CHAPTER 3

How Do Tribunals Deliberate? A Guide to Effective Arbitral Decision-Making in International Arbitration

Mika Savola

In any arbitration involving three arbitrators, deliberations between tribunal members are crucial to the outcome of a case. Yet deliberations do not always proceed smoothly. In cross-border disputes, differences in the arbitrators' cultural background, legal training, personalities and language skills will make it difficult for an ad hoc group of people who are not familiar with each other to work together efficiently. Some party-appointed arbitrators, while ostensibly independent and impartial, still exhibit inappropriate allegiance to the positions advocated by the party that appointed them.Even harmonious deliberations can pose challenges. Disputes submitted to international arbitration are often complex cases where clear answers are few and far between. Conscientious arbitrators may have legitimately different views on the correct outcome of the case. Not infrequently, those views are coloured by various psychological biases that are difficult to rein in.

The chapter discusses how arbitrators should approach their delicate duty to deliberate with a view to finding potential guidelines for effective arbitral decision-making. It focuses on issues such as rapport building, assigning duties among arbitrators, the role of administrative secretaries and tribunal-appointed experts, as well as on how to deal with bargaining, biases, dissents and 'difficult' tribunal members during deliberations. While realizing that each arbitration is unique, and what works well with one tribunal may not work well with another, the author suggests that there are some basic propositions which may help arbitrators to deal with the complexities of deliberations, especially in a multicultural setting.

§3.01 INTRODUCTION

In any arbitration involving three arbitrators, deliberations between tribunal members are crucial to the outcome of a case.[1] It is during the deliberation phase that arbitrators truly come together to form one unit to decide the dispute. Deliberations require cooperation among tribunal members at a level of intensity far exceeding that which prevails during the previous stages of the proceedings. The quality of deliberations has a direct bearing on – and is often determinative of – the quality of the tribunal's final award on the merits.[2]

Yet deliberations do not always proceed smoothly. There may be various reasons for that. In cross-border disputes, differences in the arbitrators' cultural background, legal training, personalities and language skills will make it difficult for an ad hoc group of people who are not familiar with each other to work together efficiently. Some party-appointed arbitrators, while ostensibly independent and impartial, still exhibit inappropriate allegiance to the positions advocated by the party that appointed them. In the worst-case scenario, a party-nominated arbitrator may act in an outright partisan manner, leak information of the tribunal's internal discussions or intentionally seek to derail the proceedings to block any decision against the appointing party.

Even harmonious deliberations can pose challenges. Disputes submitted to international arbitration are often complex cases where clear answers are few and far between. Conscientious arbitrators may have legitimately different views on the correct outcome of the case. Not infrequently, those views are coloured by various psychological biases that are difficult to rein in.

How should arbitrators then approach their delicate duty to deliberate? Relatively little has been written about the internal decision-making dynamics of a three-person tribunal, despite the importance of the subject. Indeed, for many arbitration practitioners, deliberations of an international arbitral tribunal remain *terra incognita*, something akin to a 'black box'.[3] This article seeks to shed light on the topic with a view to finding potential guidelines for effective arbitral decision-making. While realizing that each arbitration is unique, and what works well with one tribunal may not work well with another, I believe that there are some basic propositions which may help arbitrators to deal with the complexities of deliberations, especially in a multicultural setting.

1. This article is gender neutral. Wherever the author has used the masculine, this should be read as masculine or feminine.
2. L. Yves Fortier, *The Tribunal's Deliberations*, in Lawrence W. Newman and Richard D. Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (Third Edition, JurisNet, LLC, 2014), 831, 835-836.
3. Bernhard Berger, *The Legal Framework: Rights and Obligations of Arbitrators in the Deliberations*, in Bernhard Berger and Michael E. Schneider (eds), *Inside the Black Box: How Arbitral Tribunals Operate and Reach Their Decisions*, ASA Special Series No. 42 (JurisNet, LLC, 2014), 7; Ugo Draetta, *The Dark Side of Arbitration* (JurisNet, LLC, 2018), 147.

§3.02 DEFINING DELIBERATIONS

The term 'deliberations' is generally understood to refer to the tribunal's internal negotiations which take place after the evidentiary hearing and after the parties have exchanged their written submissions. During deliberations, the members of the tribunal consider and discuss the parties' arguments and evidence put to them and reach a decision on the disputed issues. Deliberations are considered confidential in the sense that only the arbitrators are entitled to be present[4] and receive information about the content of the deliberations, barring exceptional circumstances.[5] A breach of the duty to keep the deliberations confidential may result in a claim for damages against the arbitrator responsible.[6]

In some legal systems, the duty to deliberate is expressly provided for by law.[7] However, it is widely accepted that, even in the absence of clear statutory support, members of a three-person tribunal are required to deliberate in a collegial way before reaching any important substantive or procedural decision. This is both a duty and a right of each arbitrator: all tribunal members are expected, and should have an equal opportunity, to participate in any discussions that may have a bearing on the outcome of the tribunal's decisions.

The right of an arbitrator to take part in the deliberations is not unlimited, however. It suffices that each arbitrator is given a fair and equal opportunity to influence the tribunal's decision-making: if an arbitrator refuses to participate in the deliberations, or seeks to obstruct them unjustifiably, the majority may proceed to issue the final award despite the opposition of one tribunal member.[8] By the same token, when all three arbitrators have been given a reasonable opportunity to state their views and two of the arbitrators are in agreement on the outcome of the dispute,

4. Possibly with the exception of a tribunal-appointed secretary, if all arbitrators and the parties agree to that. On the role of tribunal secretaries, *see* further section §3.03[D].
5. An exception may apply if fundamental principles of due process are alleged to have been breached during deliberations. In some jurisdictions, including Sweden, arbitrators may even be called to testify in courts. *See* Finn Madsen, *Commercial Arbitration in Sweden* (Fourth edition, Jure Förlag AB, 2016), 324; and Patrik Schöldström, *The Arbitrators*, in Annette Magnusson, Jakob Ragnwaldh and Martin Wallin (eds), *International Arbitration in Sweden: A Practitioner's Guide* (Second Edition, Kluwer Law International B.V., 2021), 172-173. – For a critique of such approach, *see* Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (Second Edition, Sweet & Maxwell Ltd, 2007), 654.
6. The Chartered Institute of Arbitrators (CIArb) Guideline for Drafting Arbitral Awards, Part I – General, 14 (available at: guideline-10-drafting-arbitral-awards-part-i-general-2016.pdf (ciarb.org); accessed 23 March 2021).
7. This is the case, e.g., in France and Portugal. *See* José María Alonso, *Deliberation and Drafting Awards in International Arbitration*, in M. Á. Fernandéz-Ballesteros and David Arias (eds), *Liber Amicorum Bernardo Cremades* (La Ley, 2010), 133-134; Yves Derains, *La pratique du delibéré arbitral*, in Gerald Aksen, Karl-Heinz Böckstiegel, Michael J. Mustill, Paolo Michele Patocchi and Anne Marie Whitesell (eds), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in honour of Robert Briner* (ICC Publishing, 2005), 222-223.
8. The problem with obstructionist or otherwise 'difficult' tribunal members is discussed in section §3.03[H].

the third arbitrator cannot prolong the deliberations by demanding continued discussions in an attempt to persuade the others to adopt his opinion.[9]

In the legal literature, the term 'deliberations' is sometimes understood more broadly, without connecting it to any specific phase of the proceedings or the tribunal's final decision on the merits of the dispute. Many commentators have noted that deliberations are necessary for all important decisions, not just for a final award. In fact, almost all decisions regarding the conduct of the arbitration require deliberation among the members of a tribunal: fixing of time limits, the manner in which submissions are to be filed and evidence is to be presented, document production requests, applications for interim relief, requests for the bifurcation of the proceedings, and so forth. It is a matter of definition whether the tribunal's internal discussions on such questions are considered part of 'deliberations' too.[10]

Additionally, it would be wrong to think that arbitrators refrain from forming any preliminary understanding on how the dispute might be resolved already prior to the conclusion of the evidentiary hearing and the exchange of the parties' written submissions. In many cases, the dialogue among arbitrators begins shortly before the hearing when they typically meet in person (or at least by videoconference), discuss the substance of the case and prepare questions for the witnesses and experts to be heard. Informal exchange of thoughts will then continue during the hearing breaks, which many arbitrators consider a useful opportunity to confer about the relevance and materiality of the most recent witness testimony and documentary evidence addressed. While striving to keep an open mind through the entire hearing, arbitrators tend to develop impressions and reach tentative conclusions with each witness presented, and although those conclusions may be refined and sometimes even changed significantly, psychological studies have shown that what is heard at an earlier point is of disproportionately greater persuasive value.[11]

Some practitioners claim that arbitrators should deliberate already *at the outset of a case*, and even before the first case management conference, in order to proactively manage the proceedings and adapt them to the characteristics of the case. For instance, it has been submitted that the tribunal should encourage the counsel to engage in an open 'without prejudice' discussion on the substance of each party's respective case already in connection with the first procedural meeting.[12] It has also been suggested that the tribunal could simultaneously convey its provisional opinion 'on what should

