# INTERNATIONAL ARBITRATION HEARINGS: SHOWDOWN OR *DÉNOUEMENT*?

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## I. INTRODUCTION

International arbitrations present fertile ground for cultural conflicts, misunderstandings, and frustration with the arbitration process, particularly in the evidentiary hearing stage. Obviously important as the culmination of the parties' arduous efforts, the hearing phase of arbitration often results in a clash of cultures. Addressing matters relating to hearings at an earlier stage, during pre-hearing or preliminary conferences, will alleviate this cultural tension and better ensure that both participants and arbitrators share expectations as to how the proceedings will be conducted.

## II. PRE-HEARING PRESENTATIONS

If the parties enter the arbitration arena with divergent views as to procedure, one party may find itself in unfamiliar territory, and may therefore be improperly prepared for the hearing. The parties and the arbitrators should make use of a preliminary conference to allow the parties to discuss with the arbitrators such procedural matters as the exchange of documents, interrogatories, and depositions.

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Depending on what is agreed, parties' documents relevant to the case may be presented to the opposing party prior to the evidentiary hearing and limitations may be imposed on the further exchange of documents. However, if it is determined that the parties will act in the spirit of the Continental European practice of limiting or doing away with discovery, the preliminary conference can serve as an effective tool for setting guidelines for the later presentation of the parties' cases both prior to and at the hearing.

In both the American and European systems, the parties may provide basic information about witnesses at the pre-hearing conference, including the identities of witnesses and the information they will present. There is a difference of views as to the level of detail concerning the parties' positions that should be dealt with at the preliminary conference. There is a tension that arises out of the arbitrators' desire for order and predictability on the one hand, and the parties' desire for flexibility on the other.

The timing of witness statement disclosure is an issue that parties should also discuss at a preliminary conference. Clearly, those parties who want flexibility or have difficult or unfamiliar witnesses will be forced to present witness statements at an earlier stage than they would prefer. In Continental European arbitrations, where discovery is restricted, the advance presentation of witness statements can offset the lack of discoverable information. If this procedure is used, it should provide sufficient time for the presentation of rebuttal witness statements. One point to consider when deciding when to present witness statements is whether the arbitration hearings will be conducted in a single session of consecutive days, or divided into several sessions.

At a preliminary conference, the parties should not be obliged to provide notification concerning certain kinds of documents—those that will be used in cross-examination. The parties will wish to retain the element of surprise when confronting a witness with a document that impeaches the witness's credibility—for example, a document containing a prior inconsistent statement. The best way to handle this issue is to agree to exempt documents from pre-hearing production that will be used exclusively for cross-examination and not to support the party's case. This approach could enable the parties to know, prior to the hearing, which documents relate to the merits of the case in much the same way as the discovery process would.

## III. CONDUCT OF THE HEARING

The manner in which the arbitration hearing is conducted contains the greatest potential for misunderstanding. Important differences between the customs and practices of the arbitrators and the parties, depending on their respective countries of origin, emerge at this stage. For example, the American, English, and Continental European legal systems differ with respect to what should be included in the record. In the American and English systems, the hearing is the single most important event in the dispute resolution process. By contrast, in the Continental European system, the hearing is only the dramatic climax to a sequence of events. The manner in which evidence becomes part of the record in these systems provide even greater contrast. Under the American and English systems, parties must formally offer statements and documents into evidence during the hearing for them to be included in the record. However, under the Continental European system, the record is built in an ongoing manner throughout the arbitration process; parties continuously present new evidence as the tribunal continuously updates the record.

Moreover, cultures differ on the methods of examining witnesses. In the Continental European system, arbitrators often actively participate by confronting and questioning the witnesses themselves. European arbitrators may also select which witnesses they want to hear, while excluding others, despite the parties' requests. Under the American system, the parties determine the order in which witnesses will be presented. While arbitrators may interject with questions, each party introduces and queries its own witnesses.

Cross-examination is an additional potential source of conflict, stemming from differing views of oral testimony. Under the American system, cross-examination is the core of a trial, the true testing ground for oral evidence. How a witness deals with cross-examination determines the value of his or her testimony. On the other hand, Continental Europeans view oral testimony with skepticism, and cross-examination with animosity. They perceive American and English cross-examination as a process of trickery designed to confuse witnesses rather than to elicit vital information or impeach credibility. In addition, they believe that witnesses generally lie and present only the facts most favorable to their position.

