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Thoughts on the Chairing Styles Adopted by Presiding Arbitrators

Author: Emilia Onyema, Independent International arbitrator, and Professor of International Commercial Law at SOAS University of London.

Introduction

Most arbitration laws and rules provide for an odd-number arbitral tribunals and generally, the majority of tribunals, are composed of either a sole or three-member arbitrator(s). Examples are, Article 7(1) of the UNCITRAL 2010 Arbitration Rules; Article 12(1) of the ICC 2021 Arbitration Rules; and Article 12 of the 2012 KIAC Rules.

This blog examines the nature of these two types of tribunals and focuses on the participation of arbitrators in a multi-member tribunal and suggests the need for greater engagement of all the members of a tribunal in any arbitration. This refers to more engagement of all the arbitrators in the tasks of the tribunal. This will ensure that co-arbitrators gain actual practical experience and develop their practice as arbitrators. This blog examines these issues from the perspective of a sole arbitrator tribunal and a multi-member arbitral tribunal and concludes.

Sole Arbitrator

An arbitral tribunal composed of a sole arbitrator appears to be favoured under some national arbitration laws and arbitration rules, particularly in (seemingly) less complex and low value disputes. In some institutions, the sole arbitrator tribunal is favoured for the appointment of new arbitrators. In such a tribunal, the individual forming the tribunal is all by themself during the arbitral proceedings and makes all decisions by themself. They may appoint a tribunal secretary but the role of such a secretary is very limited and not considered in this blog [for more information on tribunal secretaries, see ICCA 2015 Report].

At the end of the proceedings, the sole arbitrator determines the issues and makes their decision. Some arbitration practitioners describe the sole arbitrator tribunal

as a lonely one. The arbitrator has no one to bounce ideas off or discuss the issues arising from the dispute. New entrants as arbitrators, also find themselves sitting as sole arbitrators. As is well known, the vast majority of disputes are not as straightforward as they may initially appear. This may be a good experience for the new arbitrator to 'cut their teeth' but the workload may also cause disillusionment for the unsuspecting.

On the positive, we recognise that this creates a good opportunity for the sole arbitrator to learn their trade and develop their practice. However, because they are all by themself, the benefits will be greatly multiplied or enhanced when the sole arbitrator acts under a set of rules that provides scrutiny of awards before such awards are published [such as under the ICC, KIAC, Iran Centre, Rules]. Such a scrutiny process allows experienced arbitration colleagues that are members of the particular centre or their court, to read the draft award with fresh eyes and provide comments for the consideration of the sole arbitrator. In the experience of colleagues, such scrutiny, they say, has always been helpful and reassuring to them of the soundness of the decision they make.

As it relates to the sole arbitrator and their opportunity for repeat appointments, one major downside to acting as a sole arbitrator, is the fact that other arbitrators cannot speak to your practice or abilities as an arbitrator. This 'recommendation' by other arbitrators remains important with arbitrator recommendation databases such as Arbitrator Intelligence. These databases draw their ratings or recommendations from the comments or feedback from other arbitrators who can speak to the practice of those arbitrators they have sat with. Therefore, if an arbitrator always acts as a sole arbitrator, few colleagues can speak to their arbitration practice. This is compounded by the fact that few commercial arbitral awards are published except, if the award's enforcement is challenged or it goes through an annulment procedure, to possibly bring the award into the public domain.

This blog, therefore, suggests that there must be a balance in the acceptance of appointments by prospective arbitrators. In particular for new entrants who need

the support of other colleagues to develop their practices and decision-making abilities. It may, therefore, be more prudent for new entrants to be appointed onto multi-member tribunals with established arbitrators from whom they can learn and who can 'recommend' or speak directly to their practice and abilities. This recommendation presupposes that in such a multi-member tribunal, all arbitrators fully engage with the process and meaningfully contribute to the proceedings and decision-making, which may not necessarily be a correct presumption.

Multi-member Tribunal

The other type of arbitral tribunal is usually composed of multiple individuals of an odd number and the most common is a three-member tribunal. There can also be five or even more members tribunals but this configuration does not impact either way on the discussion in this blog. A multi-member tribunal has the advantages of discussion and sharing of views and ideas on the dispute between its members. In addition, members of the tribunal can speak from direct knowledge of the arbitration practice of the other members of the tribunal as discussed above.

It is important to observe that this type of tribunal may impact the cost of the arbitration as the parties may pay more for more arbitrators or more hours spent by the tribunal. It is also correct to observe that a multi-member tribunal may impact on the fees earned by each arbitrator as they may share the pre-determined fee payable and so earn less than if the tribunal was composed of a sole arbitrator.