9. This is the essence of the Svea Court of Appeal's famous decision in *The Czech Republic v. CME Czech Republic BV*, 15 May 2003, Case No. T 8735-01.
10. *See, e.g.*, Yves Derains, *The Deliberations of the Arbitral Tribunal – 'retour au delibéré arbitral'*, in Markus Wirth (ed), *The Resolution of the Dispute – from the Hearing to the Award*, ASA Special Series No. 29 (September 2007), 16.
11. Fortier, *supra* n. 2, at 831-832; Paolo Michele Patocchi and Robert Briner, *The Role of the President of the Arbitral Tribunal*, in Newman and Hill, *supra* n. 2, at 301; Doak Bishop and James H. Carter, *The United States Perspective and Practice of Advocacy*, in Doak Bishop and Edward G. Kehoe (eds), *The Art of Advocacy in International Arbitration* (Second Edition, JurisNet, LLC, 2010), 543; Nicolas Ulmer, *Six Modest Proposals Before You Get to the Award*, in Berger and Schneider, *supra* n. 3, at 117. The effect of psychological biases on the arbitrators' deliberations and decision-making is discussed in further detail in section §3.03[F].
12. Derains, *supra* n. 10, at 16-17; Ulmer, *supra* n. 11, at 115.

be proved and how it should be done' which, however, is only possible if the arbitrators have deliberated prior to the case management conference.[13]

Others remain sceptical of the benefits of such guidance early on in the case, and for good reasons. For a start, any meaningful discussion on the merits will be difficult if the request for arbitration and the answer thereto are short on details (as is often the case). Second, many arbitrators are reluctant to openly debate about the burden of proof for fear of creating an impression of bias. Third, experience shows that counsel for the parties are uncomfortable with disclosing too much of their strategy at the outset, preferring instead to keep their options open. Against this backdrop, it may not be fruitful for the tribunal to engage in any in-depth deliberations on the substance of the dispute already before the first case management conference. In fact, there is an inherent risk that forming even preliminary opinions at an early stage of the proceedings may be counterproductive because initial views are more persistent than people tend to realize.[14]

In the following, I will use the term 'deliberations' in the narrower sense of the word to refer to the tribunal's internal negotiations that take place after the evidentiary hearing and the exchange of the parties' written submissions with a view to deciding on the disputed issues that need to be resolved for a tribunal to render its final award on the merits.

§3.03 ORGANIZING DELIBERATIONS

[A] Building Rapport

Effective deliberations require trust between the members of a tribunal. Trust, in turn, is predicated on mutual respect. An arbitrator should always show due respect to his fellow arbitrators, regardless of their cultural background, level of education, fields of expertise, arbitration experience, or the like. This is imperative as a tribunal simply cannot conduct productive deliberations in the absence of sufficient level of trust.[15]

It is difficult to trust people whom one does not know. Consequently, to ensure constructive deliberations, arbitrators should meet in person as early as possible and establish a bond between themselves. It falls primarily upon the chairperson to convene such a meeting, in a relaxed setting, and to clarify that 'the order of the day is getting to know one another, and not getting down to business'.[16] One cannot overestimate the importance of developing a positive personal relationship among the tribunal members from the outset, before they engage in any difficult negotiations regarding the merits of the case.

13. Derains, *supra* n. 10, at 17.
14. On the effect of biases in arbitral decision-making, *see* section §3.03[F].
15. Jingzhou Tao, *Deliberations of Arbitrators*, in Patricia Shaughnessy and Sherlin Tung (eds), *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre Karrer* (Kluwer Law International B.V., 2017), 358.
16. Fortier, *supra* n. 2, at 832.

Occasionally two of the three arbitrators know each other well (from previous cases or some other professional context), but not the third arbitrator. This may create a perceived imbalance within the tribunal. It is vital that the tribunal cultivates a strong culture of inclusion so that the 'newcomer' feels welcome and on an equal footing with his fellow arbitrators. Failing this, the tribunal's decision-making dynamics may suffer.

Investing in building rapport, based on respect of those involved and a separation of the people from the problem, is crucial throughout the arbitration. The tribunal should seize any opportunity to foster the spirit of 'togetherness' at all stages of the proceedings. For example, during the hearing, arbitrators are encouraged to find ways to meet each other informally, wine and dine together, and take time for small talk before their negotiation session begins and as it ends. The better the arbitrators know one another, the better their deliberations will unfold, and the less room there will be for miscommunication or confrontation between tribunal members.[17]

All this will pay handsomely when the tribunal is finally faced with all the complex issues that need to be resolved in their deliberations. If the members of the tribunal have developed a good working relationship, they have a foundation of trust to build upon in a difficult negotiation. Knowing where the other arbitrators are coming from will help communication and defuse unnecessary tensions. It may even be possible to break the ice by a joke or informal aside.[18] A good working relationship is conducive to smooth deliberations and will pave the way to a high-quality award.

[B] General Format of Deliberations

Most national laws are silent on the question of how the arbitrators should arrange their deliberations.[19] The same is true for institutional arbitration rules. It follows that the tribunal has wide discretion to organize its internal decision-making procedures as it deems appropriate.

In practice, much will depend on case-specific circumstances and personal preferences of each individual arbitrator. The tribunal may choose to conduct the deliberations mainly in writing (e.g., by exchange of questionnaires, memoranda and email correspondence) or it may prefer to hold oral negotiations (in person or by videoconference). Very often, the deliberations will include both written and oral elements. The key is to allow each arbitrator an opportunity to express his views on the

17. *Ibid.*, at 832; Patocchi and Briner, *supra* n. 11, at 301; Pierre A. Karrer, *Introduction to International Arbitration Practice* (Kluwer Law International, 2014), 179-180. These tried and tested negotiation techniques are, of course, not unique to arbitral deliberations but apply more generally in any social interaction. For a particularly insightful presentation on the subject, *see* Roger Fisher, William Ury and Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In* (Second Edition, Penguin Books USA Inc., 1991), passim.
18. Fisher, Ury and Patton, *supra* n. 17, at 37.
19. Some national legal systems, however, prescribe specific requirements for the process of arbitral deliberations, including establishing a date on which the deliberations will formally begin. France is one example. *See* Alonso, *supra* n. 7, at 133-134; Gary B. Born, *International Commercial Arbitration* (Third Edition, Kluwer Law International B.V., 2021), 2473, fn. 1061; Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International B.V., 1999), 749.

issues to be determined and to stimulate a constructive dialogue among the tribunal members with the aim of reaching a well-reasoned decision. The format through which this takes place is less important.[20]

It is not unusual for the deliberations to proceed in a rather unstructured and ad hoc manner. However, to promote efficiency, the tribunal should plan and set up a procedure and timetable for its deliberations already at an early stage of the arbitration. This is typically done through informal discussions among tribunal members. In the relatively rare instances where the arbitrators disagree on the format of deliberations, they should decide by majority vote. Failing a majority, the procedure falls to be fixed by the chairperson.[21]

It is generally good practice to start deliberating immediately after the evidentiary hearing when the arbitrators are gathered together in the same place (assuming that the hearing has been conducted in person) and while the evidence and arguments are still fresh in their minds. This first round of formal deliberations will normally concentrate on the structure of the award and the way forward in the deliberations. It is also an opportune time to discuss on a general level whether a consensus seems likely to emerge on one or more of the issues to be decided or, conversely, which are the areas of disagreement where further deliberations should focus on. The chairperson should encourage all arbitrators to 'think out loud', clarifying where necessary that any opinions expressed will be considered tentative only. Also, the chairperson should see to it that no member of the tribunal will exert pressure on any of his colleagues and that the tribunal will not jump to conclusions on any of the issues to be decided.[22]

Occasionally, however, it may be best to defer the first formal deliberation meeting until after the tribunal has received the parties' post-hearing briefs and/or hearing transcripts (if any). This may be appropriate especially in heavily fact-driven cases with voluminous evidence. Some arbitrators are disinclined to enter into deliberations immediately after the hearing, fearing that this could overemphasize the weight of witness testimony recently heard as opposed to documentary evidence on the record. They may also wish to reflect on the arguments and evidence discussed at the

20. Alonso, *supra* n. 7, at 135; CIArb Guideline, *supra* n. 6, at 13; Gaillard and Savage, *supra* n. 19, at 749-750; Poudret and Besson, *supra* n. 5, at 650-652; Tao, *supra* n. 15, at 352; Richard M Mosk, *Deliberations of Arbitrators*, in David D. Caron, Stephan W. Schill, Abby Cohen Smutny and Epaminontas E. Triantafilou (eds), *Practising Virtue: Inside International Arbitration* (Oxford University Press, 2015), 487, 495.
21. Born, *supra* n. 19, at 2473-2474; Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012), 1292-1293; Jacques Werner, *The Arbitrator as Master of Time*, in Laurént Levy and Yves Derains (eds), *Liber Amicorum en l'honneur de Serge Lazareff* (Editions Pedone, 2011), 597.
22. Born, *supra* n. 19, at 2474; Fortier, *supra* n. 2, at 833; Karrer, *supra* n. 17, at 180; Mosk, *supra* n. 20, at 492; Patocchi and Briner, *supra* n. 11, at 301; Tao, *supra* n. 15, at 354-355; Ulmer, *supra* n. 11, at 118; Waincymer, *supra* n. 21, at 1292, 1295; Humphrey Lloyd, Marco Darmon, Jean-Pierre Ancel, Lord Dervaird, Christoph Liebscher and Herman Verbist, *Drafting Awards in ICC Arbitration*, 16 ICC International Court of Arbitration Bulletin, 19, 26 (2005); Robert Briner, *The Role of Chairman*, in Lawrence W. Newman and Richard D. Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (Second Edition, Juris Publishing, Inc., 2008), 63; Karl-Heinz Böckstiegel, *Case Management by Arbitrators: Experiences and Suggestions*, in Aksen et al., *supra* n. 7, at 125.

hearing in light, and with the benefit, of post-hearing briefs and transcripts. Some may even worry that starting deliberations straight after the hearing would not give the right impression to the parties, who may disapprove of the idea that the arbitrators proceed with their decision-making before the parties have filed their post-hearing submissions.[23]

