chance for a party for dilatory tactics. Thus, the Model Law and the ICSID prescriptions reinforce the original expectation of the parties that the decision be rendered by a three-member tribunal, no matter what deviation from that might have occurred after the commencement of the arbitration and for whatever reason.

International arbitral case law and juristic views seem to suggest a bias towards the tribunal's authority to deal with the truncated situation in the exclusive sense, perhaps for the sake of the tribunal's mission to settle disputes and its duty to fulfil that mission expediently. The approach appears to prove the tribunal's inherent power to deal with the matter on its own. In the Iran-US Claims Tribunals' practice this approach appears to be consistent. Furthermore, in the Himpurna case (1999) the remaining two arbitrators gave a short shrift to the objection to its acting as a truncated tribunal in light of the existing precedents and concluded that:

“The weight of well established international authority makes clear that an arbitral tribunal has not only the right, but the obligation, to proceed when, without valid excuse, one of its members fails to act, or withdraws or – although not the case here – purports to resign.” [*Final award of 16 October 1999 in adhoc arbitration: Himpurna California Energy Ltd. V. Republic of Indonesia, XXV YBCA 186 (2000), 194*]

This is in line with what the ICC tribunal expressed in the award in Ivan Milutinovic PIM v. Deutsche Babcock AG that it is “more and more accepted that in international commercial arbitration the possibility of delaying tactics is a serious concern and the elimination of these effects is a primary task of all involved.”

In reference to the Himpurna tribunal's view quoted above, Judge Schwebel opines that such a position of the tribunal is “the better, but not the only, view of the matter” [*S.Schwebel, “Injunction of Arbitral Proceedings and Truncation of the Tribunal”, (2003) 18:4*]. He also concluded in his study on the subject that:

“While the precedents are not uniform, and the commentators are divided, the weight of international authority, to which the International Court of Justice has given its support, clearly favours the authority of an international tribunal from which an arbitrator has withdrawn to proceed and to render a valid award.” [*S. Schwebel, Justice in International Law: Further Selected Writings (CUP, 2011), p.206*].

However, one has to be cautious in view of the recent wave of national court cases (i.e. Swiss, French, Russian, Chinese and U.S.) where the enforcement of awards rendered by truncated tribunals was declined irrespective of whether an absentee or defaulting arbitrator was acting with the purpose of sabotaging the proceedings, or the truncated situation was caused by the death of an arbitrator or by the formal resignation of an arbitrator, or his participation in the arbitral proceedings was disabled by other exterior factors. The ground for such refusal of enforcement of awards was commonly found to be that an award rendered by only two arbitrators was not in accordance with the agreement of the parties on a three-member tribunal or in some cases contrary to the principles of equality of treatment and equal representation on the arbitral tribunal [*e.g. Cour d'Appel, Paris, 1 July 1997 Agence Transcongolaise des Communications – Chemin de fer Congo Océan (ATC-CFCO) v.*

Compagnie Minière de l'Ogooue - Comilog S.A., XXIVA YBCA, 281 (1999); Swiss Federal Court, Ivan Milutinovic PIM v. Deutsche Babcock AG. - the ICC Court of Arbitration in Case No. 5017 (1987); First Investment Corp. of the Marshall Islands v. Fujian Mawei Shipbuilding, Ltd., 2012 WL 831536 (E.D. La. Mar. 12, 2012)].

It is noteworthy that the courts of the traditionally popular hubs of arbitration and pro-arbitration countries such as Switzerland and France questioned the validity of a truncated tribunal's award.

In international arbitration case law and juristic views the issue of truncated tribunal has been dealt with from the tribunal's own perspective, i.e. to give effect to the considerations of expediency, efficiency of the process and the accomplishment of the mission of dispute resolution. While, on the other hand, at the other end of the scenario when the award rendered by a truncated tribunal goes to the enforcement stage before a national court the perspective turns out to be different which endorses the parties' original wish to get the dispute resolved by a three-member arbitral tribunal.

What is then the takeaway from the above? Well, international arbitrators need to be pragmatic to give a 360 degree-angle approach to the issue as at the end of the day they have to render an award that is enforceable. Thus, the tribunal can take some careful steps as follows:

First, if the truncated situation arises for whatever reasons at the beginning of the proceedings or at some stage where disruption of the proceedings is reasonably manageable, certainly replacement is inevitable unless the parties have provided otherwise in their agreement.

Secondly, if the truncated situation arises at an advanced stage or at the close of the hearings, the absentee arbitrator, unless he has formally resigned, should be kept informed of the day-to-day developments of the proceedings and the tribunal's deliberations and his feedback on them should be sought as from other members of the tribunal. In this situation the tribunal will be considered to be a fully constituted one and the absentee arbitrator will be deemed to have had the opportunity to act as any other member of the tribunal and the appointing party should be informed of the situation and non-cooperation, if any. In the circumstances, there is no reason why the tribunal should not proceed to render an award given the reasonable steps it has taken and the implications of time and expense factors for the parties if it did otherwise.

Thirdly, if the truncated situation arises at an advanced stage of the proceedings or at the close of the hearings because of the sudden death of an arbitrator or his participation is fully incapacitated by external factors, the reasonable step for the tribunal will be to consult the parties as well as the appointing authority and proceed accordingly and to weigh with them the time and expense factors and the expediency of the parties' initial intention to get the dispute settled by a three-member arbitral tribunal.

This is not to say that the above prescription fully rids a truncated tribunal of its puzzle in some respects about the prospect of the enforcement of its award by a national court, it may, however, boost some confidence as logical steps in the circumstances have been taken.