

## **THE ROLE OF THE PRESIDING ARBITRATOR SELECTED ISSUES**

### **1. THE ROLE OF THE PRESIDING ARBITRATOR – GENERAL COMMENTS**

1. The “ship master”, within limits.
2. Getting the ship under way:
  - a. Initial communication to Parties.
  - b. Verification that all arbitrators have the same materials.
  - c. Making proposals to co-arbitrators and ensuring consensus:
    - i. Initial meeting / telephone conference.
    - ii. Scope of guidelines required (on communications with the parties, format of submissions, presentation of evidence, use of IBA guidelines etc.).
    - iii. Provisional timetable including specific issues: document production, site visit, need for pause between submissions etc.
    - iv. Possibility for Tribunal to act as settlement facilitator.
    - v. Need for administrative secretary.
  - d. Drafting of initial documents: Terms of Reference (or appointment), Procedural Order No 1, special procedural rules.
3. Mastering the ship
  - a. Verification of deadlines / parties' communications and submissions.
  - b. Acknowledging receipt of communications.
  - c. Prompting co-arbitrators and anticipating steps ahead/work required.
  - d. Managing the finances (if no institution to do it).
  - e. Managing the administrative secretary.

## **2. ONGOING COMMUNICATIONS DURING THE PROCEEDINGS**

### 1. Parties

- a. Ex parte communications: can the Presiding Arbitrator contact each Counsel by telephone? What if one party does?
- b. Meetings with the Parties without the co-arbitrators.
- c. Communication to the Parties: can the co-arbitrators communicate on behalf of the Tribunal or only the Presiding Arbitrator?
- d. How to deal with leaks and bias of one arbitrator?

### 2. Institution

- a. When should communications to the institution be joint (on behalf of the Tribunal); when not?

### 3. Co-arbitrators

- a. Maintaining both arbitrators "in the loop": when are ex parte communications appropriate? What if one arbitrator always calls and the other always writes and is not available for telephone conferences?
- b. Communication to and from /use of administrative secretary.

## **3. PROCEDURAL DECISIONS**

1. When and for what types of decisions can the Presiding Arbitrator make decisions alone?
2. What about emergencies? (E.g. belated requests for extensions; late filing of submissions; urgent requests for unsolicited submission or evidence; etc.)
3. What to do if the co-arbitrators do not agree on procedural issues? (E.g. extensions, site visit, bifurcation, etc.)

#### **4. THE HEARING**

##### 1. Preparation / planning

- a. Logistics: rooms, court reporter, interpreter, etc.
- b. Pre-hearing conference: issues for discussion with the Parties (levelled playing field).
- c. Final verification of set up before the hearing.

##### 2. During the hearing

- a. Introduction.
- b. Attendance sheet.
- c. Managing the time.
- d. Questions to Counsel.
- e. Oath administration / warning about requirement to tell the truth.
- f. Questions to witnesses / objections – how to handle questions by co-arbitrators? Imbalance between co-arbitrators? Bias questions by co-arbitrator?
- g. Decision on procedural incidents / How to handle unruly counsel? Requests for submission of additional evidence? Disagreements among the Tribunal members?

#### **5. DELIBERATIONS**

##### 1. Timing: when are they needed?

- a. For the final award: before the evidentiary hearing as well as after the evidentiary hearing? Immediately after or after the post-hearing submissions and once the draft award is ready?
- b. For partial award (jurisdiction) and important procedural decisions.

##### 2. Conduct / structure of deliberations: who goes first? Should lists of issues be prepared by the Presiding Arbitrator?

##### 3. Administrative secretary: should s/he be present? Should s/he speak?

##### 4. “Splitting the baby”.

##### 5. Dealing with the bias, lazy and/or unavailable co-arbitrator.

## **6. AWARD**

1. Drafting of the award: who should draft the award? The Presiding Arbitrator alone? The person with the best drafting (linguistic) skills? When is co-drafting useful? What is the role of the administrative secretary?
2. When should the first draft of the award be ready? Before or after the evidentiary hearing?
3. Managing dissenting opinions.
4. Closing / Re-opening the proceedings.
5. Communications to the institution / the parties about the preparation / review of the award.

## **7. CONCLUSION: Key criteria for a good Presiding Arbitrator?**