The formal deliberations may proceed in different ways depending on the atmosphere and working relationship among the tribunal members. If the arbitrators have managed to establish smooth communication routines and a high level of trust, the deliberation procedures may be quite informal. By contrast, in the absence of trust, procedures are necessarily more formal and the deliberations may drag on at a slow pace.[24] Particularly if the chairperson has a reason to suspect the impartiality of one (or both) of the party-appointed arbitrators, he should tread cautiously when conducting the deliberations in order to avoid any breach of due process.[25]

Before the first deliberation meeting takes place, the chairperson should circulate a sufficiently detailed meeting agenda so that the deliberations can be conducted in an orderly fashion. At the same time, the chairperson may wish to draw up and send out a tentative list of issues to be determined by the tribunal and invite his fellow arbitrators to add to the list any items they may consider important. Depending on the circumstances, the chairperson may also invite the co-arbitrators to prepare and exchange short memoranda setting out their preliminary views on one or more of the issues to be resolved. In all cases, however, the members of the tribunal should abstain from taking any definitive positions on the questions at stake at this early stage of the deliberations. Experienced arbitrators will know that if they espouse certain views prematurely, relations among the tribunal may go sour. [26]

Some commentators have suggested that, whenever possible, the chairperson should produce a 'decision tree' before the deliberation meeting. This is a schematic outline which identifies, in logical sequence, the decisions to be taken on the merits of the case, starting with those of a preliminary nature; each decision is then followed by a binary list of consequences, depending on whether the decision is positive or negative, and so on for all the sub-decisions.[27] However, while a 'decision tree' approach may work well in some cases, it may not be appropriate in all circumstances. Critics have noted that an overly detailed agenda may operate like a 'straitjacket' and will often prove to be impractical as 'each arbitrator may wish to give his or her own

23. *See* Alonso, *supra* n. 7, at 135; and the discussion at the ASA Annual Full Day Conference of 1 February 2013 on the topic of *Inside the Black Box: How Arbitral Tribunals Operate and Reach Their Decisions* as recorded in Berger and Schneider, *supra* n. 3, at 35-39 (especially the comments made by Andreas Reiner, Kirstin Dodge, David W. Rivkin and Matthias Scherer).
24. Alonso, *supra* n. 7, at 137; Born, *supra* n. 19, at 2473; Böckstiegel, *supra* n. 22, at 126; Mosk, *supra* n. 20, at 488.
25. *See* in more detail the discussion in section §3.03[H].
26. Alonso, *supra* n. 7, at 137; Mosk, *supra* n. 20, at 489; Patocchi and Briner, *supra* n. 11, at 301; Waincymer, *supra* n. 21, at 1293; Nigel Blackaby, Constantine Partasides, Alan Redfern and J Martin Hunter, *Redfern and Hunter on International Arbitration* (Sixth Edition, Oxford University Press, 2015), 9.110; Karl-Heinz Böckstiegel, *Notes and Samples on Tribunal Deliberations*, in Berger and Schneider, *supra* n. 3, at 129-130.
27. Draetta, *supra* n. 3, at 154-155.

views on certain general aspects of the case and there should be time for an exchange of views on some general aspects whenever one of the arbitrators wishes to do so'.[28]

Even if a tribunal chooses to dispense with a 'decision tree' approach, the first thing it should do when commencing deliberations is to clarify the issues that need to be decided in order for the tribunal to deliver the final award on the merits. This is not necessarily an easy task as the parties' submissions are frequently unclear, with claims and defences sometimes hidden in footnotes or expressed in equivocal terms. Generally speaking, the parties should bear in mind that the quality of the award will often be heavily affected by the quality of their own submissions. If the prayers for relief are not carefully thought out, or the parties leave gaps in their evidence or arguments, there is only so much a tribunal can do by way of proactive case management when striving to produce a well-reasoned award.[29]

Once the stage is set for the deliberation meeting, the question arises as to 'who goes first', meaning the order in which the members of the tribunal should express their preliminary opinions on all the different issues being discussed. Views differ on this question. Many commentators seem to favour a procedure where the chairperson speaks last, allowing his fellow arbitrators to convey their opinions first.[30] But others think the opposite, arguing that the chairperson should express his view first and then ask for the co-arbitrators' input. For example, Yves Derains submits that this method is to be recommended because 'to do the contrary makes the task of reaching unanimity more difficult' for the reason that 'when a co-arbitrator has expressed an opinion, there is a danger that such opinion be crystallized and this co-arbitrator will be less easily convinced that he or she may accept a different opinion at the end of a discussion'.[31]

There is probably no one-size-fits-all answer to the question of which method is the better one. Both have certain advantages and disadvantages. To illustrate: Having the chairperson convey his opinion first will give the co-arbitrators a framework they can address and may have the positive effect that the co-arbitrators can focus on those points where they disagree with the chairperson, which can reduce the length of the discussion.[32] On the other hand, it will run the risk that the co-arbitrators' debate will be confined to less important aspects, or even become meaningless, with each

28. Patocchi and Briner, *supra* n. 11, at 301.
29. To ensure due process, tribunals should be cautious not to 'enrich' the parties' argumentation with aspects that were not clearly invoked during the proceedings. This is sometimes difficult. Particularly if counsel for a party is not qualified in the law applicable to the dispute, the legal argumentation may be deficient to such an extent that the tribunal will be hard-pressed to draft persuasive reasoning. *See* Matthias Scherer, *Drafting the Award*, in Berger and Schneider, *supra* n. 3, at 28-29; Petri Taivalkoski, *Ensuring Enforceability of the Award Against Challenges Based on Alleged Violation of Due Process*, 35 Revista del Club Espanõl del Arbitraje 59, 67 (2019).
30. Alonso, *supra* n. 7, at 137; Briner, *supra* n. 22, at 63; Patocchi and Briner, *supra* n. 11, at 301; Piero Bernardini, *Organisation of Deliberations*, in Berger and Schneider, *supra* n. 3, at 18.
31. Derains, *supra* n. 10, at 23. The author notes, however, that this recommendation only works if the deliberations are 'harmonious'. If they are 'pathological' – meaning that one or both of the co-arbitrators are not fully impartial or independent – the chairperson should refrain from disclosing his thoughts at the early stage of the deliberations to eliminate the risk that the partisan arbitrator may derail the proceedings, leak information to his appointing party or even resign from the tribunal. *Id.*, at 23-24.
32. Briner, *supra* n. 22, at 63; Mosk, *supra* n. 20, at 489.

co-arbitrator promptly joining the chairperson's position whenever the views coincide, thus forming a majority.[33] Added to that, weak or inexperienced co-arbitrators may have a tendency to join the opinion of a strong or eminent chairperson for a misguided sense of loyalty or professional admiration, irrespective of their true views.

But having the co-arbitrators speak first is not without its problems either. While ideally promoting an open and unconstrained exchange of thoughts within a tribunal permeated by a strong sense of collegiality, it may also have the downside of locking the co-arbitrators into their mental positions. Apart from that, if the tribunal's working relations are less than optimal – and particularly if the party-appointed arbitrators are not truly impartial – it may also result in an unnecessarily antagonistic debate between the two co-arbitrators, with each advocating the positions of the party that appointed them. In the end, the chairperson may realize that his fellow arbitrators are simply continuing the parties' 'war' by other means inside the tribunal.

How should the tribunal then go about managing this issue? My suggestion is that, rather than electing either method as inherently superior to the other one, the tribunal should decide the manner in which to proceed based on the case-specific circumstances.[34] The chairperson may explicitly invite his fellow arbitrators to express their preferences, if any, as to the question of 'who goes first'. This may pre-empt unpleasant surprises and reduce tensions between the co-arbitrators.

In all cases, it is paramount that decisions will actually be reached at the deliberations. It is not unusual for the arbitrators to have constructive discussions, especially over a good lunch or dinner, but stop short of reaching ultimate findings in respect of all the issues that need to be resolved. Subsequently, when the award is being drafted, it may transpire that critical issues are still open and need to be further negotiated among the arbitrators. To avoid unnecessary prolongation of the deliberations, it will often be useful for the chairperson to confirm the outcome of the tribunal's discussions in writing, possibly indicating the points on which no full agreement has yet been reached, and communicate this as soon as possible to the co-arbitrators, noting that their agreement will be assumed if they do not raise objections by a set time limit.[35]

---

33. Bernardini, *supra* n. 30, at 18.
34. Some experienced arbitrators have voiced similar ideas. By way of example, Karl-Heinz Böckstiegel writes that 'it will depend on circumstances whether it is more advisable for the party-appointed co-arbitrators to express their opinions first – in that case probably starting with the arbitrator appointed by the claimant – or for the chairman's inclinations to be disclosed first so that the discussion can concentrate on issues where the co-arbitrators disagree'; Böckstiegel, *supra* n. 22, at 126. In the same vein, *see* Draetta, *supra* n. 3, at 155; Mosk, *supra* n. 20, at 488-489; and Waincymer, *supra* n. 21, at 1293, who also observes that 'psychological studies show that the last person in a group who has a different view to preceding speakers will often feel intimidated and reluctant to speak out about their honest belief. Shifting the order so that they can sometimes speak first ensures that tribunal members feel that their views are equally important'.
35. Briner, *supra* n. 22, at 63; Patocchi and Briner, *supra* n. 11, at 301; Scherer, *supra* n. 29, at 27. Ugo Draetta also suggests that 'it is a good idea to document [the tribunal's] decisions immediately, for example, by marking them on a whiteboard or by using some other device, immediately followed by the minutes of the meeting drawn up by the President and setting out the conclusions reached'. The author warns that a failure to do so increases 'the risk of the

