The Fair and Efficient Hearing

What Advocates and Arbitrators Need To Do To Conduct a Fair, Effective and Well-Managed International Arbitration Hearing

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Overview

- Much of what we have said about conducting hearings in domestic arbitrations is applicable to international arbitrations.
- However, there are some distinctive differences between domestic and international arbitration, which are highlighted in this outline. The differences largely flow from differences in how litigation is conducted in different legal systems. A big contrast is between the common law and civil law systems. While domestic arbitration in the United States is heavily reflective of the common law approach followed in the U.S. legal system, international arbitration, to the extent it involves counsel and/or arbitrators from civil law systems, will often consist of an amalgam of the main characteristics of the two systems.
- In recent years, there have been significant convergences of the characteristic features of the litigative approaches of the common law and civil law systems, as such features are carried over into international arbitration. However, significant distinctive features of the two systems are still reflected in contemporary international arbitration practice, making it essential for lawyers and arbitrators making the transition from domestic to international arbitration to have a sensitivity to the differing expectations of participants in international arbitration coming from civil law systems.
- Salient differences between the common law and civil law systems arise, *inter alia*, in the following areas, each of which can have a significant impact on a hearing in an international arbitration:
    - the detailed nature of pleadings and attachments thereto and the continuing importance of such papers in civil law systems, as contrasted with the lesser focus on pleadings in common law systems;
    - the less extensive use of substantive motions in civil law systems;
    - the pervasive use of witness statements in civil law systems;
    - differing overall attitudes towards oral versus written testimony in the two systems;
    - broadly divergent views as to discovery/disclosure in the two systems;
    - the different ways in which expert witnesses are used in the two systems; and
    - the types of cross-examination used in the two systems.
- It is the experience of practitioners and arbitrators in the area that the calibration of the respective use of common law and civil law approaches in a particular

international arbitration will largely depend upon the attitudes of the arbitrators in the particular case.

- The purpose of this outline is to highlight the main distinctive features of hearings in international arbitration that result from the amalgam of common law and civil law approaches that may be used in the particular case, depending on the expectations, attitudes and pre-conceptions of the arbitrators and attorneys involved.

Witness Statements

- In civil law systems, there is a preference for written as opposed to oral testimony. The normal practice is for the direct testimony of witnesses to be presented in detailed sworn witness statements, to which the documents upon which the witness relies are attached. While this practice has become not uncommon in bench trials in some courts in the United States, it is not favored by many common law-based arbitrators, who like to hear the direct testimony orally and be able to assess it as it is presented.
- A main – almost epistemological – point is that, just as common law-oriented advocates and arbitrators tend to regard oral testimony as most persuasive, civil law-oriented practitioners and judges tend to see the written word as more persuasive, essentially believing that "all witnesses lie" and not being particularly enamored with the notion of cross-examination as the "most powerful engine for unearthing truth ever designed."
- The focus on witness statements in international arbitration persists, notwithstanding that everyone understands that witness statements are prepared by the lawyers and, indeed, that, given limitations on lawyers' talking with witnesses in some civil law systems, the lawyers preparing the witness statements have, in some instances, had limited communications at most with the witnesses in question.
- The use of witness statements imposes special burdens on counsel and arbitrators. Obviously, it requires counsel to develop their case and present it in some detail in advance of the hearing, both as to testimony and exhibits.
- For arbitrators from a common law system, there is a risk of overlooking the need to allot and spend whatever time is necessary to really assimilate the witness statements and the exhibits thereto in advance of the hearing, to the extent that, at least theoretically, the arbitrator is as familiar with them as he or she would have been if the witness's testimony and accompanying exhibits had been presented live on direct.
- When witness statements are used in international arbitration, it becomes important, particularly for common law-based arbitrators not that familiar with the civil law approach, to be careful to control the extent of redirect testimony, so

that redirect does not become, in effect, a delayed direct examination. Specifically, within reason, the scope of redirect testimony in international arbitration should be rather strictly limited to that of the cross, subject, obviously, to the needs of the particular case.

