

International Arbitration in the United States

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CHAPTER 10

A General Overview of the Conduct of International Arbitration Proceedings in the United States

Edna Sussman

This chapter offers a general overview of the conduct of international arbitration proceedings in the United States (U.S.). It must be kept in mind that over the last few decades there has been a concerted effort to harmonize national practices in arbitration to achieve norms acceptable across frontiers, whether by treaties, like the New York Convention, by international arbitration institutions, or by international organizations like the International Bar Association which have developed guidance documents generally referred to as “soft law.”¹ These efforts have had a significant impact on how the world of international arbitration has developed, creating a more homogeneous approach in cross-border disputes and leading to a blending of diverse legal and cultural traditions.

The chapter is intended to highlight for the U.S. based practitioner the differences between domestic and international arbitration practice and to assure the non-U.S. based practitioner of the similarities while also flagging the differences.

I INTRODUCTION

With the enactment of the Federal Arbitration Act (“FAA”) in 1925, the U.S. established its tradition of almost a century of vigorously enforcing arbitration agreements and arbitration awards. The Supreme Court has repeatedly supported arbitration, expanded its reach, and confirmed the court’s acceptance of arbitral interpretations of contracts

1. For an overview of many of the sources of soft law in arbitration, *see* Lawrence W. Newman and Michael J. Radine ed., *Soft Law in International Arbitration* (2014).

whether “good, bad or ugly.”² In keeping with this vigorous support of arbitral decisions, even decisions of emergency arbitrators or a tribunal’s interim measures, which may not constitute a “final award” and thus may not be entitled to enforcement in some jurisdictions, are generally enforced by U.S. courts.³

Several U.S. seats have emerged as the leaders for the conduct of international arbitration. New York law is the governing law most often used by corporations in their contracts, second only to English law.⁴ New York’s long tradition of enforcing contracts as written in order to assure predictability for the business community,⁵ coupled with the influence of the selection of governing law on the selection of the seat,⁶ have contributed to New York’s position as the most popular seat for international arbitration in the U.S.⁷

The U.S., a country with a polyglot population, offers a multicultural setting, enabling the selection of arbitrators and counsel steeped in diverse legal and cultural traditions. The U.S., which accounts for approximately one third of the world’s GDP, offers individuals who can serve as arbitrators or counsel with expertise in virtually every business sector. The rich tradition of litigation in the U.S. has also made possible an extensive offering of well-qualified translators, court reporters and litigation support organizations. In recent years, venues dedicated to providing facilities for arbitration have been created, providing physical settings and support services that allow arbitrations to be conducted in a comfortable, staff-supported setting that permits the participants to focus on the arbitration as opposed to logistics.⁸

Many U.S. arbitrators who conduct international arbitration also have an extensive history of conducting domestic arbitrations under the rules of the American Arbitration Association (“AAA”), which have long required that the arbitration award be issued within thirty days of the close of the hearing.⁹ Thus arbitrators in the U.S. are accustomed to, and understand the need for, issuing the award promptly in disputes arising from commercial transactions.

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2. *Oxford Health Plans v. Sutter*, 133 S. Ct. 2064, 2070-71 (2013).
 3. Edna Sussman and Alexandra Dosman, *Evaluating the Advantages and Drawbacks of Emergency Arbitrators*, Transnational Dispute Management (April 2015).
 4. Queen Mary University of London and White & Case, *2010 International Arbitrations Survey: Choices in International Arbitration* at 14, available at <http://www.arbitration.qmul.ac.uk/docs/123290.pdf>.
 5. Judith S. Kaye, *New York and International Arbitration: A View from the State Bench*, 8(1) N.Y. DISPUTE RESOL. LAWYER (Spring 2016) (Judge Kaye sat on New York’s highest court for 25 years, 15 of them as Chief Judge).
 6. Queen Mary University of London and White & Case, *2015 International Arbitrations Survey: Improvements and Innovations in International Arbitration*, at 13, available at <http://www.whitecase.com/publications/insight/2015-international-arbitration-survey-improvements-and-innovations>.
 7. At the International Centre for Dispute Resolution (“ICDR”) in 2014, twice as many arbitrations were seated in New York than in Miami, the second most popular seat, and six times as many as were seated in Los Angeles, the third most popular seat. At the ICC team based in New York in 2015, twice as many arbitrations were seated in New York than in San Francisco, the second most popular seat, and four times as many as were seated in Miami, the third most popular seat.
 8. For example, ICSID’s World Bank facilities, the New York International Arbitration Center, the Atlanta Center for International Arbitration and Mediation.
 9. The AAA Commercial Arbitration Rules effective Jul. 1, 2003 Rule R-41 provided, as is still the requirement in the rules effective October 2013, that “the award shall be made promptly by the