Equally important, to avoid any undue delay in the rendering of a final award, the tribunal should set aside sufficient time for the deliberations from the outset. International arbitrators are invariably busy people who may find it difficult to schedule deliberation meetings at short notice. All too often the tribunal has blocked out time for the hearing but is then immediately immersed in wholly unrelated matters once the hearing is finished, desperately seeking to fit deliberations into whatever slots the arbitrators may find in their calendars. On a related note, it is probably not an overstatement to say that too many arbitrators consider deliberations to be a low-priority exercise, although in actual fact it should be on the very top of their agenda. It falls primarily upon the chairperson to proactively manage the tribunal's decision-making procedures, which includes establishing a well-planned process and timetable for the deliberation, reaching-a-decision and drafting-the-award phases with a view to promoting efficiency and ensuring that the final award can be issued swiftly.[36]

One final point merits mentioning. During the deliberations, the tribunal should avoid any communications between the chairperson and only one of the co-arbitrators. Put differently, all deliberations on the substance of the dispute should be conducted between all three arbitrators so as to avoid any suspicions or later allegations by a party (or an arbitrator) that one of the arbitrators did not have an opportunity to fully participate in the deliberations and influence the tribunal's decision-making on a particular point. A limited exception to this general rule may, however, arise in cases where one co-arbitrator intentionally refuses to participate in the deliberations or seeks to obstruct them. Such exceptional situations are discussed later in this article.[37]

[C] Assigning Duties Among Arbitrators

The end product of an arbitration is the final award on the merits. Arbitrators should start preparing the first draft of it early on. They should also consider whether the work might be split between the members of the tribunal, with each contributing specific parts of the draft.

In many cases, the chairperson is responsible for the drafting of the entire award, while the co-arbitrators' role is limited to commenting on the draft(s) prepared by the chairperson. Ideally, the latter should begin to prepare the narrative section (the so-called recital) already soon after the first case management conference. The draft

---

deliberation being reopened later "on paper"' and may also have the effect that 'when the President produces the draft award, at least one of the co-arbitrators is likely to be taken by surprise, which surely will be immediately followed by criticism and arguments, which will provoke in turn a similar reaction from the other co-arbitrator. Sometimes the entire deliberation must be repeated'. *See* Draetta, *supra* n. 3, at 158-159.

36. Böckstiegel, *supra* n. 26, at 129; Ulmer, *supra* n. 11, at 118-119; Werner, *supra* n. 21, at 597. Jeffrey Waincymer aptly notes that 'the chair should manage the stages of deliberation, preparation of drafts, reviewing drafts, revisions, finalisation, signature and service' and that 'it makes sense to allocate time periods where all tribunal members are needed for any of these steps at the same time as designating hearing times [as] otherwise delays are only to be anticipated for busy arbitrators trying to coordinate their spare time'. *See* Waincymer, *supra* n. 21, at 1292-1293.

37. *See* section §3.03[H].

recital should then be updated throughout the proceedings by including information on the parties and their counsel, the arbitral tribunal and administrative secretary (if any), the procedural history of the case, the relief sought by the parties and their main factual and legal arguments, as well as other non-contentious matters. The chairperson will typically circulate the first draft award before, or shortly after, the evidentiary hearing for any technical comments by the co-arbitrators. No member of the tribunal should include his views on any substantive issues in this first draft.[38]

It is not unusual, however, for a chairperson to suggest that his fellow arbitrators produce the first draft of certain parts of the award for comment by the other tribunal members. For example, it may be agreed that one co-arbitrator will draft the procedural history section and the other one the section dealing with the costs of the arbitration. Other arrangements are possible too. Not infrequently, if only one of the arbitrators is qualified in the law applicable to the contract in dispute, the other tribunal members may expect specific contributions from him. According to one prominent practitioner, such an arbitrator may be 'invited to study complex legal issues and to submit memoranda on them' and even 'draft the parts of the award on these legal issues, in particular if the conclusion in this respect is against the party by which he or she was nominated'.[39]

Tribunals should think carefully though before agreeing on any division of work among their members. 'Collective drafting' may not be advisable if the arbitrators come from vastly different legal cultures, or if their linguistic skills differ greatly.[40] In any event, the chairperson ought to be responsible for the coordination of the work and the consistency of the tribunal's reasoning. Further, in all cases, the chairperson should maintain the overall editorial control in order to ensure consistency in the use of terms and in style.[41]

[D] Role of Administrative Secretaries and Tribunal-Appointed Experts

Different arbitrators take different views on the use of tribunal secretaries. Some consider them useful, especially in document-heavy cases where an administrative secretary can arguably add efficiency to the arbitral process; others resist delegating any part of the arbitrators' duties to any third person, irrespective of the nature of the dispute.

The process of appointing an administrative secretary will depend on the applicable rules. Some rules leave the decision to the tribunal itself, whereas others

38. Born, *supra* n. 19, at 2475; Böckstiegel, *supra* n. 26, at 129-130; Draetta, *supra* n. 3, at 151-152; Fortier, *supra* n. 2, at 833-834; Lloyd et al., *supra* n. 22, at 25; Patocchi and Briner, *supra* n. 11, at 303; Waincymer, *supra* n. 21, at 1313; Albert Jan van den Berg, *Organizing an International Arbitration: Practice Pointers*, in Newman and Hill, *supra* n. 2, at 418.
39. Derains, *supra* n. 10, at 20. The author also states that 'this is advisable as, provided that co-arbitrator is really convinced of the correctness of the solution, he or she will know how to express it in a way which may convince the losing party that it could not win'.
40. Michael Black, *A Short Note on the Decision-making Process*, in Berger and Schneider, *supra* n. 3, at 121; Scherer, *supra* n. 29, at 27.
41. Black, *supra* n. 40, at 121; Lloyd et al., *supra* n. 22, at 25.

require the acceptance of the parties and/or the institute concerned. Even where not mandated to do so by the applicable rules, it is good practice for a tribunal to consult the parties before proceeding with the appointment. If any party objects to the use of a secretary, the arbitrators should generally refrain from appointing one.[42]

The duties of an administrative secretary have been the subject of much debate in recent years. There is a general consensus that the arbitrator's mandate is fundamentally personal and non-delegable in the sense that the tribunal is not permitted to delegate its essential decision-making functions to anyone else, including a tribunal secretary. But apart from that, the question of whether particular tasks may be entrusted with an administrative secretary – especially in the context of deliberations – provides a fertile ground for disagreement. For instance, views diverge among arbitration practitioners as to whether it is appropriate to allow a secretary to:

- summarize the parties' written submissions, evidence or legal positions for the benefit of the tribunal;
- be present at the deliberations for the purpose of subsequently drafting (parts of) the final award for the tribunal's review; or
- discuss any part of the merits of the case with the arbitrators, possibly voicing the secretary's own opinion during the deliberations.[43]

While some practitioners think that there is nothing wrong in allowing a secretary to do any of these things so long as the tribunal retains its decision-making control, others fear that relying too much on the assistance of an administrative secretary may discourage the arbitrators from acquiring intimate knowledge of the complete case file or put a damper on their direct personal communications. It has also been said that the act of writing is the ultimate safeguard of intellectual control over the decision-making process,[44] which is why the tribunal should never let a secretary to draft any part of the tribunal's reasoning or the dispositive section of the award.

Various arbitration institutes have published guidance notes providing specific examples of apparently non-controversial tasks that may be safely delegated to an administrative secretary in arbitration proceedings governed by the rules of the institute in question.[45] In the absence of such guidance, a tribunal should consult the

42. Some arbitration institutes expressly forbid the appointment of a secretary over the objection of a party; *see*, *e.g.*, the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration (effective as of 1 January 2021), para. 221. Other institutes, however, cater for the eventuality that one party may raise a purely dilatory objection which should not necessarily exclude the appointment where considered appropriate. For example, the Finland Arbitration Institute (FAI) Note on the Use of a Secretary (2020) provides that 'if any party objects to the use of a secretary, the arbitral tribunal may proceed with the appointment only where the tribunal is convinced that this will benefit all parties by saving time and costs' (para. 2.3).
43. For these and other examples, *see* J. Ole Jensen, *Aligning Arbitrator Assistance with the Parties' Legitimate Expectations: Proposal of a 'Traffic Light Scale of Permissible Tribunal Secretary Tasks'*, 38 ASA Bulletin, 375, 390-394 (2020).
44. Zachary Douglas, *The Secretary to the Arbitral Tribunal*, in Berger and Schneider, *supra* n. 3, at 89.
45. *See*, *e.g.*, the list of 'organisational and administrative tasks' set out in para. 224 of the ICC Note, *supra* n. 42.

parties regarding the tasks of a secretary.[46] This is prudent to avoid later allegations that the arbitrators have exceeded their mandate, or violated due process, by allowing an administrative secretary to influence the tribunal's decision-making in an improper manner.