- It should be noted that the witness statement approach assumes the availability of the witness for cross-examination at the hearing. However, there are traps for the unwary here, both for counsel and arbitrators, if the opposing party decides not to cross–examine the witness, leading to the situation where the only evidence of record directly from the witness will be the witness statement. Many practitioners and arbitrators believe that, in such circumstances, it is appropriate for arbitrators to permit or even require some direct testimony from the witness, so they can get a sense of the witness's demeanor and the like and have any questions answered.
- It should also be noted that, under the witness statement approach, there will generally be a "warm-up period" of some period of time, typically 15 to 30 minutes or the like, for the witness to summarize his or her testimony very broadly and comment on what the other side's expert witness on the subject has said and other matters that have come up in the case subsequent to the preparation of the witness statement, provided, however, that this warm-up period can be extended for good cause shown.
- It is worth noting that witness statements, if interposed early enough in a case, can serve a purpose akin to discovery, at least to the extent of giving an adversary notice of what the direct testimony of the witness will be – indeed what that testimony is.
- The jury is out on the extent to which arbitrators actually rely on witness statements, as opposed to largely ignoring them and relying almost exclusively on the cross-examination and redirect testimony. Some practitioners and arbitrators believe that arbitrators generally rely fairly heavily on witness statements and others believe that they tend to largely discount them because of the known reality that the witness statements are generally prepared by counsel.
- However, in support of the notion that arbitrators often rely rather heavily on witness statements, it is noteworthy that it is the practice of some arbitrators in international arbitrations to meet after receipt and review of the witness statements, but before the commencement of the hearing, to discuss their preliminary views of the case.

Cross-Examination

- While the opposing side in civil law trials has the opportunity and usually utilizes it to cross-examine witnesses whose witness statements have been offered into evidence, civil law practitioners are not accustomed to the aggressive cross-examination that often occurs in common law systems and are can be offended by

it. It is important both for counsel in international arbitrations and for members of arbitration panels in such cases to be aware of the varying approaches and attitudes of case participants as to the appropriateness of harsh cross-examination.

Underlying Cognitive Issues

- These differing attitudes as to the reliability of written versus oral testimony may affect, if only subliminally, the cognitive styles of advocates and arbitrators from the two systems, leading to the situation where common law-based arbitration practitioners may assimilate witnesses' view of the world more readily from oral testimony and civil law-based practitioners may assimilate such matters more readily from written statements.
- Individual arbitrators will, of course, each have their own particular epistemological and cognitive styles, affecting how they best assimilate evidence, whether from oral or written presentations, and what kinds of evidence they will ultimately find most persuasive.
- A lot of work has also been done in recent years on the subject of heuristics – mental short cuts – that humans typically use in hearing, assimilating, and evaluating information. Such heuristics are made up essentially of unconscious, instantaneous reactions humans have to what is presented to them, based on preconceptions, ways of looking at the world, and even physiological factors, such as the time of day, food one has imbibed, the order of the evidence presented, and the like. Given differences in life experience — perhaps across the entire spectrum of influences based on nature and nurture — between people from different parts of world and cultures, it may be that the heuristics affecting common and civil law practitioners are somewhat different.

Expert Witnesses

- Where, in common law-based domestic arbitration, counsel select expert witnesses and generally expect them to present as strong a case as they can on behalf of the side that retained them, in international arbitrations influenced by civil law systems, the arbitrators will sometimes select the experts and expect them to be truly neutral.
- In international arbitration, the practice of "hot-tubbing" of expert witnesses is often followed, whereby, to one extent or another, such witnesses will be expected to cooperate with one another in narrowing their areas of disagreement and refining their analysis as to such areas.

Secrecy Laws

- Some civil law systems, including notably in Western Europe, have secrecy laws that are very protective of individual witnesses, including of employees of

corporate and other entities. These laws essentially create a zone of privacy that cannot be invaded by the arbitration process, even as to matters at issue in the arbitration that the witnesses were involved in as part of their employment.

- While issues relating to such secrecy laws will typically have been addressed earlier in an arbitration, particularly in the early planning phase of the case, such as at the preliminary hearing and in follow-up preliminary hearings, such issues can come up at the hearing, making it important for counsel and the arbitrators to be prepared to make whatever adjustments to the hearing process are reasonably necessary in light of such privacy laws.
- A most important consideration in this regard is to make sure that the two sides to the case are treated fairly and equally in that they are playing by and subject to the same rules, to the extent practicable.