The manner in which the record of the proceedings is kept is a further source of cultural confusion. American lawyers are accustomed to

a verbatim transcript prepared by a stenographer throughout the proceedings. Thus, during cross-examination, lawyers are able to confront witnesses with their exact words from their prior testimony. By contrast, in the Continental European system, witness statements are initially taken down in the arbitration chairman's notes. These notes are then subjected to discussion with the lawyers and a written summary of the witness's testimony is prepared. This system obviously reduces the impact of direct and cross-examination. Value is placed, not on the words used by witnesses themselves, but on the characterization of what the witnesses said.

Parties and arbitrators may alleviate many problems associated with cross-cultural arbitration if, at an early stage, they reach an understanding as to how the proceedings will be conducted. Of course, if the arbitrators are American and discovery is permitted, American parties will face fewer conflicts on this issue. But, if the arbitrators, the chairman, or one party's lawyer is not American, this discussion will be of considerable value.

Whether a Continental European or Anglo-American approach is used may turn on such considerations as the arbitration chairman's nationality and legal background. If the parties have adopted the International Chamber of Commerce (ICC) Rules, and are unable to select a chairman, one is appointed by the ICC.[1] Typically, if one of the parties to an international arbitration is American, the institution will not choose an American chairman.[2] One possible solution to this uncertainty would be to provide, as part of an arbitration clause, something like a box in which the parties could check off whether they prefer an Anglo-American or a Continental European procedure.

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1. According to the ICC's Rules of Conciliation and Arbitration, "[i]f the parties fail so to nominate a sole arbitrator within 30 days from the date when the Claimant's Request for Arbitration has been communicated to the other party, the sole arbitrator shall be appointed by the Court." International Chamber of Commerce: Rules of Conciliation and Arbitration, Art. 3, Jan. 1989, 28 I.L.M. 231, 236 (entered into force Jan. 1, 1988).

2. As stated in Article 2(1), when selecting a chairman to an international arbitration, the ICC "shall have regard to the proposed arbitrator's nationality, residence and other relationships with the countries of which the parties or other arbitrators are nationals." INT'L CHAMBER OF COM. ARB. R., Jan 1, 1988, art. 2, 28 I.L.M. at 236. In addition, Article 2(6) provides that "The sole arbitrator or the chairman of the arbitral tribunal shall be chosen from a country other than those of which the parties are nationals. However, in suitable circumstances and provided that neither of the parties objects . . . the chairman of the arbitral tribunal may be chosen from a country of which any of the parties is a national." *Id*. at 236-37.

## IV. HEARING DATES

Theoretically, parties to an international arbitration may agree that a hearing is not necessary. Typically, however, if one party seeks a hearing, its request will not be denied. As provided in the ICC Rules, "[a]fter study of the written submissions of the parties and of all documents relied upon, the arbitrator shall hear the parties together in person if one of them so requests . . . ."[3] By contrast, the United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL Rules) appear to leave this decision to the arbitrator's discretion.[4]

Another consideration for preliminary discussion is whether the hearings should be held in a single block of consecutive days or on several separate occasions. Both alternatives have advantages and disadvantages. First, finding blocks of time when all concerned parties are able to attend may prove difficult. For example, European arbitrators tend to be professors with teaching obligations throughout most of the year. Suggestions for circumventing this problem include reserving smaller blocks of time for the presentation of particular elements of the case. Other suggestions include setting target hearing dates at an early phase of the arbitration proceedings.

Fragmented hearings may prove inefficient, because the parties are forced continually to refresh their memories about what took place at prior hearings. One example of problems encountered with fragmented hearings is the procedure followed by the Society of Maritime Arbitrators in New York. Arbitrators in such proceedings frequently hold hearings during lunchtime and in the early evenings. Because these brief hearings are often conducted every few weeks, the arbitration process may drag on for months. On the other hand, if the overall process is not unreasonably prolonged, parties may find these intervals useful, because of the additional time they afford for preparation for each phase.

The parties to an international arbitration must also consider whether time limitations should be imposed for the hearing. European arbitrators tend to like time limitations of all sorts, even to the point of rejecting evidence presented after a deadline. In one instance in my

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3. *Id.* art. 14, 28 I.L.M. at 240.