The use of *tribunal-appointed experts* is relatively rare in international arbitration; it is much more common for each party to rely on its own party-appointed experts.[47] Sometimes a tribunal-appointed expert is needed though. There are a number of practical issues that a tribunal has to consider and agree with the parties when engaging a tribunal expert.[48] In addition, as with the administrative secretary, the tribunal must be careful not to delegate its decision-making function to the expert, and to avoid any impression of doing so. To that effect, arbitrators should resist the idea of having private meetings with the expert, without the presence of counsel for each party. Ignoring this advice can have costly consequences. I concur with the view that 'if a tribunal were to listen to additional input from the expert during a meeting or deliberations without giving the parties the opportunity to comment on that input before taking it into account, this would undoubtedly breach rules of natural justice. While the tribunal may want the expert present to walk them through the available evidence, it would be very easy for the line between explanation and comment to be crossed'.[49]

[E] About Bargaining

The decision-making dynamics within a three-person tribunal may be greatly influenced by the applicable arbitration regime, particularly the question of how the arbitrators will reach a decision if they are not unanimous. Laws and rules differ on this point, with some requiring a majority decision and others allowing the chairperson to decide alone where a majority cannot be obtained. In the former system (in the following, 'system A'), the chairperson must 'win' the vote of at least one of the co-arbitrators (assuming that the co-arbitrators disagree with each other) for a tribunal to be able to render an award. In the latter system (in the following, 'system B'), however, the chairperson may act more independently, and his role and influence in the deliberations may therefore be much more substantial.[50]

46. A few arbitration rules expressly provide for such consultation. *See*, *e.g.*, the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the SCC Rules) of 2017, Article 24(2).
47. Nathan D. O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (Second Edition, Informa Law from Routledge, 2019), 5.03.
48. For an informative overview of such issues and how they may be dealt with, *see* O'Malley, *supra* n. 47, at 6.19-6.22, 6.39-6.43; and Roman Khodykin and Carol Mulcahy (Consultant Editor Nicholas Fletcher QC), *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration* (Oxford University Press, 2019), 9.30-9.37, 10.20-10.47 and a separate checklist in Appendix 11.
49. Khodykin and Mulcahy, *supra* n. 48, at 9.121. The authors go on to note that 'unsurprisingly, there have been instances where national courts have found that *ex parte* meetings between a tribunal and a tribunal-appointed expert amount to an irregularity'. *Id.*, at 9.122.
50. Born, *supra* n. 19, at 2474, 3302; Gaillard and Savage, *supra* n. 19, at 747-748.

The far-reaching consequences of this difference may be illustrated with the following example: Company X has commenced arbitration proceedings against company Z, claiming damages for breach of contract in the amount of EUR 50 million. The arbitrator nominated by the claimant finds that Z has breached the contract but that it should (for whatever reason) be ordered to pay only half of the damages claimed by X, i.e., EUR 25 million. On the other hand, the arbitrator nominated by the respondent holds that Z is not liable at all and that X's claim against Z should be rejected entirely. Under system B, if the chairperson is of the opinion that Z has breached the contract but that the amount of damages to be awarded to X should not exceed EUR 10 million, then the chairperson can impose his view and the award will be made accordingly. By contrast, under system A – which requires a majority decision – the chairperson would have needed to reach a compromise with one of the co-arbitrators in order to issue an award.

There is much to commend in system B, with the possibility of a chairman-alone award, as it will avoid a deadlock where the arbitrators are unable to agree on the outcome of a case. While it may be expected that the chairperson is normally able to work out a compromise with one of the co-arbitrators and to reach a majority decision, there may be situations where he finds *both* co-arbitrators' positions unreasonable. The prospect of a chairman-alone award will prove valuable in such circumstances as the presiding arbitrator – presumptively the most neutral member of the panel – need not compromise his views and join with the least unreasonable of the co-arbitrators in order to form a majority. Moreover, that possibility may have a preventive effect in and of itself, as knowledge that unreasonable positions can yield no tactical benefit dissuades partisan conduct on the part of the co-arbitrators.[51]

It goes without saying that no member of a tribunal should enter into deliberations with the aim of bulldozing his way through the fellow arbitrators' arguments, convinced that only he holds all the right answers. Quite the contrary: it is the hallmark of a good arbitrator to be open-minded, always prepared to listen and willing to be persuaded. A diligent arbitrator should not hesitate to modify his views if it becomes apparent, in the course of the deliberations, that his initial position was untenable.[52]

In practice, most arbitrators are reasonable people able to negotiate and compromise in order to reach a unanimous decision. Occasionally this tendency to concede and abandon initial negotiation positions may go so far that arbitrators are accused of falling victim to the 'splitting the baby syndrome', delivering an uneasy compromise award rather than deciding the dispute strictly according to the applicable legal rules and the merits of the case.[53] For example, in a case concerning damages for an early

51. Jan Paulsson and Georgios Petrochilos, *Revision of the UNCITRAL Arbitration Rules* (2006), 126 at para. 235 (available at: http://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arbrules_report.pdf; accessed 26 March 2021).
52. Fortier, *supra* n. 2, at 834; Tao, *supra* n. 15, at 356; Yves Derains and Laurent Lévy, *Introduction*, in Yves Derains and Laurent Lévy (eds), *Is Arbitration Only As Good As the Arbitrator? Status, Powers and Role of the Arbitrator* (ICC Publication No. 714E, 2011), 9.
53. Gary Born remarks that 'in some deliberations, there is a substantial amount of what might look like "negotiation," in which different issues are resolved through give-and-take. This give-and-take sometimes derives from purely-objective assessment of the merits of different issues and

termination of a business contract where the respondent disputes that the termination was unlawful, one co-arbitrator (typically the one appointed by the respondent) may agree to find liability for damages if the other co-arbitrator (typically the one appointed by the claimant) is willing to compromise on the amount of damages to be awarded to the claimant.[54] Further, it sometimes happens that the co-arbitrator who is left in the minority in the tribunal's deliberations on the substance of the dispute indicates, more or less directly, that he might be willing to accept the majority's reasoning and outcome provided that the tribunal will adjust its decision on the allocation of costs, for example, by not awarding full costs to the claimant although it prevailed on the merits in full.[55]

Are arbitrators within their rights when engaging in such give-and-take? Should the chairperson allow such 'bargaining' when necessary to reach a unanimous award? Anecdotal evidence suggests that many chairpersons are willing to go to great lengths to secure unanimity, feeling that they have failed to manage the deliberations if all arbitrators are not able to agree on the outcome. However, there are also many practitioners who frown upon the kind of quid pro quo setting, where one arbitrator is amenable to concurring with another one only if the latter concedes a particular point. The critics of 'bargaining' underscore that the chairperson should not be overzealous about achieving unanimity because the tribunal's ultimate goal is to reach a correct decision, even if it results in one co-arbitrator issuing a dissenting opinion. If the chairperson agrees with one co-arbitrator that X is right, it is not legitimate to 'bargain' with the minority arbitrator and compromise the correct outcome, so the argument goes.[56]

Whatever the rights and wrongs of this debate, arbitrators should be candid about its existence and prepared to deal with any 'bargaining attempts' if and when they arise in actual deliberations. It is then primarily the chairperson's task to accommodate the different approaches that individual tribunal members may have to the negotiation process and to ultimately strike a balance between the quest for the accurate outcome, on the one hand, and the quest for a unanimous award, on the other hand.[57]

---

sometimes from other factors (including personal egos, general adjudicative philosophies, non-neutral co-arbitrators and the like)'. *See* Born, *supra* n. 19, at 2474. Ugo Draetta proposes various reasons for 'split the baby' decisions, such as the tribunal's lack of 'courage to decide', 'a distorted sense of "equity"', or simply 'the kind of laziness on the part of the arbitrators, in particular the President, in addressing the merits of the claims and counterclaims'. *See* Draetta, *supra* n. 3, at 164-165. *See* also Derains and Lévy, *supra* n. 52, at 8 (explaining brilliantly why 'the worst arbitrator' is 'the one who hates to displease the parties').

54. This example was specifically discussed at the ASA Conference of 1 February 2013, *supra* n. 23. The discussion is recorded in Bernhard F. Meyer, *Structuring a Bargaining Process*, in Berger and Schneider, *supra* n. 3, at 59-66.
55. Bernard Hanotiau, *The Parties' Costs of Arbitration*, in Yves Derains and Richard H. Kreindler (eds), *Evaluation of Damages in International Arbitration* (ICC Publication No. 668, 2006), 221.
56. *See* the discussion at the ASA Conference of 1 February 2013, *supra* n. 23, as recorded in Berger and Schneider, *supra* n. 3, at 65-66, 70 (especially the comments made by Paolo Michele Patocchi and Andreas Reiner).
57. Further on dissenting opinions, *see* section §3.03[G].

The question of 'bargaining' should be separated from the formal *voting rules* that the arbitrators need to comply with under the *lex arbitri*. As an alternative to the chairperson's casting vote, some arbitration laws have introduced a so-called co-adjustment rule which is applicable when the arbitrators are to award a sum of money, and cannot obtain a majority for any particular sum. In such event, the votes in favour of the highest amount are counted with the votes in favour of the next highest amount until a majority is reached.[58] The difference between these two methods may be illustrated with the following example: All three arbitrators grant a claim for damages and vote that the respondent shall pay EUR 1 million, EUR 2 million and EUR 10 million (the chairperson). According to the co-adjustment rule, the amount of the award will be EUR 2 million, whereas under the model based on the chairperson's casting vote, the amount will be EUR 10 million.[59]

How the arbitrators arrange their voting procedures can be decisive to the outcome of the case in other circumstances as well. By way of illustration, imagine that the co-arbitrators are in agreement that liability in damages exists but disagree as to the quantum of the damages. The chairperson, on the other hand, wishes to dismiss the case on the grounds that there is no liability in damages at all. Should the co-arbitrators be in agreement on all issues in order to avoid the outcome being decided by the chairperson? Or is the voting to be divided into different votes so that each question is decided independently?

Arbitration laws are generally silent on this question, and commentators have proposed conflicting solutions. For instance, Redfern and Hunter submit that 'if there is lack of unanimity in relation to one of many issues, the award as a whole will usually be issued by a majority. If there is no majority in relation to a number of issues, the award as a whole should be that of the presiding arbitrator if the relevant rules permit; otherwise, the arbitrators will have to continue, in one way or another, to try and reach a majority decision'.[60] By contrast, Poudret and Besson assert that the chairman should not 'necessarily make use of his casting vote and decide alone on all the issues when a majority is reached on some points only but not on others. Unless such questions are necessarily linked, we feel that it is preferable to vote on each of them and only allow the chairman's casting vote where this is indispensable'.[61]

As evident from the above discussion, arbitrators enjoy certain discretion when fixing their internal voting procedures. They should exercise that discretion prudently in light of the importance that specific voting arrangements may have on the final outcome of the case.

