Kluwer Arbitration Blog

Deliberations of the Arbitral Tribunal: Opening the "Black Box"

Alessandra Lobo, Gabriel Veras, Giulia Spalletta (L.O. Baptista Advogados) · Saturday, November 16th, 2019 · Young ITA

"Deliberations of the Arbitral Tribunal" was the theme of the #YoungITATalks held in Sao Paulo on October 10, 2019, organized by L.O. Baptista Advogados and Young ITA.

Experienced arbitrators Adriana Braghetta (L.O. Baptista), Carlos Elias (CEARB) and Mariana Craveiro (ContiCraveiro) discussed with moderator Mariana Cattel (L.O. Baptista) the 'behind the scenes' of arbitral tribunals' deliberations.

An efficient deliberation of the tribunal is essential to ensure due process, to grant a fair award and to avoid a surprising decision to the parties. However, deliberation is still a "black box", a secret part of arbitration. There are no official guidelines on good practices related to it, especially because each arbitration can be influenced by many variables, such as the nuances of the specific dispute, the applicable law, the arbitrators' culture and/or the seat of arbitration. So, are there any appropriate steps of general application that every tribunal should follow when deliberating? And is there a right time to hold deliberations?

Drawing from their experience as arbitrators, the panelists believe that even though each case has its own particularities, the answer is affirmative. They indicated that the deliberations should occur throughout the proceedings, not only in the moment of drafting the award. As a consequence, appropriate measures can be taken from the beginning of the arbitration. In their opinion, leaving the analysis of the case to the end of the proceeding may lead to an inaccurate decision, because the arbitral tribunal will not have enough familiarity with the facts and documents to fully understand and explore all the issues brought by the parties. This distancing from the case could lead to inefficient deliberations and to confusion as to what the main issues are that need to be clarified in the evidence production phase. If the tribunal is not engaged with the issues early on, it will not know whether the document production requested by the parties is indeed relevant to decide the dispute, which can unnecessarily extend the duration and costs of the proceeding.

So, what can be done to develop an efficient deliberation? The panelists considered that arbitrators' commitment to the case and the dynamics between the tribunal members are crucial to the effectiveness of the deliberation process. The tribunal, as a committed team from the outset of the arbitration, has to be curious and sharp on all the details of the case, to listen to what the parties and other arbitrators have to say and not be afraid to take difficult decisions. This leads to the importance of establishing an efficient and effective communication channel between the

arbitrators. When all the tribunal members know, trust and communicate with each other, there can be a smooth exchange of ideas, which should ultimately result in a solid award. In cases where the arbitrators are not yet acquainted, one measure that helps develop this relationship of trust among the members of the tribunal from the start is to hold early meetings in person rather than by tele/video-conference. In a face-to-face meeting, the arbitrators have the opportunity to fully focus on the details of the case and to actually listen to their fellow arbitrators' opinions and interpretation of the facts. This opportunity to hear and to be heard creates a collaborative environment between the members of the tribunal and encourages arbitrators to be active and engaged throughout the proceeding.

Further, this proactive posture and engagement in every phase of the proceeding helps to ensure a more fluid deliberation process. To build this engagement, the panelists suggested that arbitrators should schedule meetings to **(i)** explore the case, studying the parties' arguments, **(ii)** elaborate their own timeline/chronology with the most relevant facts, to understand when and how the dispute arose, **(iii)** define the issues they consider important for the ruling, and **(iv)** guarantee that they will address all the issues in the award, even to establish their irrelevance. Holding such meetings early in the case (and relatively frequently) should assist the arbitrators to understand the main issues of the case and to make appropriate decisions as to the procedure. For example, it will allow the tribunal to better evaluate whether expert examinations would be useful, preventing unnecessary production of evidence.

Moreover, the panelists shed some light on other measures that arbitrators can take during the deliberation process, including: **(i)** to begin the analysis of the submissions only after having received the statement of claim and the others party's answer, so as to get an overall sense of the main issues and arguments on each side, as doing so helps the arbitrators to keep an open mind while exploring each party's case, thus avoiding any prejudgments the arbitrators may make early on in the case; and **(ii)** to schedule a hearing for the parties to present their case after the first round of written statements to debate the relevant issues of the case (*i.e*. a so-called "Kaplan Opening"; see further: "Keep it Simple. Keep it Interesting" by Sapna Jhangiani).

But who is responsible for taking action and implementing these measures? Ordinarily, the chairman of the tribunal has the responsibility of organizing the arbitration and coordinating the dialogue and exchange of ideas (see further: "The Chairman's Role in the Arbitral Tribunal's Dynamics" by Laurent Lévy).

However, the deliberations should be shared among all members of the tribunal. In fact, co-arbitrators can step in and even take over the responsibility of drafting the award if the chairman is not diligent enough. After all, as pointed out by Jara and Olórtegui, deliberations are shaped by the principle of collegiality. If one arbitrator is excluded from the opportunity to deliberate and convey his opinion on the final draft of the award, the decision is at risk of annulment and the other members of the tribunal could be held professionally liable (see further: "Puma v. Estudio 2000: Three Learned Lessons" by José Maria de la Jara and Julio Olórtegui; the Supreme People's Court of China's decision in Guangying Garment v. Eurasia; and the Federal Supreme Court of Switzerland's decision in Sefri v. Komgrap).

The parties' counsel can also adopt measures to assist the arbitrators to deliberate efficiently. For example, on the written statements, lawyers should not leave questions unanswered or avoid dealing with the thorny parts of their case. It is fundamental to create a dialogue with the counterparty (through the written pleadings or otherwise) to clarify to the arbitrators what are the

most important issues under discussion. One issue that, in the panelists' view, parties should address early on in the proceeding are the particularities of the case regarding the economic rationale of the business in dispute, as understanding what drives economic decisions in that specific market might help the tribunal to better ascertain how the dispute arose and how each party behaved. Also, being aware of the tribunal's background and profile before presenting the case contributes to a more objective presentation of the issues and helps to build rapport with the members of the tribunal and to capture the tribunal´s interest. In hearings, for example, counsel may build rapport by making eye contact with the arbitrators to check if they are following the presentation and how they are reacting to each argument, and to assess when to pause or what to further explain, as Sapna Jhangiani pointed out. It is important to have in mind that, in the counsel's toolbox, the most powerful and relevant weapon is simplicity. The use of infographics and timelines can help communication to be clear and concise while providing the arbitral tribunal with all the information it needs to make a decision. (See further: "Keep it Simple. Keep it Interesting" by Sapna Jhangiani). In addition, the parties' counsel should be careful not to be sarcastic or to insult, humiliate or annoy witnesses during hearings because these guerrilla tactics usually don't work with experienced arbitrators.

Finally, an efficient deliberation process requires not only the arbitrators' active engagement with the issues of the case, but also the tribunal's commitment to act as a unit, and the counsels' efforts to present their case objectively. The key to open the black box of deliberation lies on the increase of transparency as to the conduct of the proceeding, and on the use of case management techniques that further communication among the arbitrators, and between the parties and the tribunal. After all, besides being great legal experts, arbitrators must also be excellent case managers.

This entry was posted on Saturday, November 16th, 2019 at 7:43 am and is filed under Arbitral Tribunal, Arbitrators, Deliberations
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.