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April 8, 2015

VIA EMAIL

Mr. Babak Barin
Prof. Catherine Kessedjian
Judge William J. Cahill

Re: DCA and ICANN; ICDR Case No. 50-20-1300-1083

Dear Mr. Chairman and Members of the Panel:

On behalf of ICANN, I am responding to Procedural Order No. 6, in which the Panel requested that the Parties confirm their respective positions on the following two issues:

Panel Issue No. 1:

Presence of and opportunity for the Panel *only* to ask witnesses *viva voce* questions during any in-person, telephonic or video hearing ordered by the Panel.

ICANN's Position re: Issue 1:

As I explained during our call on March 31, 2015, ICANN's Bylaws do not permit any examination of witnesses by the parties or the Panel during the hearing. Article IV, Section 3, Paragraph 12 of the Bylaws states:

> In order to keep the costs and burdens of independent review as low as possible, the IRP Panel should conduct its proceedings by email and otherwise via the Internet to the maximum extent feasible. Where necessary, the IRP Panel may hold meetings by telephone. In the unlikely event that a telephonic or in-person hearing is convened, *the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance*. (Emphasis added.)

ICANN understands that, in its March 24, 2015 declaration, the Panel concluded that a hearing could include not only arguments but examination of witnesses, rejecting ICANN's argument that the hearing of witnesses was not permissible. However, ICANN has determined that it has no choice but to follow the provisions of its Bylaws that set forth the rules for all Independent Review proceedings.[1]

As I stated during our March 31 call, in lieu of live testimony, ICANN would welcome written questions from the Panel to the witnesses before the hearing. And, of course, if the Panel needs more information after the hearing to clarify evidence presented during the hearing, Paragraph 5 of the Supplementary Procedures would permit this request as well. A similar type of procedure has been used in alternative dispute resolution proceedings in situations where a witness cannot attend a hearing.[2]

Panel Issue No. 2:

Evidentiary treatment by the Panel of the witness statements already filed, if there is to be no cross-examination by the Parties and no *viva voce* questions asked by the Panel during any in-person, telephonic or video hearing ordered by the Panel.

ICANN's Position re: Issue No. 2:

As ICANN noted in my letter of February 26, 2015, it is common for panels in alternative dispute resolution proceedings to receive written testimony without cross-examination and to assess the weight to be given to that testimony, either when one party informs a panel that it has no intention to cross-examine a witness who has submitted a statement, or when a witness cannot attend a hearing for good cause.[3]

[1] In the event the Panel asks Ms. Bekele questions during any hearing, ICANN will not ask any questions because of the limitation in Paragraph 12.

[2] See Jeff Waincymer, Procedure and Evidence in International Arbitration (Kluwer Law International 2012) at 899, reporting that in ICC Case No. 9333, where a witness could not appear at a hearing, the Tribunal collected questions from the other party and its own and sent a questionnaire to the witness.

[3] Section 4.8 of the 2010 IBA Rules on the Taking of Evidence provides: "If the appearance of a witness has not been requested pursuant to Article 8.1, none of the other Parties shall be deemed to have agreed to the correctness of the content of the Witness Statement." See also Roland Ziade and Charles-Henri De Taffin, Fact witnesses in international arbitration, RDAI/IBLJ, No. 2, 2010 at p. 121: "each party is free to waive its right to cross-examine some or all of the opposing witnesses, and such waiver cannot be deemed an admission of the facts set forth in the witness statement."

Indeed, the law is clear that there is no "right" to cross-examination in an arbitration (much less an Independent Review proceeding).[4]

If the written testimony is demonstrated to be odds with other testimony and exhibits, the written testimony can be given less (or even no) weight. On the other hand, if the written testimony is consistent with other testimony and exhibits, the Panel likely would credit the veracity of the written testimony.[5]

In this matter, ICANN has two declarants – Ms. Dryden and Mr. Chalaby. Ms. Dryden's declaration addresses events that occurred before and during the Governmental Advisory Committee (GAC) meeting at which the GAC issued "consensus advice" against DCA's application for .AFRICA. After ICANN submitted Ms. Dryden's declaration, ICANN produced documents from the GAC that confirm the accuracy of Ms. Dryden's testimony and refute DCA's position. Indeed, in its opening brief, DCA had provided the Panel with only a snippet of the email exchange that occurred prior to the GAC meeting, and the portion DCA did not provide the Panel (but which is now in the record) demonstrates that DCA's argument is completely wrong. Further, DCA's only declarant, Ms. Bekele, has no first-hand knowledge of any of these events because she was not on the email string leading up to the GAC meeting, and she did not attend the meeting itself.