Similarly, the extensive use of motions to dismiss and motions for summary judgment in litigation in the U.S., and the consequent comfort with the recognition and enforcement of such arbitral decisions by the courts, allows arbitrators in the U.S. to more readily respond favorably to the recent call by the arbitration community for earlier consideration and, where appropriate, disposition of issues,¹⁰ with less concern that a court might find that the parties had not been afforded a full and fair opportunity to present their case.¹¹

U.S. based arbitral institutions, like institutions worldwide, have taken measures in recent years to foster an expeditious and cost-effective resolution of arbitrations, measures which have been taken to heart in response to user demand. Thus, while there may be a general perception that more extensive document disclosure would be permitted in the U.S., seasoned U.S. based international arbitration practitioners understand and respect the difference between arbitration and litigation and the difference between domestic and international arbitration.¹²

It is against this backdrop that this chapter examines four phases of the arbitration proceeding: Section II the Constitution of the Tribunal; Section III the Prehearing Phase; Section IV the Hearing; and Section V the Award.

II CONSTITUTION OF THE TRIBUNAL

As is the case across jurisdictions, the parties' contract will dictate the manner in which the arbitrators will be selected. If the contract provides for party-appointed arbitrators, which is often the case especially in international arbitrations, party choice will, of course, be honored. However, certain U.S. based arbitral institutions have long offered the "list" method for the selection of arbitrators, in which the institution provides a list of potential arbitrators in response to the preferences stated by counsel.¹³ The list is an alternative which has been urged by some as preferable to the direct party-appointed

arbitrator and, unless otherwise agreed by the parties or specified by law, no later than thirty days from the date of closing the hearing." The culture at the AAA strongly discourages any delays in closing the hearing or requests for extensions beyond the thirty days absent truly extenuating circumstances. The ICDR Rules effective Jun. 1, 2014 provide for awards to be made "no later than 60 days from the date of the close of the hearing."

10. See, e.g., David Rivkin, *A New Contract Between Arbitrators and Parties*, Asian Dispute Rev. (Jan. 2016); Adam Raviv, *No More Excuses: Toward a Workable System of Dispositive Motions in International Arbitration*, 28 ARB INT'L 487 (2012).
11. Edna Sussman & Solomon Ebere, *Reflections on the Use of Dispositive Motions in Arbitration*, 4(1) N.Y. DISPUTE RESOL. LAWYER, 28 (2011) (reviewing U.S. case law and offering advice on how arbitrators should approach such motions).
12. Compare the provisions in the *Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic Commercial Arbitrations* with the *Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of International Arbitrations* issued by the New York State Bar Association Dispute Resolution Section. Available at http://www.nysba.org/Sections/Dispute_Resolution/Reports_and_White_Papers/Other_Publications_of_the_Dispute_Resolution_Section.html; The U.S. courts support arbitration's limited discovery and introduction of evidence. See, e.g., *Bain Cotton Company v. Chestnutt Cotton Company*, 531 Fed. Appx. 500 (5th Cir. 2013); *Triomphe Partners, Inc. v. Realogy Corp.*, 2011 WL 3586161 (S.D.N.Y. 2011).
13. See, ICDR Procedures, Art. 12(6).

system, a system which was labeled a “moral hazard” by leaders in the field.¹⁴ It is commonly stated in international arbitration circles that, while the party-appointed arbitrator must be and remain independent and impartial, the party-appointed arbitrator may “ensure that the contentions of the party appointing him or her are properly aired throughout the arbitral proceedings, and that they are given due consideration and not ignored.”¹⁵

While no set of guidelines takes the place of or supersedes applicable law or party agreement, U.S. arbitrators may look to leading ethical guidelines. The American Bar Association (ABA) together with the AAA developed the ABA-AAA Code of Ethics for Arbitrators in Commercial Disputes in 1977, the first set of guidelines to address ethics for arbitrators. The Code was revised in 2004 to conform to international practice and the presumption of neutrality for all arbitrators, including party-appointed arbitrators, a change from the operative presumption under the earlier 1977 Code. As expected with the issuance of the 2004 Code and the changed presumption, U.S. practice has moved away from the appointment of non-neutral arbitrators and such a process is rarely employed now, with the exception of a very few industry sectors.