58. *See*, *e.g.*, section 32(1) of the Finnish Arbitration Act (967/1992, as amended). *See* also Article 22(3) of the 1966 European Convention providing a Uniform Law on Arbitration (known as the 'Strasbourg Uniform Law'; available at https://rm.coe.int/CoERMPublicCommonSearch Services/DisplayDCTMContent?documentId = 090000168006ff61; accessed 26 March 2021).
59. Madsen, *supra* n. 5, at 319-320.
60. Redfern and Hunter, *supra* n. 26, at 9.118.
61. Poudret and Besson, *supra* n. 5, at 661. Madsen appears to be of the same opinion; *see supra* n. 5, at 320-322.

[F] Dealing with Biases

It is common knowledge that arbitrators with different cultural background view arguments and evidence in a different light. By way of example, the evidentiary weight of oral versus documentary evidence may be considered differently depending on the nationality and legal training of the tribunal members. Similarly, what strikes one arbitrator as a credible witness testimony may appear as evasive and untrustworthy to another one, simply because of cultural predispositions.

In recent years, psychologists and other students of human behaviour have also investigated how various psychological biases affect legal decision-making, including during the deliberations of an arbitral tribunal. In remarkable studies, researchers have determined that a sizable percentage of arbitrators have established a clear leaning in the case by the end of the opening statement (prior to any exposure to witness evidence). Moreover, with each arbitrator being uniquely influenced by his lifetime experiences, they construct different assessments of cases even when exposed to the very same facts, evidence and arguments. This process of creating a narrative for the case is central to the arbitrator's ultimate findings on the substance of the dispute: once a narrative has become firmly visualized, arbitrators will rarely change their opinions about what happened, although they will occasionally change their minds about how the events should be legally classified.[62]

Researchers have labelled this tendency as 'confirmation bias' (sometimes also referred to as 'belief bias effect'). Essentially, it stands for the proposition that the evaluation of evidence is influenced by prior beliefs such that people are inclined to selectively use the information to arrive at conclusions that justify their prior beliefs. Additionally, when confronted with information that contradicts their existing views, people evaluate it with greater scepticism.[63] This tendency is closely related to another phenomenon known as the pre-decisional distortion of information, which posits that once initially neutral decision-makers identify a leading alternative based on the evaluation of the first evidence they encounter, they then have a tendency to bias their evaluation of subsequently encountered information towards supporting the leading alternative.[64]

'Anchoring' is another well-documented bias. Study after study has shown that when people make numerical estimates, they commonly rely on the *initial value* available to them (irrespective of their expertise). That initial value tends to 'anchor'

62. Richard C. Waites and James E. Lawrence, *Psychological Dynamics in International Arbitration Advocacy*, in Bishop and Kehoe, *supra* n. 11, at 109-110, 114; Edna Sussman, *Biases and Heuristics in Arbitrator Decision-Making: Reflections on How to Counteract or Play to Them*, in Tony Cole (ed), *The Roles of Psychology in International Arbitration* (Kluwer Law International B.V., 2017), 64.
63. Peter Ayton and Geneviève Helleringer, *Bias, Vested Interests and Self-Deception in Judgment and Decision-Making: Challenges to Arbitrator Impartiality*, in Cole, *supra* n. 62, at 38. American judge and legal scholar Richard Posner has summarized the idea concisely: 'people hate being in a state of doubt and will do whatever is necessary to move from doubt to belief'. *See* Richard Posner, *The Jurisprudence of Skepticism*, 86 Michigan Law Review 827, 873 (1988).
64. Ayton and Helleringer, *supra* n. 63, at 39-40.

their final estimates even if the anchor provides no useful information.[65] In other words, even completely irrelevant numbers unconsciously move the decision-maker's thinking in the direction of that number. The 'anchoring bias' may be pernicious especially in the tribunal's assessment of the parties' conflicting damages calculations.[66]

The difficulty with biases lies in the fact that they are largely subconscious. People are oblivious to the contaminating effect that biases have on their judgment, labouring instead under the illusion of objectivity. Worse still, studies have concluded that simply understanding the need to avoid biases, and the desire to overcome them, is not sufficient to cure the problem: awareness of the mental contaminant and motivation to correct it is unlikely to lead to full control.[67]

All this paints a rather grim picture of the hurdles that arbitrators will face when endeavouring to conduct their deliberations impartially and with an open mind. While not a fail-safe procedure to counter the harmful effects of biases, arbitrators may find it useful to consider the following list of actions in order to mitigate the problem:

- Create a checklist with columns for each party, listing the facts that favour the party in question. Then do the same for legal arguments.
- Reduce your reliance on memory. Look for record citations for all of the important facts for both sides to ensure that you have recalled them correctly.
- Consult your fellow arbitrators closely. Review all aspects of the facts and law with them. Elicit independent thinking of each member of the tribunal.
- Identify why you may be wrong, what are the important pieces of evidence that go the other way and why are they not reliable or credible.
- Replay how you reached your conclusion. Think about what evidence you rejected, and why, in reaching that conclusion.
- Ask yourself what the losing party would feel that you overlooked in your analysis.[68]

65. Mark A. Cymrot and Paul Levine, *Going First Makes a Difference: Decision-Making Dynamics in Arbitration*, in Cole, *supra* n. 62, at 180-182; Sussman, *supra* n. 62, at 55.
66. Sussman, *supra* n. 62, at 55-56. *See* also US District Judge Mark W. Bennett (as quoted in Cymrot and Levine, *supra* n. 65, at 184): 'anchoring bias suggests that the first items of information are likely to receive more consideration than information that appears later. Although the order in which information is received should be irrelevant to decisions that rely on that information, the mind does not work this way. First impressions are powerful influences on judgment and seem to provide the prism through which subsequent information is filtered. Even when first impressions are erroneous, they continue to affect judgment long after they have been discredited'.
67. Ayton and Helleringer, *supra* n. 63, at 41-43; Sussman, *supra* n. 62, at 65-66. As eloquently explained by the late, great Lord Goff in *R v. Gough* [1993] 2 All ER 724: 'bias is such an insidious thing that, even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by bias'.
68. The above list is inspired by, and partly quoted from, Sussman, *supra* n. 62, at 67-68.

[G] Dealing with Dissents

Harmonious deliberations do not necessarily imply unanimity on all issues to be decided. Even tribunals permeated by a strong spirit of collegiality and mutual respect may disagree on complex substantive or procedural matters.[69] The question then arises whether, and how, a dissenting arbitrator may voice his dissent where necessary.

Most arbitration laws and rules do not mention dissenting opinions. Under such systems, dissenting opinions are generally permitted (although not encouraged). In practice, however, many arbitrators (especially chairpersons) feel that they should do their utmost to produce a unanimous award and avoid dissents. There are many reasons for that: unanimous awards have a greater legitimacy in the eyes of the parties and may encourage voluntary compliance, whereas a majority award may engender doubts about the outcome and invite unmeritorious challenges; allowing arbitrators to dissent 'too easily' can dissuade them from seeking a unanimous solution; in some legal systems, dissents may be seen as impinging upon the secrecy of the tribunal's deliberations; and last but not least, in commercial arbitration, dissenting opinions rarely serve any meaningful purpose as there is no 'auditorio' except for the parties, who need a decision, not an opinion. Besides, it is beyond question that dissenting opinions should not be issued merely in order to 'provide therapy' for the losing party (who nominated the dissenting co-arbitrator) or for the dissenter himself (who may feel marginalized for not being able to persuade his co-arbitrators to agree with him).[70] If party-appointed arbitrators show their allegiance through a dissent, they undermine the authority and perceived neutrality and independence of the arbitral tribunal.[71]

There is undoubtedly force in the arguments against dissenting opinions in commercial cases.[72] To add one consideration to the list, arbitrators – and the parties

69. Derains explains this well: 'L'harmonie ne se confond pas avec l'unisson. En matière internationale, les arbitres appartiennent souvent à des traditions juridiques différentes. Il en résulte des conceptions opposées non seulement quant à la conduite de la procédure mais aussi quant à l'analyse des dispositions contractuelles et la perceptions des relations d'affaires, voire des relations humaines plus généralement. … Un délibéré harmonieux n'est pas un délibéré dominé par une unanimité permanente. Il connaît des confrontations d'idées, des débats parfois difficiles. Mais il se distingue du délibéré pathologique, en ce que les divergences d'opinions entre les arbitres résultent de convictions personnelles de chacun d'entre eux et ne sont pas le simple reflet des positions contradictoires des parties.' *See* Derains, *supra* n. 7, at 231.
70. C Mark Baker and Lucy Greenwood, *Dissent – But Only If You REALLY Feel You Must: Why Dissenting Opinions in International Commercial Arbitration Should Only Appear in Exceptional Circumstances*, 7 Dispute Resolution International, 31, 39 (2013).
71. For a concise summary of arguments for and against dissents, *see* Manuel Arroyo, *Dealing with Dissenting Opinions in the Award: Some Options for the Tribunal*, 26 ASA Bulletin 437, 457-459 (2008); and Audley Sheppard and Daphna Kapeliuk, *Dissents in International Arbitration*, in Cole, *supra* n. 62, at 324-328, 332-336.
72. Investment arbitration is a slightly different animal. While reliable statistics are hard to find, dissenting opinions seem to be more common in investor-state cases than in commercial arbitration. Some see them as contributing to the development of investment law, especially as most treaty-based awards are publicly available. However, a few renowned practitioners have criticized dissenting opinions in investment cases too for the reason that nearly 100% of them are in favour of the party that appointed the dissenting arbitrator, which raises concerns about neutrality. On this debate, *see* Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25 ICSID Rev – FILJ 339, 339-355 (2010); Albert Jan van den Berg, *Dissenting Opinions by*

themselves – should realize that an arbitrator is not expected to issue a dissent even though he would disagree on some aspect of the tribunal's decision. Indeed, there is no duty to dissent, except perhaps in the very rare case of breach of due process during deliberations.[73] Still, in the end, intellectual honesty and rigour must rule the day, and in certain cases dissents may be appropriate. I personally subscribe to the view that if an arbitrator strongly believes that the majority is taking such a seriously wrong decision that his conscience does not allow him to remain silent – and the minority arbitrator fails to convince his fellow arbitrators to change their mind – there is nothing wrong in penning a dissent. But such circumstances probably do not arise very often.