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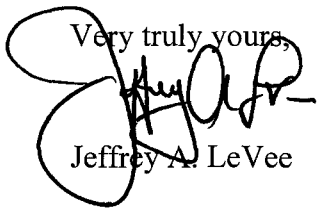
[4] *See Sunshine Min. Co. v. United Steelworkers of Am., AFL-CIO, CLC*, 823 F.2d 1289, 1291, 1295 (9th Cir. 1987) (because arbitrators may rely on evidence inadmissible under the Federal Rules of Evidence, "a party does not have an absolute right to cross-examination."); *In Matter of Consol. Arbitrations Between A.S. Seateam v. Texaco Panama, Inc.*, Case No. 97 CIV. 0214 (MBM), 1997 WL 256949, at *8 (S.D.N.Y. May 16, 1997) (affirming arbitration award when a party was not allowed to cross-examine a declarant because the "affidavit was properly before the arbitrators" and "parties do not have an absolute right to cross-examine witnesses"); *Hernandez v. Smart & Final, Inc.*, Case No. 09-CV-2266 BEN NLS, 2010 WL 2505683, at *9 (S.D. Cal. June 17, 2010) (confirming arbitration award where a party was permitted to present an expert opinion by way of written statement).

[5] Antonias Dimolitsa, "Giving evidence: Some reflections on oral evidence vs documentary evidence and on the obligations and rights of the witnesses" in Arbitration and Oral Evidence at pages 2-4. *See also* Conduct of the Proceedings in Alan Redfern, J. Martin Hunter , et al., Redfern and Hunter on International Arbitration (2009), pp. 363 - 437, at §6.97: "It can be stated with some confidence that, in relation to disputed facts, modern international arbitral tribunals accord greater weight to the contents of contemporary documents than to oral testimony given, possibly years after the event, by witnesses who have manifestly been 'prepared' by lawyers representing the parties. In international arbitrations, the best evidence that can be presented in relation to any issue of fact is almost invariably contained in the documents which came into existence at the time of the events giving rise to the dispute."

Mr. Chalaby's declaration addresses DCA's claim that two of ICANN's Board members might have had conflicts of interest when they voted to accept the GAC Advice that DCA's application not proceed. DCA has *never* submitted any evidence on the conflict issue, and DCA's Reply Memorial does not even address the issue. Ms. Bekele's declaration (submitted with DCA's Reply Memorial) does briefly address the conflict issue but does not submit any evidence to rebut Mr. Chalaby's statements or the exhibits that Mr. Chalaby referenced (including ICANN's conflicts of interest policy and how the policy was followed in this instance).

At the hearing, counsel will no doubt address the declarations of Ms. Dryden, Mr. Chalaby, and Ms. Bekele, and they should be free to argue how the Panel should treat any of the testimony in the declarations. We recognize that DCA's counsel may argue that the Panel should disregard the declarations of Ms. Dryden and Mr. Chalaby as a result of ICANN's decision not to make either available for live questions, and I would respond, if necessary, as to why disregarding the declarations is inappropriate in this instance, and why DCA's claims should fail irrespective of how the Panel treats the two declarations.

Very truly yours,



Jeffrey A. LeVee

cc: Counsel for DCA

LAI-383236897v1

Sunshine Min. Co. v. United Steelworkers of America, AFL-CIO, CLC

United States Court of Appeals, Ninth Circuit. | March 25, 1987 | 823 F.2d 1289 | 124 L.R.R.M. (BNA) 3198

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Outline

823 F.2d 1289
United States Court of Appeals,
Ninth Circuit.

SUNSHINE MINING COMPANY, Plaintiff-Appellee,
v.
UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC and Local 5089, United Steelworkers of America, Defendants-Appellants.

No. 85-4378. | Argued and Submitted Dec. 2, 1986. | Decided March 25, 1987. | As Amended Aug. 10, 1987.