The International Bar Association’s (“IBA”) Guidelines on Conflicts of Interest in International Arbitration are also consulted by international arbitrators and set forth general standards similar to the ABA/AAA Code. In an effort to foster greater consistency and fewer unnecessary challenges and arbitrator withdrawals and removals, the IBA also provided a non-exhaustive list of scenarios that commonly arise in practice, and assigned each scenario to one of three color-coded lists: red, orange or green (the “Application Lists”).¹⁶ Because the Application Lists establish an objective rather than a subjective standard, they are not dispositive when an arbitrator’s disclosure is reviewed in the U.S. or indeed in many other jurisdictions.¹⁷

14. See e.g., Jan Paulsson, *Moral Hazard in International Dispute Resolution*, ICSID Review, Vol. 25 Issue 2 (fall 2010); Jan Paulsson, *Must We Live with Unilaterals?*, American Bar Association, Section of International Law Newsletter, Vol. 1, Issue 1 at 5 (2013), available at <http://apps.americanbar.org/dch/committee.cfm?com=IC730000> (“ABA Newsletter”); Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, in Arsanjani et al. (eds.), *Looking to the Future: Essays in International Law in Honor of W. Michael Reisman* (2011); for a contrary position see, 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*, *Arbitration International*, Vol. 29 (2013); Charles N. Brower, *The (Abbreviated) Case, for Party Appointment in International Arbitration*, ABA Newsletter *supra*, at 10.

15. Ugo Draetta, *Behind the Scenes in International Arbitration*, at 59 (2011).

16. IBA Guidelines on Conflicts of Interest in International Arbitration (2014); see part II, the Application Lists, which are intended to “provide specific guidance” as to which “situations do or do not constitute conflicts of interest, or should or should not be disclosed.” *Id.* at 17.

17. See Edna Sussman, *Ethics in International Arbitration: Soft Law Guidance for Arbitrators and Party Representatives*, in Newman & Radin, *supra* note 1, at 244-50 (discussing acceptance of the Applications Lists or lack thereof by institutions and courts). See also, *W. Limited and MSDN BHD*, [2016] EWHC 422 (England and Wales High Court of Justice 2016) available at <http://www.bailii.org/ew/cases/EWHC/Comm/2016/422.html> (identifying weaknesses in the Application Lists).

Section 10 of the FAA lists “evident partiality” as one of the bases for vacating an award.¹⁸ In assessing whether evident partiality has been demonstrated the majority of circuits have adopted standards similar to the Second Circuit’s standard that “evident partiality” within the meaning of 9 U.S.C. §10 will be found where “a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.”¹⁹ The Second Circuit held that an award will not be set aside for failure to make a disclosure unless the arbitrator knows of a “material relationship” with a party and fails to disclose it.²⁰ The court further stated that an arbitrator is required to take steps to ensure that the parties are not misled into believing that no nontrivial conflict exists, and an arbitrator is required, if he thinks a nontrivial conflict may exist, to investigate or disclose his reasons for not investigating it.²¹

Arbitrators trained by the AAA/ICDR are instructed that “if they think of it, disclose” on the theory that it is best to flush out early any connections which a party might perceive as evidence of partiality and thus avoid later challenges to arbitrators or to the award. The governing philosophy is that the parties should have the information necessary to allow them to make a judgment as to whether an arbitrator should serve in their dispute and then permit the institution to make a judgment as to whether any challenge lodged is well-founded. Thus, the tension between what was referred to at the ICCA Congress in Miami in 2014 by the Secretary-General of one of the leading arbitral institutions as “TMI” or “too much information” in disclosures, versus the more restrained IBA Application Lists, tends in the U.S. to be resolved by arbitrators in favor of more rather than less disclosure. This is consistent with the demand in recent years for more transparency in arbitration and the trend worldwide towards more disclosure as exemplified by the ICC’s issuance in 2016 of its Guidance Notes on Conflict Disclosures by Arbitrators which, in the words of Alexis Mourre, President of the ICC Court, “aims at ensuring that arbitrators are forthcoming and transparent in their disclosure of potential conflicts.”²²

18. 9 U.S.C. §10(a)(2).

19. *Scandinavian Reinsurance Co. v. Saint Paul Fire and Marine Ins. Co.*, 668 F.3d 60 (2d Cir. 2012). New York’s highest court adopted this Second Circuit standard. *U.S. Electronic Inc. v. Sirius Satellite Radio Inc.*, 17 N.Y.3d 912 (2011). But the application of this standard is not consistent throughout all circuits—some courts may apply a variation of the standard set by the Ninth Circuit that “a reasonable impression of partiality” is required to show evident partiality. *Schmitz v. Zilveti*, 20 F.3d 1043, 1047 (9th Cir. 1994). It must also be noted that several U.S. states have statutes and ethical codes that specifically address arbitrator ethics, including disclosure requirements, which must also be considered.