4. Paragraph 1 of Article 25 of the UNCITRAL Rules provides that "[i]n the event of an oral hearing, the arbitral tribunal shall give the parties adequate notice of the date, time and place thereof." In addition, Paragraph 4 of Article 25 states that "[t]he arbitral tribunal is free to determine the manner in which witnesses are examined." UNCITRAL Rules, *Report of UNCITRAL on the Work of its Ninth Session*, 31 UN GAOR, Supp. No. 17 at 34, U.N. Doc. A/31/17, para. 57 (1976), *reprinted in* 15 I.L.M. 701 (1976).

experience, the European chairman, without consulting the parties, scheduled witnesses at the rate of one an hour. The Iran-U.S. Claims Tribunal presents an example of problems associated with imposing restrictive time limits.[5] In this tribunal, evidentiary hearings more closely resemble a period of summation and argument, rather than what would generally be considered a complete hearing. Witnesses appear for only brief periods because the entire proceeding is often abbreviated to a few days. Clearly, these timing decisions have a profound impact on the continuity of the hearing, and should be dealt with in the pre-hearing conference to prevent undue confusion and prejudicial misunderstanding.

## V. WITNESSES

Another distinction between Continental European and American arbitrations lies in the determination of who may be a witness. Unlike under the American system, the European approach is to make a distinction between witnesses and parties' representatives. For example, in the Iran-U.S. Claims Tribunal a party representative cannot be sworn in or sit in the witness chair, despite his knowledge of the case, but may make an informal presentation. In addition, witnesses are generally excluded from the hearing room, must affirm to tell the truth, and must testify from the witness chair. By contrast, parties' representatives remain in the hearing room throughout the arbitration proceedings and are permitted to make their presentations outside the witness chair, and are not required to affirm to tell the truth.

Furthermore, international customs vary with respect to witness preparation and the use of expert witnesses. While Swiss court rules prohibit prior contact between lawyers and witnesses, U.S. courts not only allow such prior contact, but may even consider attorneys who have not prepared their witnesses as having committed malpractice. Parties to an international arbitration might consider establishing, at an early stage, the extent of permissible witness preparation and when witnesses, particularly experts, are to be excluded from the hearing room. With respect to expert witnesses, Continental Europeans often like to delegate fact-finding

5. The Iran-U.S. Claims Tribunal in the Hague was established in conjunction with the Algiers Accord following the Iranian hostage crisis. *See* Lawrence W. Newman & Arthur W. Rovine, *Arbitration of International Disputes, The Alternative Dispute Resolution Practice Guide*, § 19:7 (Roth et al. eds., 1993). Generally, the "Tribunal applies the UNCITRAL Arbitration Rules, suitably adapted to meet the needs of a massive set of cases brought primarily by U.S. nationals, both individuals and corporations, against the Government of Iran and its controlled agencies and entities. The Tribunal also hears cases between the two governments, as well as cases concerning the interpretation of the Algiers Accords." *Id.*

responsibilities to experts.[6] In fact, many European countries address in their Civil Procedure codes the procedures under which court-appointed experts carry out their responsibilities. If the parties agree to authorize the tribunal to appoint an expert, they should discuss the ground rules under which the expert will carry out his or her responsibilities, in particular the terms of reference.

With respect to expert witnesses presented by the parties, the tribunal can require the experts to submit a report of their findings in advance of their testimony. Arbitrators can also adjourn the hearing to permit cross-examination after completion of their direct examination. Additionally, the arbitrators may, as do most U.S. courts, require experts to submit copies of prior testimony and their prior publications regarding the relevant subject. Of course, the element of surprise associated with cross-examination is greatly reduced by this kind of disclosure.

## VI. CONCLUSION

International arbitration is an arena which brings together parties with different customs, practices, and legal systems to cooperate in a single proceeding. The arbitration process, particularly during the evidentiary hearing phase, can lead to problems and misunderstandings arising from these cultural differences. However, much of the tension and disagreement can be prevented if the problematic issues are addressed at a preliminary conference. Such a meeting allows both arbitrators and parties to clarify their understandings and expectations, and better enables them to reach an agreement as to how the arbitration will proceed.

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6. For example, Article 26 of the UNCITRAL Model Law on International Commercial Arbitration provides:

> (1) Unless otherwise agreed by the parties, the arbitral tribunal
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> (a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;
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> (b) may require a party to give the expert any relevant information or to produce, or to provide access to any relevant documents, goods or other property for his inspection.
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> (2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

UNCITRAL Model Law on International Commercial Arbitration, Document VIII-D, *Report of the UN Commission on International Trade Law*, 24 I.L.M. 1302 (1985).