There are many different ways in which an arbitrator may express his dissent: decline to sign the award at all; sign the award noting his dissent next to his signature; sign the award, but request that his dissent be expressly mentioned in the reasoning of the award, in more or less detail, for example, next to the portions of the award to which the dissent relates (or even just in a footnote); or write a separate dissenting opinion to be appended to the award.[74] As a practical matter, the tribunal will need to discuss internally how the dissent should be technically dealt with. If the majority arbitrators agree on the incorporation of the dissenting opinion in the award, they could include it in full; include a summary of the dissenter's views; or intersperse particular aspects of the dissent throughout the majority reasoning. Where reference is made to the dissent, the majority arbitrators can then decide whether or not to give reasons as to why they disagree with the dissenter.[75]

An arbitrator who wishes to issue a dissenting opinion should exercise that right with due respect for the integrity of the process and his duty of collegiality to fellow arbitrators. The dissenting opinion should not disclose any details of the deliberations; it should be clearly identified as the personal opinion of its author; it should be limited to explaining the basis of the opinion, rather than criticizing and thereby undermining the majority reasoning; it should not raise any new arguments that the arbitrator failed to raise at the deliberations; and it should not unduly assist the losing party in asserting

---

Party-Appointed Arbitrators in Investment Arbitration, in Mahnoush H Arsanjani, Jacob Katz Cogan, Robert D Sloane and Siegfried Wiessner (eds), *Looking to the Future: Essays on International Law in Honor of W Michael Reisman* (Martinus Nijhoff, 2011), 821-843; Charles N. Brower and Charles B. Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson–van den Berg Presumption That Party-Appointed Arbitrators are Untrustworthy is Wrongheaded*, 29 Arbitration International 7, 7-44 (2013); Albert Jan van den Berg, *Charles Brower's Problem with 100%–Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, in Caron et al., *supra* n. 20, 504-513; Born, *supra* n. 19, at 3313.

73. Waincymer, *supra* n. 21, at 1299; Antonias Dimolitsa, *Are Genuine Dissenting Opinions of Any Real Use?*, in Andrea Carlevaris, Laurent Lévy, Alexis Mourre and Eric A. Schwartz (eds), *International Arbitration Under Review: Essays in Honour of John Beechey* (ICC Publication No. 772E, 2015), 139; Bernhard Berger, *Rights and Obligations of Arbitrators in the Deliberations*, 31 ASA Bulletin 244, 260 (2013). Berger refers approvingly to Article 9 of the IBA Rules of Ethics for International Arbitrators (1987), which provides that an exemption from the general confidentiality of deliberations may have to be made if the minority arbitrator 'considers it his duty to disclose any material misconduct or fraud on the part of his fellow arbitrators'.
74. Draetta, *supra* n. 3, at 168-169; Sheppard and Kapeliuk, *supra* n. 71, at 313.
75. Arroyo, *supra* n. 71, at 459-461; Waincymer, *supra* n. 21, at 1307.

grounds for annulment or challenges to enforcement.[76] Also, the minority arbitrator should produce a written draft of the dissenting opinion for consideration by the other arbitrators so as not to take them by surprise, and to give the majority arbitrators an additional chance to reconsider and improve their reasoning.[77]

It is primarily the chairperson's responsibility to organize the deliberations smoothly in the face of dissenting opinion(s). Unperturbed by the prospect of dissent, the chairperson should make the arrangements required in order for the dissent to be received, considered and incorporated into the award. As a general rule, no extension of time to complete the deliberations should be granted merely on the grounds that the minority arbitrator wishes to formulate a dissenting opinion.[78] The chairperson should also ensure that the rendering of the award will not be delayed because of a dilatory dissenting arbitrator.[79]

[H] Dealing with Partisan Arbitrators and Other Difficult Tribunal Members

It is often said that party-appointed arbitrators have a special role in ensuring that their appointing party's case is properly understood by the tribunal. However, there is a fine line between fulfilling that role and sacrificing one's integrity. Experience tells that some co-arbitrators have difficulties being fully impartial, and they may express a tendency to discount the more complex or weaker aspects of the nominating party's case.[80] Occasionally a party-appointed arbitrator may act in a completely partisan manner. Examples include: explicitly advocating the nominating party's positions during the deliberations; threatening to resign if the majority will not agree to rule in

76. Arroyo, *supra* n. 71, at 456; CIArb Guideline, *supra* n. 6, at 14-15; Draetta, *supra* n. 3, at 171-172; Waincymer, *supra* n. 21, at 1311-1312; James H. Carter, *The Rights and Duties of the Arbitrator: Six Aspects of the Rule of Reasonableness*, in Jean-François Bourque (ed), *The Status of the Arbitrator, ICC International Court of Arbitration Bulletin: 1995 Special Supplement* (ICC Publishing S.A., 1995), 33; Alan Redfern, *The 2003 Freshfields Lecture – Dissenting Opinions in International Arbitration: The Good, the Bad and the Ugly*, 20 Arbitration International 223, 226 (2004). Redfern submits that 'the "good" dissent may be short, polite and above all restrained, so that the dissenter says: "It is with regret that I must dissent from the views of my learned colleagues", followed perhaps by a few short, sharp sentences' (*id.*, at 226).
77. CIArb Guideline, *supra* n. 6, at 14; Fortier, *supra* n. 2, at 835; Lloyd et al., *supra* n. 22, at 33; Draetta, *supra* n. 3, at 172-173. Draetta notes, however, that 'often dissenting opinions are issued only at the last minute and unexpectedly by the other arbitrators', with the result that they fail to 'give any time to the other co-arbitrators to possibly change their mind' (*id.*, at 173).
78. Arroyo, *supra* n. 71, at 461-462; Patocchi and Briner, *supra* n. 11, at 302; Waincymer, *supra* n. 21, at 1308.
79. Arroyo, *supra* n. 71, at 461-462; Sheppard and Kapeliuk, *supra* n. 71, at 334; Dominique Hascher, *Collection of Procedural Decisions in ICC Arbitration 1993–1996* (ICC Publishing S.A. – Kluwer Law International, 1998), 70.
80. Sophie Nappert and Dieter Flader, *Psychological Factors in the Arbitral Process*, in Bishop and Kehoe, *supra* n. 11, at 126. The authors put forth various possible explanations for 'partisan' behaviour: 'arbitrators are free agents. Unlike judges, they have no tenure, and operate in a competitive market for services. The quest for future appointments may colour the arbitrators' behaviour, and impact on their decision-making. They may be reticent to render difficult, or unpopular, decisions and prefer to split cases down the middle. In a three-member tribunal, they may tend to rely on dissents rather than look for consensus in deliberations, which could imply

favour of the party in question; secretly informing the appointing party of the views of the other tribunal members so that it could anticipate the tribunal's decisions; or refusing to participate in the deliberations so as to derail the proceedings and delay the rendering of an award.[81]

While such conduct is obviously improper, it is not unheard of in practice. Partisan arbitrators present a real threat to the legitimacy of international arbitration. Apart from that, they pose difficult questions to the fellow arbitrators, and particularly the chairperson, as to how to conduct the deliberations and award drafting. Below are some suggestions that conscientious arbitrators may find useful in the event that the deliberations turn out to be 'pathological' because of one arbitrator's objectionable tactics:

- If the relationship between the tribunal members is suboptimal, a chairperson might best conduct deliberations in a formal manner with written records.[82] He should also be careful not to disclose his preliminary views on the merits of the case too early in order to avoid any attempt by a partisan co-arbitrator to disrupt the proceedings by dilatory manoeuvres, such as untimely resignation or leakage of information of the tribunal's internal discussions to the appointing party.[83]
- As soon as one of the co-arbitrators starts dissenting on procedural or substantive issues, every effort should be made by the majority to continue keeping that arbitrator fully informed, invited to and involved in the tribunal's deliberations and decision-making.[84] However, if one arbitrator refuses to participate in the deliberations without good reason, the other arbitrators may proceed in the arbitrator's absence after giving appropriate notice of the meeting(s) and offering an opportunity to submit comments on the issues to be decided.[85]
- Where the majority arbitrators proceed with the deliberations, they should draft the award and then ask the non-participating arbitrator to review the draft and submit any comments he may have. It is a good precaution to send the draft by registered mail with notice of receipt or by any equivalent means allowing proof of delivery.[86]
- As long as the non-participating arbitrator has not resigned, such arbitrator should be treated as if he is still willing to participate in any deliberation

a degree of compromise that they consider would affect their eligibility for reappointment'. *Id.*, at 126. *See* also Derains and Lévy, *supra* n. 52, at 8; and Sheppard and Kapeliuk, *supra* n. 71, at 331, 333.