20. *Scandinavian Reinsurance Co.*, *supra* note 19, 668 F.3d at 73.

21. *Id.* In keeping with this statement, many arbitrators, after listing specific connections identified through conflicts checks and based on their recollection (typically including such connections as the prior appearances before them of the same party, attorney or law firm and possibly their active participation on a committee with an attorney appearing before them) also include a block disclosure which sets forth the limits of their ability to identify connections.

22. Available at <http://www.iccwbo.org/News/Articles/2016/ICC-Court-adopts-Guidance-Note-on-conflict-disclosures-by-arbitrators/>.

III THE PREHEARING PHASE

[A] The Prehearing Conference

Following a consultation among the arbitrators to identify the unique issues raised by the specifics of the dispute before them, the arbitration process generally commences by the delivery of an agenda for the preliminary hearing (also called a case management conference or a preparatory conference) to counsel. The preliminary hearing in larger cases is often conducted in person, but may be conducted by phone in deference to party preference, especially where counsel and parties are located in disparate parts of the world. Many tribunals invite party representatives to attend and suggest that counsel confer in advance of the session about the items raised in the agenda in order to make the session most productive.

The preliminary hearing affords the opportunity for the tribunal to obtain a fuller understanding of the issues in dispute. While the statement of claim and answer in international arbitrations are typically much more comprehensive than the notice pleading often served in U.S. litigation and U.S. domestic arbitration, the discussion with the parties provides the opportunity to identify the salient issues. The schedule for the determination of any jurisdictional objections, whether based on such matters as claims against a non-signatory or the failure to complete any conditions precedent to arbitration (an issue more frequently arising with the use of step clauses in arbitration agreements) can be set. It should be noted that international arbitrators may distinguish between challenges to jurisdiction based on admissibility as opposed to challenges based on arbitrability while the courts in the U.S. approach both as questions of arbitrability.²³ Whether early resolution or bifurcation of any of the central issues would lead to a more expeditious and cost-effective arbitration process can be considered and decided. The discussion may lead the tribunal to discourage the parties from filing frivolous jurisdictional or dispositive motions and thus prevent dilatory, expensive and unnecessary process, or conversely lead the tribunal to encourage the early filing of such motions when it appears they would be useful either by disposing of issues early in the case or creating a framework which provides a more informed basis for the parties to achieve an early settlement. Thus such discussions enable the tribunal to guide the arbitration process in the manner most appropriate to that particular case.

Discussion of party expectations as to the process follows. With the recent attention to the differences in ethical obligations of counsel that culminated in the issuance of guidelines for party representatives by the IBA,²⁴ tribunals are increasingly

23. For a discussion of the differences, see, e.g., Laurent Gouiffes and Melissa Ordonez, *Jurisdiction and Admissibility: Are we any Closer to a Line in the Sand?* Arbitration International, Vol. 32, Issue 1, 107 (2016).

24. IBA Guidelines on Party Representation in International Arbitration (2013); Doak Bishop and Isabel Fernandez De La Cuesta; *A Defense of the IBA Guidelines on Party Representation*, in Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2014, Arthur Rovine Ed. (2014); Edna Sussman and Solomon Ebere, *All's Fair in Love and War: or is it?: An International Code of Ethics for Counsel in Arbitration*, Am. Rev. of Int'l Arb., Vol. 22 No.

addressing ethics-related issues in the preliminary hearing session in international arbitrations in order to create a level playing field. The examples most often given to illustrate these significant differences include witness preparation, document disclosure, and ex-parte communications.²⁵ With the agreement of all parties the tribunal may adopt the IBA Guidelines on Party Representation as binding or as guidance, adopt common standards for all or simply use the conversation to assure that all are at least informed as to how opposing counsel and parties will proceed and what they are ethically barred from doing or obligated to do. While any outcome short of harmonizing the practices of all participants may not achieve a level playing field, even awareness of the others' practices serves to enhance the fairness of the process.

In international arbitration it is expected that the parties will exchange the documents in their possession upon which they rely. Expectations as to additional document disclosure may be raised and a discussion of party expectations in that regard may be conducted at the preliminary hearing in an effort to narrow the scope and reduce the burden to the parties. Targeted requests for documents consistent with the IBA's Rules on the Taking of Evidence in International Arbitration ("IBA Evidence Rules") are now common in international arbitration and parties are not always limited to the exchange of reliance documents. However a desire to keep costs down or a concern that there is a disequilibrium in practices and ethical obligations relating to document production (such as the "litigation hold" common in the U.S. and foreign to many other jurisdictions and business entities in those jurisdictions) may cause counsel to opt for no document discovery. Accordingly, tribunals are sensitive and consider whether the subject should even be raised.