A multi-member tribunal may also take longer with greater logistical problems with physical meetings and different time zones for virtual hearings. One major task in a multi-member tribunal (which is not relevant in a sole member tribunal) is the selection and appointment of a presiding arbitrator. We note that most information available online on the presiding arbitrator focus on how such arbitrator may be selected and appointed. One example is the Jus Mundi Protocol. There is little published on the role of the presiding arbitrator which is primarily

managerial. An 2017 article from the China Business Law Journal notes that the presiding arbitrator has great influence over the outcome of the arbitration.

Some arbitration laws and rules allocate a greater role or function to the presiding arbitrator, who generally may be paid a higher fee. For example, the presiding arbitrator may on their own, make procedural decisions and effectively chair meetings whether with the parties or only the tribunal members. The presiding arbitrator also leads the evidentiary hearing and corresponds between the tribunal and parties (particularly in the absence of a tribunal secretary) and in ad hoc arbitrations may organize the deposit and payment or disbursement of funds from the parties. In recognition of these extra tasks, the presiding arbitrator may earn a little more or clock more billable hours than the co-arbitrators.

Some (presiding) arbitrators have sometimes bemoaned the lack of participation or little engagement from some co-arbitrators appointed onto multi-member tribunals. The possibility that a co-arbitrator can passively go through the arbitration without performing any major task of drafting or leading a meeting with the parties, is very concerning and is the main trigger for this blog.

If the argument is for new entrants to be appointed onto multi-member tribunals as discussed above, then all arbitrators must have the opportunity to fully participate in any tribunal they are appointed onto. This blog recognises and examines two different managerial styles adopted by presiding arbitrators and argues that a more participatory tribunal, with a division of tasks to be performed by all members of the tribunal, is the more beneficial style for the parties and the international arbitration community. The blog also acknowledges the possibility that more presiding arbitrators style will fall somewhere between the spectrum of the two polar-opposite styles discussed below.

Presiding Arbitrators Management Styles

There appears to be two polar-opposite styles adopted by presiding arbitrators. One style can be described as ‘participatory’ which engages with the co-

arbitrators, and the second style can be described as ‘domineering’ or ‘controlling’, which does most of the tasks by themself and the co-arbitrators are not as engaged as they could possibly be.

The participatory presiding arbitrator is one that ensures the active participation of all members of the tribunal. They engage the co-arbitrators and may allocate some drafting tasks for the consideration of the tribunal before it is issued. For example, co-arbitrators can draft the terms of appointment, agenda for the preliminary meeting, procedural orders, and other decisions of the tribunal and may be allocated sections of the final award to draft. As a learning tool, such participation will be beneficial to new entrants who when they are appointed as sole arbitrators, will understand the process and how to write various decisions.

The domineering presiding arbitrator’s style is to take absolute control over the arbitration (in some cases as though they were a sole arbitrator) with the misconceived notion that the success of the arbitration is their sole responsibility. In such a situation, the presiding arbitrator forgets that the success of the arbitration is the responsibility of the tribunal (not one arbitrator). Such presiding arbitrator basically takes charge of the arbitration and performs all or most of the tasks themselves and hopefully keeping the co-arbitrators informed.

There are tasks that the presiding arbitrator can and ideally should share with the co-arbitrators, particularly at the award drafting stage. For example, the co-arbitrators or one of them can draft the procedural history, the issues can be split between the arbitrators (after deliberations) to draft, with the presiding arbitrator pulling all drafts together as one document for review of the members of the tribunal. Some presiding arbitrators prefer to draft the final award by themselves (after the deliberations) and circulate to the co-arbitrators for comments and further discussions, if necessary, before the draft is finalised for publication to the parties or to the institution.

As already noted, it may be that some presiding arbitrators fall somewhere between these two broad descriptions. It is however important that presiding arbitrators avoid the domineering style.

The question that these two styles raise is whether the parties (and co-arbitrators) should be informed of the managerial style of the proposed nominee to preside over the tribunal, before they are appointed. To effect this, it will require each arbitrator to identify their presiding style and the reasons for their preferred style, and their willingness to adapt as necessary and as needed by the co-arbitrators.

Conclusion

This blog shares some thoughts on the managerial styles of presiding arbitrators and identified two broad styles, one being participatory (and which is the preferred option if circumstances permit) and the domineering style which should be avoided. The blog also argues for each arbitrator (particularly new entrants) to resist having too many appointments as sole arbitrator or as co-arbitrator without any experience of sitting as a presiding arbitrator.