Party-Appointed Arbitrators

- While in domestic arbitration in the United States, there is still a sense, depending somewhat on the arbitrators, provider institutions, and industries involved in the particular case, that party-appointed arbitrators may be partisan, or somewhat partisan, notwithstanding the default rule under the ABA/AAA Code of Ethics that arbitrators are neutral unless specifically designated as non-neutral, in international arbitration the expectation is much higher and more definite that party-appointed arbitrators will be truly neutral.
- Nonetheless, this expectation in international arbitration is ameliorated somewhat by the preconception, even in international arbitration, at least in the mind of some practitioners and arbitrators in the area, that party-appointed arbitrators are expected to make sure that their appointing party's positions in the case are "understood."
- Accordingly, even in international arbitration, the situation can arise where a party-appointed arbitrator is aggressively asking questions of witnesses designed to elicit or develop the position espoused by his or her appointing-party in the particular case or is overtly partisan in the deliberations in this regard.
- The arbitrators in each case need to make sure the case is being handled appropriately and fairly. The chair will have particular responsibility in this regard.
- Among other things, the chair has to devise and administer a fair approach for communications within the panel and for communications of the arbitrators with counsel and the parties at the hearing.

The Role of Arbitrators in Finding/Developing the Facts

- In civil law systems, judges play an active role in developing the facts at trial, as contrasted with the common law approach, where judges are typically more reliant on counsel to develop and present their case.
- This civil law approach sometimes flows over into the attitude of some civil law-based arbitrators in international arbitration, who sometimes see themselves as having somewhat more of a fact-finding role than arbitrators schooled in the common law system would typically expect.
- This can lead to arbitrators with such a civil law-orientation sometimes taking a somewhat more active role in questioning than U.S. arbitrators are prone to do in domestic arbitration.
- It is important that arbitrators communicate clearly and candidly with one another in this regard to make sure that the particular case is administered in a way that is both fair and has the appearance of being fair. The chair has particular responsibility in this regard.

Absence of Depositions

- Because depositions have historically not been used and are even today rarely used in civil law systems, civil law-based arbitrators in international arbitrations generally believe that depositions are not the norm and should rarely be permitted.
- Nonetheless, as noted above, there has been somewhat of a convergence of common law and civil law practice in international arbitration, to the extent that depositions are occasionally now proposed by counsel in international arbitrations and permitted, at least to some extent, in such arbitrations by arbitrators whose backgrounds are in civil law systems.
- This point as to whether depositions have been permitted can have an impact on the conduct of the hearing in an international arbitration, in terms of whether testimony is presented by deposition and available to counsel for use in cross-examination.

Significance to the Hearing of Potential Issues as to the Enforcement of Awards in International Arbitrations

- Since, by definition, international arbitrations will typically involve parties located in many jurisdictions, awards in international arbitrations will often potentially have to be enforced in multiple jurisdictions, depending on where assets of the losing party are located. Given the overriding importance to arbitrators that their awards be enforceable, this reality as to the need for awards to be enforceable in multiple jurisdictions imposes the burden on counsel and arbitrators in international arbitrations to take whatever steps are reasonably

necessary to assure that the award in the particular case meets the standards of the various jurisdictions in which enforcement might be sought.

- This concern is greatly simplified by the existence of several widely acceded-to multi-national conventions, including, most notably, the New York Convention, to which most of the countries in the world are signatories, making arbitration awards generally enforceable in most countries throughout the world.
- It is obviously quite important for counsel and arbitrators to have a sense of the requirements of such conventions so the award in the particular case will be enforceable. As merely one example, in many countries of the world, unlike in the United States, arbitration awards generally must be of a reasoned nature to be enforced.
- Arbitrators need to be aware of the extent, if any, to which the manner of administration of the hearing may affect the enforceability of the resultant award in the potentially relevant jurisdictions.

Rules Regulating the Conduct of Counsel in International Arbitrations

- To the extent that differences in the ethical regimes applicable to different attorneys and even, possibly, arbitrators in a case can impact on what conduct is permissible in the arbitration, it is obviously important that this matter be focused on early in the case, so everyone is prepared to do whatever is necessary to make the process work smoothly and effectively within the applicable standards.
- The IBA Guidelines on Party Representation in International Arbitration set forth guidelines for the conducting of international arbitrations by advocates, including provisions directly applicable to advocates' performance of their representation of clients at the hearing.
- For example, the Guidelines provide that advocates, who discover that they or a fact or expert witness has made a false statement of fact to the tribunal, should, subject to applicable considerations of privilege and confidentiality, take prompt remedial measures (discussed in the Guidelines) as to the false statement;
- While the Guidelines are merely that, guidelines, they highlight the need for counsel and arbitrators to be aware of whatever legal and ethical regimes may apply in each particular international arbitration.
- While the Guidelines are new and not yet widely followed, they are an invaluable resource for counsel and arbitrators in terms of meeting and managing reasonable expectations in international arbitration.
- Counsel and arbitrators are well advised to familiarize themselves with the Guidelines and refer to them frequently throughout the course of an international arbitration.