It is generally understood that such U.S. litigation discovery tools as depositions, interrogatories, and requests to admit are not utilized and are usually not permitted in international arbitrations.²⁶ While party autonomy must ultimately dictate, because these limitations on discovery are generally accepted in international arbitration seated in the U.S., even the question of whether any such tools can be used is almost never raised and tribunals rarely permit them even when raised. However, in exceptional circumstances, such as the need to preserve essential testimony that might otherwise be lost, depositions may be permitted.

4, 611 (2012) (discussing the developments which led up to the issuance of the IBA Guidelines); Catherine A. Rogers, *Lawyers Without Borders*, 30 U. PA. Int'l Law 1035 (2009). The London Court of International Arbitration (LCIA) arbitration rules introduced in 2014 include a binding annex to the rules providing guidelines for the parties' legal representatives. Article 16 of the ICDR Rules issued in 2014 include a place-saver for the future introduction of binding guidelines for the conduct of party representatives.

25. Catherine A. Rogers, *Lawyers Without Borders*, *supra* note 24, at 1036-37; Cyrus Benson, *Can Professional Ethics Wait? The Need for Transparency in International Arbitration*, 3 DISP. RESOL. INT'L 78, 82-85 (Mar. 2009); (identifying as additional areas of difference lawyer communication with employees of an adverse corporate party, statements of fact to the tribunal known to be unsupported by the evidence, the obligation to advise the court of adverse legal authority, the nature of counsel's obligation to assure production of responsive documents, and the obligation to report perjury).
26. See, e.g., ICDR Rules, Art. 21(10) ("Depositions, interrogatories, and requests to admit as developed for use in U.S. court procedures generally are not appropriate procedures for obtaining information in an arbitration under these rules.").

As in domestic arbitration, arbitrators in international arbitration are not bound by domestic rules of evidence. The IBA Evidence Rules provide excellent guidance on such matters as hearing the testimony of witnesses, the admission of exhibits into evidence, the use of witness statements, the hearing of experts, the order of testimony at the hearing and the overall admissibility and assessment of evidence. These IBA rules are commonly adopted at the start of the case as guidance, and sometimes as binding, and may be referenced with frequency in international arbitrations throughout the arbitration.

An important objective of the preliminary hearing is to establish the schedule and process for the arbitration. Almost invariably tribunals follow a harmonized international norm that bridges the civil and common law divide. Witness statements with the exhibits upon which the witness relies, legal memoranda and expert reports, if any, are submitted serially, first with claimant's memorial, then respondent's counter-memorial, and, in many cases, followed by claimant's reply memorial and then respondent's rejoinder. Thus, well in advance of the hearing the tribunal and opposing party are provided with a comprehensive presentation of the parties' cases. These presentations serve as a vehicle for providing the information that would otherwise be provided through U.S. discovery tools and serve to shorten the hearing as the witness statements stand in place of the direct testimony.

The preliminary hearing also provides the opportunity to review a host of other procedural issues necessary to the conduct of the arbitration, including confirming the applicable procedural rules, confirming the applicable governing substantive law or identifying the issues relating thereto, providing any deadlines for any requested amendments to pleadings, ensuring that there is a timely identification of the final relief sought including the quantum, and discussing whether a confidentiality order is desired.²⁷ Other issues may also be discussed, such as the language of the arbitration, the nature of the award desired, the locale for the hearing, the authorization of the chair (also called the president) of the tribunal to decide certain limited issues, responsibility for identifying translators and court reporters, requesting that the experts be available at the same time at the hearing for witness conferencing ("hot tubbing") or suggesting that the experts consult with one another without counsel in advance of the hearing to narrow the issues. In addition, consideration can be given to whether and when it would be useful to review the issues prior to the hearing with counsel, whether mid-proceeding or closer to the hearing, to refine the scope of the presentations. Dates are set for status conferences and a general discussion can be offered by the tribunal as to how the hearing will be conducted.

27. Unlike some other jurisdictions and, of course, depending on the applicable institutional rules, in the United States generally the arbitration is only confidential for the institution and the arbitrators but not for the parties. If a confidentiality order is sought, as is commonly done, counsel would do well to consider whether that order should be drafted differently than the one in the typical U.S. litigation. U.S. court proceedings are generally available to the public and courts are reluctant to seal proceedings. Therefore confidentiality agreements are usually drafted to protect only the documents produced. In arbitration, counsel should consider drafting it more broadly to cover all of the arbitration proceedings, subject only to the right to present the award to a court for enforcement or vacatur.