Union filed grievance on behalf of employee terminated for insubordination. Arbitrator held hearing, officially closed hearing, and issued award conditioned upon psychiatric examination of employee. The United States District Court for the District of Idaho, Harold L. Ryan, J., entered judgment in favor of employer. Union appealed. The Court of Appeals, Orrick, Senior District Judge, sitting by designation, held that: (1) inasmuch as psychiatric examination, upon which arbitrator's award was conditioned, was never conducted, award was incomplete, and district court erred in substituting its interpretation of award for that arbitrator, and case would be remanded to arbitration for final and complete determination of issue submitted; (2) arbitrator's order that employee submit to psychiatric examination to be paid for by parties did not violate due process by depriving parties of opportunity to cross-examine psychiatrist on results of psychiatric examination; (3) ordering psychiatric examination was not beyond arbitrator's authority even though he had already closed record; and (4) arbitrator had authority to order that psychiatric examination of employee be paid for by both parties.

Reversed with instructions to remand to arbitrator.

West Headnotes (17)

[1] Alternative Dispute Resolution
Scope and Standards of Review

District court's grant of summary judgment vacating arbitration award is reviewed de novo.

5 Cases that cite this headnote

[2] Alternative Dispute Resolution
Scope and Standards of Review

Scope of review of arbitrator's decision is extremely narrow.

6 Cases that cite this headnote

[3] Alternative Dispute Resolution
Scope and Standards of Review

Because arbitration is alternative to judicial resolution of disputes, extremely low standard of review is necessary to prevent “judicialization” of arbitration process.

6 Cases that cite this headnote

[4] Labor and Employment

Interpretation of Collective Bargaining Agreement

As long as arbitrator's award "draws its essence" from collective bargaining agreement, it must be enforced.

7 Cases that cite this headnote

[5] Labor and Employment

Scope of Inquiry

Only if arbitrator dispenses his own brand of industrial justice should award be vacated.

1 Cases that cite this headnote

[6] Labor and Employment

Discharge

Consideration of employee's mental condition was well within arbitrator's authority in grievance filed on employee's behalf after employee was terminated for insubordination for cursing and shouting profanities at his supervisor employee had sustained work-related head injury several years earlier.

1 Cases that cite this headnote

[7] Alternative Dispute Resolution

Agreement or Submission as Determinative

Arbitrator's authority is limited to issue submitted to him by parties.

6 Cases that cite this headnote

[8] Alternative Dispute Resolution

Consistency and Reasonableness; Lack of Evidence

Arbitrator's award that considers "just-cause" provision to include element of fault is plausible interpretation of contractual language, to which courts must defer.

1 Cases that cite this headnote

[9] Alternative Dispute Resolution

Finality

Structuring arbitration award to condition it on results of future psychiatric examination rendered it partial or interim award, even though it was not so designated.

3 Cases that cite this headnote

[10] Alternative Dispute Resolution

Recommittal to Arbitrators by Court

Inasmuch as psychiatric examination, upon which arbitrator's award was conditioned, was never conducted, award was incomplete, and district court erred in substituting its interpretation of award for that arbitrator, and case would be remanded to arbitration for final and complete determination of issue submitted.

10 Cases that cite this headnote

[11] Constitutional Law
Alternative Dispute Resolution

Arbitrator's order that employee submit to psychiatric examination to be paid for by parties did not violate due process by depriving parties of opportunity to cross-examine psychiatrist on results of psychiatric examination; issue of employee's mental condition was first raised at prearbitration grievance proceedings and both parties had adequate opportunity to present evidence and argue question at hearing in posthearing briefs. U.S.C.A. Const.Amends. 5, 14.

8 Cases that cite this headnote

[12] Alternative Dispute Resolution
Hearing

Hearing before arbitrator is fundamentally fair if it meets "minimal requirements of fairness," that is, adequate notice, hearing on evidence, and impartial decision by arbitrator.

28 Cases that cite this headnote

[13] Alternative Dispute Resolution
Application of Judicial Rules
Alternative Dispute Resolution
Witnesses

Arbitrators may admit and rely on evidence inadmissible under evidence rules, and while party does not have absolute right to cross-examination, arbitrator must give each parties to dispute adequate opportunity to present its evidence and arguments.

15 Cases that cite this headnote

[14] Alternative Dispute Resolution
Delegation of Authority

Arbitrator's duty is personal one that cannot be delegated.