Choice of Law

- Because of the multiple jurisdictions from which parties, counsel and arbitrators may come in the typical international arbitration, and the multinational nature of the transactions that are typically involved in such arbitrations, complex issues as to choice of law will often be presented, including as to the law applicable to such matters as the following:
  - arbitrability of claims or defenses asserted in the case;
  - the underlying transactions or matters at issue in the case;
  - the conducting of the hearing;
  - the enforcement of the award in the various – sometimes numerous – jurisdictions in which enforcement may need to be sought; and
  - the ethical and legal obligations of counsel and the arbitrators.
- Advocates and arbitrators need to be aware of the requirements of these various possible legal regimes that may apply in a particular international arbitration.
- Obviously, arbitrators need to conduct the hearing in light of legal considerations applicable to matters being presented in the hearing.

Implication of Need for Reasoned Award

- Arbitrators in international cases will need to consider the need for a reasoned award and take whatever steps are necessary to enable them to prepare such an award.
- Some arbitrator believe that they need a transcript of the hearing to write the award and hence press counsel to arrange for a court reporter for the case. Other arbitrators are more flexible in this regard and are comfortable preparing their awards based on their notes.

Arbitrability

- While issues in an international case as to the arbitrability of the claims presented will typically have been addressed earlier in the case, at times the issue will be left for the hearing and in other instances there will be a separate hearing as to arbitrability, where much of what is said in this outline may be applicable.

Rules of Evidence Applied at the Hearing

- While in international arbitration, as in domestic arbitration, the rules of evidence are not strictly enforceable, nonetheless, since the lawyers and many of the arbitrators will be present or former litigators and sometimes retired judges, the rules of evidence will nonetheless continue to have an impact, or at least a potential impact, on the conducting of international arbitrations.
- This makes the underlying attitudes and expectations of the lawyers and arbitrators involved as to the purpose and usefulness of the rules of evidence

particularly important in the given case, making it crucial that counsel understand the orientation of their arbitrators in this regard and that arbitrators have a sense of the attitudes and expectations of counsel and parties in terms of what is fair and reasonable.

- It is equally important that co-arbitrators consult with one another in advance of the hearing in an effort to get on the same page as to what approach will be taken as to the application of rules of evidence in the hearing.
- Because of the potential for different approaches and expectations in terms of the approach to be taken with respect to the receipt of evidence at hearings in international arbitrators, it is important that this matter and matters of this nature be sorted out as much as possible in advance of the hearing, to avoid undue surprises and potential unfairness at the hearing.

Getting Acknowledgements from Parties at the End of the Hearing that They Had the Opportunity to Offer Whatever Evidence They Wanted to Offer

- Because of the differences in expectations of participants in international as opposed to domestic arbitration, the practice, generally followed in domestic arbitration, of asking parties at the end of the case whether they have had an opportunity to offer any evidence and make any arguments that they want to make, is particularly important in international arbitration.

Interpreters

- Witnesses will often need to testify in different languages at hearings in international arbitrations, requiring the use of interpreters.
- This presents various issues that need to be addressed in advance and worked out, to make the hearing go as smoothly as possible, including such issues as the following: the qualifications of the interpreters; who the interpreters will be; the mode of interpretation, whether sequential or simultaneous; the extent to which questions and comments by the interpreter will be permitted; how it will be handled if the other side wants to have its own interpreter in the room and wants to question interpretations provided by the official interpreter, as the matter proceeds; what the official language of the proceeding is; who bears the cost of the interpreter; and the like.

Translations of Documents

- Similar issues are regularly presented in international arbitration as to the language of exhibits that are presented in the case, including issues as to the official language of the proceeding; the permissible language or languages in which exhibits may be presented to the arbitrators; the handling of the original

documents and the translated versions thereof; proceedings for challenging translations; and the like.

IBA Rules on the Taking of Evidence in International Arbitration

- Approaches to many of the above matters are set forth in the IBA Rules on Taking Evidence. Matters covered in the Rules include hearing the testimony of witnesses, the admission into evidence of exhibits, the use of witness statements, the hearing of experts (both party and tribunal-appointed), the order of testimony at the hearing, and the overall admissibility and assessment of evidence.
- While the Rules are not necessarily binding, they are applied in many international arbitrations, in some cases because the parties have agreed or the arbitrators have directed that they will be applicable, and in other cases because counsel and arbitrators rely on them informally, whether specifically or implicitly.
- It well behooves counsel and arbitrators in international arbitrations to review the Rules throughout the proceeding.