[B] From the Prehearing Conference to the Hearing

The involvement of the tribunal between the prehearing conference and the hearing varies depending on the case. Some cases require considerable case management during this period, while others progress smoothly based on the framework established at the preliminary hearing and the first order issued by the Tribunal establishing the procedures with good cooperation between counsel.

Motions that were authorized at the preliminary hearing or subsequently are presented and decided. Jurisdictional motions are often bifurcated and decided as an initial matter. On occasion, factual issues relating to the jurisdictional motion are so intertwined with the facts on the merits that the jurisdictional decision must await the hearing. Disputes relating to document disclosure may arise which are presented for resolution to the tribunal, often with the use of a Redfern schedule which simplifies the presentation to the tribunal. Issues such as privacy laws, blocking statutes, ethical obligations requiring the production of documents or conversely precluding their production, 28 U.S.C. §1782, and other considerations relating to document production may have to be addressed. Requests for subpoenas may also be presented for issuance by the tribunal.²⁸

The presentation of more comprehensive written submissions, from the more detailed statement of claim and defense, to the successive memorials and witness statements long before the hearing, as compared to the typical U.S. litigation or domestic arbitrations, allows the tribunal to consult at an earlier juncture with the parties in an effort to focus the issues and narrow the presentations at the hearing to what the tribunal believes would be probative and useful to the determination of the merits.²⁹

Frequently a status call is set for a few weeks prior to the hearing to review hearing procedures to ensure the avoidance of any surprise which could throw the hearing off-track. Matters which can be reviewed include those relating to timekeeping (whether a chess clock approach will be used to control the length of the hearing, whether opening statements will be delivered and how long they will be), witnesses (whether all witnesses will be available in person or by some form of telecommunication as to which arrangements must be made, how long any “warm-up” presentations by witnesses will be, whether witnesses will be sequestered), logistics (retention of a court reporter, confirmation of an agreed translator, review and coordination of all technical and mechanical requirements for the hearing), and documentary evidence (when demonstrative exhibits will be exchanged, identification of a date for objections

28. *A Model Federal Arbitration Summons to Testify and Present Documentary Evidence at an Arbitration Hearing*, international Commercial Disputes Committee and Arbitration Committee, of the New York City Bar Association (2015) (reviewing the case law relating to the issuance of subpoenas in arbitration in the United States and providing a model subpoena). Available at <http://www2.nycbar.org/pdf/report/uploads/20072911-ABCNYModelArbitralSubpoena.pdf>.

29. See, e.g., Neil Kaplan, *If It Ain't Broke Don't Change It*, 80(2) *ARB.* 172-175 (2014); Lucy Reed, *Arbitral Decision-Making: Art, Science or Sport?* 30(2) *J. INT'L. ARB.* 85, 95-96 (2013).

Jan K. Schäfer, *Focusing a Dispute on the Dispositive Legal and Factual Issues, or How German Arbitrators Think – An Introduction to a Traditional German Method*, *B-ARBITRA* 333 (No. 2 2013) (all urging earlier discussions with the parties of the issues in the case).

to any new documents if not already set). The tribunal may also wish to establish a procedure for counsel to advise one another and the tribunal of who will be called and the order of witnesses.

IV THE HEARING

While some courts in the U.S. are now accepting witness statements in lieu of direct testimony for cases being tried to the bench, it is still common practice both in court and domestic U.S. arbitrations to use live witness testimony for direct examinations. This is consistent with the common-law perspective that witness testimony is central to the presentation of the case and a determination of the merits. In international arbitrations, witness statements previously submitted in writing stand as the direct testimony. While much criticized as typically being statements drafted by the lawyer and not by the party and thus inherently less worthy of being credited, and while there are differences across cultures as to permissible conduct with respect to the preparation of witness statements, witness statements continue to be the norm in the presentation of direct testimony in an international arbitration.

Although the witness statement stands for his or her direct testimony, generally a short “warm up” period is provided to the witness before cross-examination is commenced. This allows the witness be presented to the tribunal, to address new information that came to light since the last opportunity the witness had to provide a written submission, and sometimes to emphasize briefly a few important facts from the witness statement. Generally cross-examination is not limited as to scope so that witnesses only need be called once to testify. Tribunals carefully monitor the redirect to ensure that it does not in effect become a direct examination that takes place after the cross.