81. Alonso, *supra* n. 7, at 143-144; Born, *supra* n. 19, at 2473; Briner, *supra* n. 22, at 64; Derains, *supra* n. 10, at 23-24; Marc J. Goldstein, *Living (or Not) with the Partisan Arbitrator: Are There Limits to Deliberations Secrecy?,* 32 Arbitration International 589, 595-596 (2016).
82. Böckstiegel, *supra* n. 22, at 126; Waincymer, *supra* n. 21, at 1294.
83. Derains, *supra* n. 10, at 23-24.
84. Böckstiegel, *supra* n. 22, at 121.
85. CIArb Guideline, *supra* n. 6, at 13.
86. Briner, *supra* n. 22, at 65; CIArb Guideline, *supra* n. 6, at 13; Patocchi and Briner, *supra* n. 11, at 303.

meeting and available to comment on a draft award. Even if he has made it clear that he will not participate, he should continue to receive the drafts and be given adequate time to present his comments.[87]

- The majority is well advised to record in the final award all of its efforts to engage the minority arbitrator in the tribunal's deliberations. This serves to minimize the risk of later allegations that the arbitrator was improperly excluded from the tribunal's decision-making and/or did not have a reasonable opportunity of submitting his views and influencing the content of the award. The best protection against ill-conceived setting aside actions is to demonstrably offer every opportunity for the minority arbitrator to take part in the tribunal's deliberations and decision-making.[88]
- Once the chairperson is satisfied that the necessary opportunity has been given to both co-arbitrators to express their views, he should fix a date at which deliberations will be closed and the award will be issued. The chairperson should simultaneously note that all questions have been discussed and decided and indicate whether certain (or all) decisions will be taken by majority (or possibly by the chairperson alone, if permitted under the applicable rules).[89]

Behaviour does not have to be criminal to be obnoxious.[90] Rather than being outright partisan, some arbitrators display other unwelcome personality traits. There are arbitrators who are simply lazy, or too busy with other cases; they may show up in hearings and deliberations unprepared and without proper knowledge of the case file. Equally difficult are those tribunal members who are 'a law unto themselves', too intransigent to even consider revaluation of their position.[91] There is not much that even the most experienced chairperson can do to effectively manage arbitrators with flawed personalities. The only advice is for the parties (and the arbitral institutions, as the case may be) to avoid reappointing incompetent or unprincipled arbitrators in future cases.

One should not, however, overstate the problem with the partisan arbitrators. In practice, the problem is often resolved by the other two tribunal members adopting a suspicious attitude towards the biased arbitrator so that he will end up in the minority and have no influence on the outcome.[92] The point has also been made that, although there will inevitably always be some arbitrators who deviate from duty, for most people, the incentive to maintain a reputation for independent judgment trumps any temptation to inappropriate behaviour. A strong incentive to good conduct derives

87. Patocchi and Briner, *supra* n. 11, at 303.
88. Briner, *supra* n. 22, at 64; CIArb Guideline, *supra* n. 6, at 12; Taivalkoski, *supra* n. 29, at 67.
89. Briner, *supra* n. 22, at 65.
90. William G. Bassler, *An Essay on the Challenges to Collegiality*, in Berger and Schneider, *supra* n. 3, at 112.
91. Bassler, *supra* n. 90, at 112-114; Born, *supra* n. 19, at 2474, fn. 1063 (quoting Pierre-Yves Tschanz); Phillip Capper, *Dealing with Bias and Obstruction*, in Berger and Schneider, *supra* n. 3, at 46-47; Draetta, *supra* n. 3, at 150; Tao, *supra* n. 15, at 358.
92. Goldstein, *supra* n. 81, at 598; Julian D M Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003), 316.

from the shame of appearing as biased, lazy or incompetent in the eyes of fellow arbitrators.[93]

[I] Final Considerations

Deliberations is a broad and many-faceted topic. This article has touched on only some of the key aspects. Other important issues, which can only be listed briefly here, include the following:

- Arbitrators may sometimes realize, during deliberations and after the proceedings have already been closed, that there are points not adequately addressed by the parties that may be decisive to the outcome of the case. The question arises as to whether the parties should be given the opportunity to address such points.[94] As a rule, the tribunal's reasoning and findings should not extend to matters that the parties have not had a chance to comment upon in their submissions, as the award may otherwise become vulnerable to attack. The tribunal may therefore need to consider reopening the proceedings on a particular point.
- When contemplating whether to reopen the proceedings, the tribunal should be careful to avoid any appearance of bias. This may be difficult as the reopening of the case on a given point sua sponte may well give the parties a clear indication as to what direction the tribunal seems to be going in the resolution of the merits of the dispute. In such circumstances, the tribunal must seek to reconcile its desire to do justice with the need to maintain its impartiality and neutral image in the eyes of the parties. A decision to reopen the proceedings should never be made lightly; rather, it should be reserved to situations where it is necessary in order to secure due process.[95]
- An arbitration is only as good as the final award. While efficiency, expeditiousness and procedural fairness are important, it is the award that is the true measure of quality in an arbitration.[96] In drafting the award, the tribunal needs to have in mind first and foremost the parties: the award is intended for them. The tribunal should facilitate voluntary compliance by producing an award which explains clearly and persuasively how and why it has arrived at its conclusions. Additionally, the tribunal must resist the temptation to express opinions on matters of fact or law which do not need to be determined in order to decide the case. The cardinal principle of judicial restraint – if it is not

93. William W. (Rusty) Park, *Rules and Reliability: How Arbitrators Decide*, in Cole, *supra* n. 62, at 17.
94. Mosk, *supra* n. 20, at 497.
95. Mika Savola, *Guide to the Finnish Arbitration Rules* (Lakimiesliiton Kustannus, 2015), 355-356.
96. Anja Ipp, *Show, Don't Tell: Creative Writing for Arbitrators*, in Antonio Crivellaro and Mélida N. Hodgson (eds), *Explaining Why You Lost – Reasoning in Arbitration* (ICC Publication No.: 810E, 2020), 68.

necessary to decide more, it is necessary not to decide more – ought to guide the award drafting.[97]

- The drafting process should be organized efficiently and conducted in a collegial manner. When submitting their comments on the chairperson's draft, usually in a marked-up form, the co-arbitrators should focus not only on the substantive questions but also on typographical errors and potential inconsistencies or gaps in the chairperson's reasoning. At the same time, the co-arbitrators should bear in mind that everyone has his own 'style' and that the purpose of the cooperation is not to rewrite the draft out of a misplaced pride of authorship. This also means that, in the event of disagreement over some of the amendments suggested by a co-arbitrator, the chairperson has the final say.[98]
- There are often issues related to the arbitrators' tax liabilities, or social security payments, that need to be considered before the final award is made. The chairperson should see to it that these are properly taken care of.[99]
- An award has to be signed by all arbitrators. Real signatures are required; electronic signatures will not suffice. The process for gathering signatures has to be planned and organized sufficiently early on to accommodate the busy calendars of all three tribunal members and to avoid any unnecessary delay in the rendering of an award because of the unavailability of the arbitrator(s) to sign the award at a given point in time.[100]
- Finally, the award must be properly distributed to the parties and/or the arbitration institute concerned.[101] The lex *arbitri* will determine whether the parties are entitled to have an original of the award or only a copy thereof. Differences exist across jurisdictions also when it comes to the question of whether the award can be validly delivered to counsel for the parties or whether it has to be delivered to the party itself. The tribunal should investigate these issues before making the award to ensure its valid service to the parties.[102]

97. Lloyd et al., *supra* n. 22, at 27. Böckstiegel advises as follows: 'Decide the case, no more! The award is not the place for the arbitrators' missionary feelings or academic ambitions.' *See* Böckstiegel, *supra* n. 22, at 126. In a similar fashion, van den Berg reminds that 'arbitration is not about academic hobby-horsing; rather, it is a service industry. This means in particular that the tribunal has to aim at a result where both parties have the feeling that (a) their case has been carefully considered, and (b) that they have been treated fairly'. *See* van den Berg, *supra* n. 38, at 418.
98. Draetta, *supra* n. 3, at 159.
99. Scherer, *supra* n. 29, at 29.
100. Scherer, *supra* n. 29, at 28.
101. In some jurisdictions, a copy of the award may also have to be deposited at the state court's register. *See* Hans van Houtte, *The Delivery of Awards to the Parties*, 21 Arbitration International 177, 179 (2005).
102. van Houtte, *supra* n. 101, at 181.

§3.04 CONCLUDING REMARKS

Tant vaut l'arbitre, tant vaut l'arbitrage. This old adage is particularly true for deliberations. In the words of one prominent arbitrator, deliberations can be 'a stimulating exercise' when all members of the tribunal have the 'moral and intellectual qualities required' and 'a nightmare' when one co-arbitrator (or, occasionally, both) have 'no other purpose than to continue the parties' war inside the tribunal'.[103] Even when the arbitrators have cultivated good working relations, managing deliberations is an art which requires prudence, skill and firmness.[104] It does not come naturally to everyone, but like any other skill, it can be learned through experience.

In this article, I have tried to outline some practices that international arbitrators may wish to apply in their deliberations. I readily admit that a degree of humility is in order when approaching the subject: as each arbitration is a world of its own,[105] all generalizations are difficult and potentially dangerous. Still, I believe that following the advice and guidelines discussed above will generally be conducive to successful deliberations. And the better the deliberations, the greater the likelihood of the tribunal producing a high-quality award – which is what matters most at the end of the day.

103. Derains, *supra* n. 10, at 24.
104. Alonso, *supra* n. 7, at 132; Poudret and Besson, *supra* n. 5, at 652.
105. Alonso, *supra* n. 7, at 136; Tao, *supra* n. 15, at 353.