1 Cases that cite this headnote

[15] Alternative Dispute Resolution
Delegation of Authority

Simply requesting production of evidence that arbitrator believes germane or necessary to resolution of issues submitted is not improper delegation of arbitrator's duty, as long as arbitrator carefully evaluates and weighs that evidence himself.

1 Cases that cite this headnote

[16] Alternative Dispute Resolution
Scope of Relief
Alternative Dispute Resolution
Reconsideration by Arbitrators

Ordering psychiatric examination was not beyond arbitrator's authority even though he had already closed record; conditioning of award upon psychiatric examination made award incomplete so that arbitrator properly

exercised his authority to reopen award to supplement record.

1 Cases that cite this headnote

[17] Labor and Employment
Costs and Attorney Fees

Arbitrator had authority to order that psychiatric examination of employee be paid for by both parties, in grievance proceedings arising from employee's discharge; arbitrator concluded that psychiatric evidence was prerequisite to his resolution of issue submitted for arbitration, so that it was plausible interpretation of contractual language to conclude that psychiatric examination of arbitrator order was essential part of "expense of the Arbitrator" to be paid for by both parties.

4 Cases that cite this headnote

Attorneys and Law Firms

***1291** Rudolph L. Milasich, Jr., Pittsburgh, Pa., for defendants-appellants.

James E. Ruyle, Portland, Or., for plaintiff-appellee.

Appeal from the United States District Court for the District of Idaho.

Before BROWNING, Chief Judge, WRIGHT, Circuit Judge, and ORRICK, * District Judge.

* Honorable William H. Orrick, Jr., Senior United States District Judge, Northern District of California, sitting by designation.

Opinion

ORRICK, Senior District Judge:

Appellants, United Steelworkers of America, AFL-CIO, and Local 5089, United Steelworkers of America (the "Union"), appeal from the judgment and order of the district court, which vacated portions of an arbitration award, closed the arbitration hearing, and denied the grievance filed on behalf of Russell Carlson by the Union against appellee, Sunshine Mining Company (the "Company"). For the reasons set forth below, we reverse the decision of the district court with instructions to remand the grievance to the arbitrator.

I

The controversy in issue involves the discharge of a miner, Russell Carlson, by the Company on April 19, 1984. Carlson worked at the Company for a total of seven years. In 1981, he received a head injury in a rock fall and was referred to a neurologist. The neurologist noted no signs of permanent psychological problems, although he recommended that Carlson engage in surface work for several months. Carlson eventually returned to underground mining in January 1982. Between February and October of 1983, Carlson accumulated a number of unexcused absences and was discharged. During the ensuing grievance, the Company agreed to reinstate Carlson on the condition that

he attempt to improve his attitude toward his work.

Carlson returned to work, although certain problems persisted. First, Carlson was inclined to mutter obscenities about his supervisor and management officials; second, other workers believed Carlson to be "nervous," and harassed him by throwing firecrackers at him in the mine, and poking him in the darkened elevator as it descended into the mine.

On April 9, 1984, Carlson's supervisor instructed him to "raise the crib" at the 4,200 foot level of the mine before blasting. Carlson began cursing loudly. At the end of the shift, when the crew assembled next to the elevator, Carlson again shouted profanities at his supervisor, and continued this verbal abuse as the crew rode the ***1292** elevator out of the shaft. The supervisor testified that he had never seen such a strong and extended emotional reaction by a worker in the mine. Other crew members reported that Carlson appeared to be mentally unstable. Carlson himself could not remember the details of the incident, although he stated that he had "spells" or hallucinations after which he could not remember what he had said or done. Carlson had previously taken anti-convulsants as prescribed by the neurologist, but he was not taking any medication on the day in question.

The following day, Carlson received a notice of suspension prior to discharge. He was then terminated for insubordination. The Union filed a grievance on Carlson's behalf, and when the issue remained unsettled, it was referred to arbitration in accordance with Article XIV of the 1980 Collective Bargaining Agreement between the parties. [1]

1 The relevant portion of Article XIV of the Collective Bargaining Agreement states:

> Any question or dispute concerning compliance by the Company with, or interpretation or application of this Agreement, memoranda or supplemental agreements concerning wages, hours and other terms and conditions of employment, shall be treated as a claimed grievance in the sequence outlined as grievance procedure until settled. Should an agreed settlement be lacking at the final stage of the grievance procedure, said claimed grievance may then be referred by the grievant's representative to arbitration. The Arbitrator's decisions made within the scope of the submission and authority of the Arbitrator shall be final and binding on all parties.