Cross-examinations by U.S. trained lawyers have previously been regarded as aggressive and intrusive. As cross-examination has become the norm in international arbitrations wherever they may be seated, cross-examination techniques have been developed by counsel from all jurisdictions, making the differences once highlighted in cross-examination styles across cultures and legal traditions less pronounced. However, counsel must be sensitive to the legal tradition of the arbitrators before whom they are appearing and consider whether an aggressive cross-examination may still be viewed as offensive, as it certainly once was.

It is the responsibility of the party offering a witness statement to ensure the availability of the witness for cross-examination. The failure to make the witness available may cause the tribunal to reject that witness’s statement.³⁰ Generally only those witnesses who the opposing party seeks to have brought to the hearing for cross-examination are presented live at the hearing. Counsel sometimes elect not to call certain witnesses who may be significant for the opposing party in the hope that the

30. Article 4 (7) of the IBA Evidence Rules provides: “If a witness whose appearance has been requested... fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any witness statement related to that Evidentiary Hearing by that witness unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise.”

witness statement will make less of an impression on the tribunal than an oral presentation during which the tribunal has an opportunity to see and hear the witness. Whether arbitrators will permit the presentation, even briefly, of witness whose cross-examination has not been requested by the opposing party will depend on the arbitrators. Some are wedded to the view that only those called for cross-examination should appear while others will permit a short direct testimony by such witnesses who would then also be available for cross-examination.

Arbitrators endeavor to be sensitive to the differences in cultural backgrounds. Such differences can influence the way witnesses present their testimony and may require an arbitrator to accommodate his or her own style to ensure that the parties feel that they have received a full and fair hearing. Several significant characteristics that differ across cultures have been identified.³¹ Some characteristics identified as relevant to dispute resolution range from manner of greeting and dress to body language, saving face, and even to concepts of truth.³²

Often the arbitration agreement will provide for the language of the arbitration. Where the agreement is silent on this point, the tribunal will seek agreement between the parties and failing agreement will look to whether there is a governing institutional rule or look to the practical aspects of the situation. Where translation is required, care is taken to make sure that the translator is competent, to establish whether or not simultaneous translation will be used and to ensure that appropriate equipment is available. Clear direction is given by the tribunal as to what will constitute the official translation. The tribunal may establish a process for whether the translator may ask questions or make comments, and provide a mechanism if a party seeks to challenge any translation. Similar issues arise with respect to documents that require translation.

Increasingly telecommunication techniques, especially videoconferencing, are being used successfully in international arbitrations to avoid the travel expense that would be incurred and avoid the need for witnesses to spend days traveling and away from their business affairs. It is to be expected that as technology improves and arbitrators and parties become more comfortable with the use of the technology, the use of telecommunication tools will continue to increase.

In many traditions, it is customary for the court to appoint its own expert. While in international arbitration parties generally retain their own experts to present their positions, it is commonly viewed that there is an expectation that such experts owe a duty to the tribunal to give their best expert evidence, an expectation which one would

31. Geert Hofstede, *Cultures and Organizations* (1997); Edward T. Hall, *Beyond Culture* (1976) (e.g., identifying among other cultural differences low context/ high context communication, short term/long term orientation, individualism/collectivism, low power/high power).

32. Karen Mills, *Cultural Differences and Ethnic Bias in International Dispute Resolution: An Arbitrator/Mediator's Perspective*, *Transnational Dispute Management* Vol. 5 Issue 4 (2008) (The article offers as an example, an aristocratic Javanese doctor who explained the situation truthfully, in an understated polite matter. He is cross-examined by an aggressive litigator who insults him, twists his words and makes him lose face completely unnerving him, so he becomes silent and seemingly acquiescent to whatever the litigator says thereafter. The U.S. party then puts on its witness who tells a completely fictitious account of the same incident. The Asian arbitration counsel is polite in cross-examination and does not take him to task for lying, assuming the arbitrators will see through the façade.)

hope would also prevail in U.S. courts and U.S. domestic arbitrations, but an expectation which is heightened in the international context. The “hot tubbing” of expert witnesses is often employed enabling the tribunal to address questions to both experts who appear before them simultaneously to narrow the issues, identify the areas of agreement and concentrate on the reasons for the remaining disagreements.

Arbitrator styles during the hearing vary. Some actively examine witnesses. Some do not. The traditional view is that civil law arbitrators adopt an inquisitorial approach in keeping with their domestic court practice where the judge is the one that asks the questions while common-law arbitrators are more prone to letting counsel conduct the examination. In practice these days in international arbitration these differences too have become less pronounced and much variation can be found among the arbitrators in both legal traditions.

