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Improper Deliberations in International Arbitration as a Ground for Annulment

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The obligation for an arbitral tribunal to deliberate before rendering an award is at the heart of the arbitral process. In fact, parties typically agree to submit their disputes to a panel of three arbitrators for the purpose of ensuring objectivity, well thought decisions and equal treatment. Deliberation is so fundamental to the arbitral procedure that its absence, or abuse, could form the basis of annulment proceedings. This is what happened in the *Puma* case, in which the Spanish Supreme Court recently held that a party to an annulled award was entitled to recover arbitrator fees paid to two arbitrators on the basis that by excluding the third arbitrator from the deliberations they had been reckless and engaged their liability under section 21 of the Spanish Arbitration Law (Judgment of the Spanish Supreme Court, 102/2017).

Most leading arbitration rules are virtually silent on the requisite formalities, if any, of deliberations. Arbitration rules routinely address their confidential nature and sometimes specify that they may take place at a place different from the seat of the arbitration, but they do not generally include provisions relating to the timing (Article 15.10 of the LCIA Rules being an exception) or the conduct of the deliberations. Certain arbitration regimes address the possibility of a decision rendered by a truncated tribunal, including in the event that an arbitrator refuses to participate in deliberations and/or sign an award. Yet, aside from arbitrators' overarching obligation to be impartial and fair, arbitration rules and statutes tend to remain silent on any duties of arbitrators to conduct the deliberations in a specified manner.

As a result, the standard a court should apply when faced with an arbitral tribunal that does not properly deliberate is far from clear. It has been argued that deliberation is an implied right of the parties derived from their right to be heard and their right to equal treatment. Others have suggested that it is an arbitrator's duty based on international public policy, since its absence would result in a decision not taken by the arbitral tribunal but by one or two individuals abusing their power.

In the *Puma* case, the arbitral award was set aside on the basis that Mr. Santiago Gastón de Iriarte, the arbitrator appointed by Puma AG RDS ("Puma"), had not participated in the final deliberation. After several meetings between all three arbitrators, the deliberations regarding damages to be paid by Puma broke down. Two days after the last of these meetings, and with knowledge that Mr. Gastón was travelling, the remaining two arbitrators met, without summoning Mr. Gastón, and rendered an award on terms on which Mr. Gastón did not agree. The parties were notified of the

award that same day.

In its decision of 15 February 2017, the Spanish Supreme Court affirmed the ruling of the Provincial Court of Appeal of Madrid, finding that the deliberations had been conducted contrary to the principle of arbitral collegiality. The Supreme Court held that a violation of the principle of collegiality was a violation of the right to a fair trial (Article 24 of the Spanish Constitution) and constituted a ground for annulment for public policy (section 41.1(f) of the Spanish Arbitration Law). The Court came to this conclusion after confirming that the non-participation of the third arbitrator was not the result of purposeful delay, obstruction or intervention in the decisive final discussion in which the final award was to be rendered (which under most arbitration regimes would have allowed a truncated tribunal to issue an award).

The Court stated that deliberation and voting *"operates as a means of internal control of its members […]. In other words, it is not the case of that, once the possibility of the majority has been envisaged, or by the agreement of those who support a particular proposal or decision, the participation of the remaining members can be rejected 'ad limite', since they have the right and obligation to know […] the internal reasons that justified the decision and final vote"*.

The issue of improper deliberations, as discussed in the Puma case, is not a novel one. In Sweden, for example, the absence of a proper deliberation on contentious issues has been relied upon as a ground for annulment as early as 1924 (see Årsbackaträvaruaktiebolag v. E. Hedberg, NJA 1924 p. 569). More recently, the award in *Czech Republic v. CME* was challenged, though unsuccessfully, on the basis of the alleged exclusion of an arbitrator from the deliberations (Svea Court of Appeals, Case no T 8735-01).

In France, the Court de Cassation considered the principle of collegiality in a similar context in the case of *Papillon Group Corporation vs. Arab Republic of Syria and Others* decided in 2011. In this case, the Court de Cassation held that given that the Paris Court of Appeal had found that a collegial meeting had taken place and that the third arbitrator had had an opportunity to voice his opposition through a dissenting opinion, the presumption that the arbitral award was rendered after deliberation had not been refuted by the challenging party. As such, the Court de Cassation held that the Paris Court of Appeal was right in concluding from these elements that there had not been any violation of the principle of collegiality described by it as *"suppose[ing] that every arbitrator has the right to debate any decision with his colleagues"* (Decision n° 706, F-D, R 09-17.346, 29 June 2011).

Without more guidance on the manner in which they should be conducted, deliberations are left exposed to abandonment or abuse. This consequence is exacerbated by the confidential nature of deliberation which makes the occurrence of an impropriety more difficult to establish. In this context, the rising demand for more transparency in international arbitration might lead arbitral institutions to become more inclined to promote a more formal and transparent deliberation process. However, one may legitimately wonder whether doing so would thwart inevitable – often frivolous – challenges and thereby better protect the integrity of the arbitral process. Or, on the contrary, whether a more regulated approach to deliberations would open the door to yet more undue scrutiny over arbitrators and their awards, which in turn could negatively impact the decision-making process and arbitrators' independence.

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