The parties stipulated that the issue before the arbitrator was as follows: "Was the grievant discharged for just cause? If not, what is the appropriate remedy?" The relevant provision of the Collective Bargaining Agreement vested "the sole direction of the working forces, including * * * the right to * * * discharge for cause" in the Company, subject to the other provisions of the agreement. Collective Bargaining Agreement, Art. XXVI, Control in Management.

A hearing was held on May 31, 1984, before Arbitrator Carlton J. Snow, at which evidence was presented and oral argument made. The parties elected to submit post-hearing briefs. The arbitrator officially closed the hearing on July 12, 1984. On August 13, 1984, the arbitrator issued the award. He concluded that there was a serious question concerning Carlson's mental stability at the time of the incident that led to his discharge. The arbitrator found that Carlson had engaged in insubordinate conduct, but reasoned that if

he were mentally ill at the time, the illness, under certain circumstances, would preclude a finding of just cause for discharge.

Recognizing the uniqueness of the situation, the arbitrator framed a unique award. The arbitrator found that the evidence supported "a conclusion that the grievant's mental instability may have been a significant factor" in his discharge, but that there was insufficient evidence to determine whether Carlson's mental instability was temporary, or whether it rendered him incapable of continued performance of his duties. Stating that a final determination as to whether Carlson's discharge had been for cause could be made only if expert evidence concerning his psychological condition became part of the record, the arbitrator ordered the parties to select a psychiatrist to examine Carlson. The psychiatrist was to submit his or her findings concerning Carlson's mental condition at the time of the incident, and at the present time. If the psychiatrist concluded that Carlson suffered from no mental illness, the discharge was to be sustained. If the psychiatrist concluded that Carlson was mentally ill at the time of the incident, and his prognosis for recovery would preclude underground mining work, the discharge would similarly be sustained. However, if the psychiatrist determined that Carlson was mentally ill on April 9, but had recovered sufficiently to work underground, he was to be reinstated without back pay but with seniority. The arbitrator stated that he would retain jurisdiction in the matter for sixty days following issuance of a psychiatric report, as authorized by the parties.

***1293** The Company requested that the arbitrator reconsider his decision, arguing that he had no authority to reopen the record for post-hearing evidence, or to require the Company to pay part of the costs of the psychiatric examination. This request was denied. On October 11, 1984, the Company requested a stay of implementation of the award, stating that if the Union undertook to have Carlson examined, it would not be responsible for any portion of the fee, pending the outcome of litigation it intended to file. The Company then filed this action in the district court to vacate the arbitration award. The Union answered and filed a counterclaim to compel enforcement of the award.

After a hearing on cross-motions for summary judgment, the district court entered a judgment in favor of the Company. The court ordered the record closed and the grievance denied on the basis of the arbitrator's finding of insubordination. In its contemporaneously filed memorandum opinion and order, the district court noted that "[a]n arbitrator may hold the record open for the inclusion of additional evidence." Nonetheless, it found that the parties had been denied due process by the arbitrator's conditioning of his final determination, after closing the record, on a conclusion to be reached by a psychiatrist with respect to Carlson's mental illness. Furthermore, the district court found that the arbitrator acted beyond his authority in ordering the psychiatric examination, which it deemed to be an improper delegation of the arbitrator's fact-finding function.

II

[1] The question before this court is whether the district court properly vacated portions of the arbitral award, closed the record, and denied the grievance when it granted summary judgment. A district court's grant of summary judgment vacating an arbitration award is reviewed *de novo. New Meiji Market v. United Food & Commercial Workers Local # 905,* 789 F.2d 1334, 1335 (9th Cir.1986).

[2] **[3]** The scope of review of an arbitrator's decision is extremely narrow. *Edward Hines Lumber Co. v. Lumber & Sawmill Workers Local No. 2588,* 764 F.2d 631, 634 (9th Cir.1985). It is well established that the courts must not reexamine the merits of an arbitral award, because to do so would undermine the federal policy of settling labor disputes by arbitration. *United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 596, 80 S.Ct. 1358, 1360, 4 L.Ed.2d 1424 (1960). Because arbitration is an *alternative* to the judicial resolution of disputes, this extremely low standard of review is necessary to prevent the "judicialization" of the arbitration process. *E.I. DuPont de Nemours & Co. v. Grasselli Employees Independent Association of East Chicago, Inc.,* 790 F.2d 611, 614 (7th Cir.1986).