Because of the possible differences in expectations among those from different legal traditions, in the international context the practice of asking at the end of the hearing, “whether the parties have had an opportunity to offer all evidence or make all arguments that they wish to make” and asking if the parties can confirm that they have “had a full and fair opportunity to present their case,” is particularly important.

The hearing may conclude with closing arguments by counsel immediately after the close of the testimony or may conclude with instructions from the tribunal as to any further points the tribunal wishes to have briefed in post-hearing submissions. If there are post-hearing submissions, a post-hearing submission argument may be scheduled by the tribunal.

V THE AWARD

Tribunals make every effort to gather to deliberate immediately after the final argument or submission while the facts and the positions are fresh in their minds. The great majority of arbitrators favor having the tribunal confer throughout the proceeding; while keeping an open mind throughout, so the issues for discussion have been identified and preliminary consultation has taken place.³³ While there are exceptions, the chair of the tribunal usually prepares the first draft of the entire award. The tribunal endeavors to write a sound, enforceable award that carefully explains why the losing side’s positions were not accepted.

As the arbitrators weigh the evidence in their deliberations slightly different standards of proof may be applied. The standard of proof is stated differently in different jurisdictions and the meaning attributed to even the same or a similarly stated standard has been said to differ from jurisdiction to jurisdiction.³⁴ In common-law jurisdictions the standard of proof is typically stated as (a) a preponderance of the

33. Edna Sussman, *The Arbitrator Survey: Practices, Preferences and Changes on the Horizon*, 26 Am. Rev. Int’l Arb. 519 (2015) (survey showed that 63% of the respondents believed “that it was better to share views early in the process and discuss reactions to the merits throughout the proceeding”).

34. See discussion in Michael Bond, *The Standard of Proof in International Commercial Arbitration*, 77 ARB. 304 (2011).

evidence for the ordinary civil claim; (b) clear and convincing or cogent evidence for a more serious claim such as an allegation of fraud; and (c) beyond a reasonable doubt for criminal charges. Civil law jurisdictions, if they speak to a standard at all, refer to *l'intime conviction du juge* or free assessment.³⁵ There is no clear consensus as to what law governs the determination of the standard of proof: the substantive law governing the merits of the arbitration, the law of the seat or an overriding international norm.³⁶ The question of who bears the burden of proof and what standard of proof is required may be an important one in the deliberations.

While awards in international arbitration almost always do follow international norms with the provision of a reasoned award, tribunals seated in the U.S. may be persuaded to issue an award without reasons, institutional rules permitting. Unlike some non-U.S. jurisdictions, which will not enforce an award without reasons or any form of “baseball” arbitration, unreasoned awards are enforceable in the U.S. This approach on the part of the courts in the U.S. provides the parties with greater flexibility to determine the form of the award which would best serve their interests. The principles governing the application of *res judicata* and collateral estoppel differ in the U.S. from those of many other jurisdictions and it is frequently difficult to persuade U.S. courts to allow court filings to be made under seal. Thus, parties who wish to protect trade secrets or other confidential information, or who wish to preclude the possibility of any collateral estoppel arguments based on the award, or simply to save the money that would be expended on the preparation of a reasoned award, may elect to request an unreasoned award. Tribunals, even if willing to issue an unreasoned award and permitted to do so under the applicable rules, must be and are sensitive to issuing an award that is enforceable and thus may seek assurance from counsel that they have investigated the law applicable in enforcing jurisdictions before agreeing to issue an award without reasons.

VI CONCLUSION

No two arbitrations are alike. Each must be addressed individually by the arbitrators and the parties to develop a process tailored to the case. While significant and successful efforts have been devoted to harmonizing international arbitration across borders, differences remain. Those differences as to expectations and cultural backgrounds of all of the participants in the process, counsel’s ethical obligations, arbitrators’ legal backgrounds, and the procedures of the seat must be taken into consideration along with the specific factual and legal issues involved in crafting the appropriate process for the specific dispute.

35. *Id.*

36. See discussion in Jennifer Smith & Sara Nadeau-Seguin, *The Illusive Standard of Proof in International Commercial Arbitration*, in LEGITIMACY, MYTHS, REALITIES CHALLENGES, ICCA CONGRESS SERIES NO. 18 (Miami 2014) (Albert Jan van den Berg ed., 2015). See also Abhinav Bhushan, *Standard and Burden of Proof in International Commercial Arbitration: Is There a Bright Line*, 25 AM. REV. INT’L. ARB. 601 (2014).