[4] **[5]** As long as the arbitrator's award "draws its essence" from the collective bargaining agreement, it must be enforced. *Enterprise Wheel,* 363 U.S. at 597, 80 S.Ct. at 1361; *Broadway Cab Cooperative, Inc. v. Teamsters & Chauffeurs Local Union No. 281,* 710 F.2d 1379, 1382 (9th Cir.1983). An award is said to "draw its essence" from the contract if it is based on the contractual language and the parties' conduct. *Howard P. Foley Co. v. International Brotherhood of Electrical Workers, Local 639,* 789 F.2d 1421, 1422-1423 (9th Cir.1986). Only if the arbitrator dispenses "his own brand of industrial justice" should the award be vacated. *Enterprise Wheel,* 363 U.S. at 597, 80 S.Ct. at 1361. The Supreme Court recently reaffirmed this deferential standard of review in *W.R. Grace & Co. v. Local Union 759,* 461 U.S. 757, 764, 103 S.Ct. 2177, 2182, 76 L.Ed.2d 298 (1983).

> When the parties include an arbitration clause in their collective-bargaining agreement, they choose to have disputes concerning constructions of the contract resolved by an arbitrator. Unless the arbitral decision does not "dra [w] its essence from the collective bargaining agreement," a court is bound to enforce the award and is not entitled to review the merits of the contract dispute. *This remains so even when the basis for the* ***1294** *arbitrator's decision may be ambiguous.*

(Citation omitted; emphasis added.)

[6] **[7]** **[8]** Applying these principles to this case, it is clear that consideration of Carlson's mental condition was well within the arbitrator's authority.[2] The scope of the arbitrator's authority is limited to the issue submitted to him by the parties. *Mobil Oil Corp. v. Independent Oil Workers Union,* 679 F.2d 299, 302 (3d Cir.1982). The issue submitted to the arbitrator in this case was whether Carlson's discharge was for "just cause." The arbitrator interpreted "cause" to encompass a mental fault element, *i.e.,* an

insubordinate but mentally ill employee would lack the fault necessary to support a finding of just cause. An award that considers a "just-cause" provision to include an element of fault is a plausible interpretation of the contractual language, to which the courts must defer. *E.I. DuPont de Nemours,* 790 F.2d at 614.

2 The Company makes an argument that the issue of Carlson's mental condition was not raised by appellants at the hearing. The issue was first raised in grievance proceedings prior to arbitration; and both sides argued the issue in the briefs submitted to the arbitrator. Carlson and other witnesses also testified at the hearing regarding Carlson's mental condition. Thus, the Company's assertion is completely without merit.

> This notion of fault analysis as part of a just cause determination is not a novel concept based on the personal whims of a single arbitrator; the same concept has been applied by several other arbitrators.
>
> *Id.* at 614. *See also Mobil Oil Corp.,* 679 F.2d at 303.

The Company argues that *Butterkrust Bakeries v. Bakery, etc., Workers International Union, Local 361,* 726 F.2d 698 (11th Cir.1984), compels a different result. In *Butterkrust*, the arbitrator first found just cause for dismissal, and then attempted to condition reinstatement upon completion of a Dale Carnegie class. The court there held that once the arbitrator found the existence of just cause for dismissal, his authority over the parties in the dispute ceased. *Id.* at 700. *Butterkrust* is inapposite to this case because the arbitrator never found just cause for discharge. He found that Carlson's conduct constituted insubordination, but he did not determine that such insubordination constituted cause of discharge.[3] Instead, the award concluded that the just-cause-for-discharge issue could only be resolved if expert psychological evidence became part of the record.

3 *International Association of Machinists v. San Diego Marine Construction Corp.,* 620 F.2d 736, 738 (9th Cir.1980), upheld an arbitration award that found even though the grievant was "insubordinate" there was not "just cause" to discharge him.

[9] Nonetheless, structuring the award to make it conditional on the results of a future psychiatric examination rendered it a partial or interim award, even though it was not so designated. The authority of arbitrators to issue interim awards has been upheld. For example, in *Sportswear, etc., Garment Workers Union, Local 246 v. Evans Manufacturing Co.,* 318 F.2d 528 (3d Cir.1963), the court upheld the arbitrator's authority to issue a preliminary award that directed the union be permitted to examine the employer's books, before arbitral resolution of all facets of the submitted issue. Stating that it had "no doubt of the propriety of the order under review, as one, on the basis of the record, within the authority of the Arbitrator," the court compared the decision of the Supreme Court in *Enterprise Wheel,* 363 U.S. 593, 80 S.Ct. 1358, which held that an award need not be set aside for incompleteness and ordered the award returned to arbitration for a definite determination. *Evans Manufacturing Co.,* 318 F.2d at 530.[4]

4 "Ninth Circuit precedent supports our jurisdiction to review such an award. As *Aerojet-General Corp. v. American Arbitration Ass'n,* 478 F.2d 248 (9th Cir.1973), demonstrates, we have not precluded review of all nonfinal arbitrator's awards. The present case falls in the category of exceptional cases in which the panel must decide the merits of the appeal in order to determine the interim nature of the arbitrator's award. Neither *Kemner v. District Council of Painting & Allied Trades No. 36,* 768 F.2d 1115 (9th Cir.1985), nor *Aerojet-General* preclude review of such a case."

***1295** **[10]** Inasmuch as the psychiatric examination ordered by the arbitrator in this case was never conducted, the instant award is incomplete. It is firmly established that the courts may resubmit an existing arbitration award to the original arbitrator for interpretation or amplification. See *Locals 2222, 2320-2327, International Brotherhood of Electrical Workers v. New England Telephone & Telegraph Co.*, 628 F.2d 644, 647 & n. 4 (1st Cir.1980), and cases cited therein. The district court, therefore, erred in substituting its interpretation for that of the arbitrator. The case must be remanded to arbitration for a final and complete determination of the issue submitted.

III

A more difficult question is presented by the arbitrator's order that Carlson submit to a psychiatric examination to be paid for by the parties. The results of this examination were to be used to determine Carlson's reinstatement or discharge. The district court found that this order exceeded the bounds of the arbitrator's authority on three separate grounds. Each will be discussed in turn.

[11] **[12]** First, the arbitrator's order did not constitute a violation of due process by depriving the parties of an opportunity to cross-examine the psychiatrist on the results of the psychiatric examination. Labor arbitrations do not provide the same procedural protections as do judicial proceedings. As the district court recognized, an arbitrator "need only grant the parties a fundamentally fair hearing." *Bell Aerospace Co. Division of Textron, Inc. v. Local 516, UAW*, 500 F.2d 921, 923 (2d Cir.1974). A hearing is fundamentally fair if it meets "the minimal requirements of fairness"-adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator. *Ficek v. Southern Pacific Co.*, 338 F.2d 655, 657 (9th Cir.1964), *cert. denied*, 380 U.S. 988, 85 S.Ct. 1362, 14 L.Ed.2d 280 (1965).

[13] Arbitrators may admit and rely on evidence inadmissible under the Federal Rules of Evidence. *See, e.g., Bell Aerospace Co.*, 500 F.2d at 923. Similarly, a party does not have an absolute right to cross-examination. *See, e.g., Hoteles Condado Beach, La Concha & Convention Center v. Union de Tronquistas Local 901*, 763 F.2d 34, 40 (1st Cir.1985). The arbitrator must, however, give each of the parties to the dispute an adequate opportunity to present its evidence and arguments. *Id.* at 39. In this case, the issue of Carlson's mental condition was first raised at the prearbitration grievance proceedings, and both parties had an adequate opportunity to present evidence and argue the question at the hearing and in the post-hearing briefs. The arbitrator's ordering of a psychiatric examination, therefore, cannot be said to render the arbitration fundamentally unfair.

[14] The district court also considered the arbitrator's order to be an improper delegation of decision-making authority to the psychiatrist. It is true that the arbitrator's duty is a personal one that may not be delegated. *National Bulk Carriers, Inc. v. Princess Management Co.*, 597 F.2d 819, 824 (2d Cir.1979). Nonetheless, the nature of some cases makes the use of expert testimony helpful. *See* F. Elkouri, *How Arbitration*

Works, 334-39 (4th ed. 1985) (hereinafter cited as "*How Arbitration Works* ").

[15] Simply requesting production of evidence that the arbitrator believes germane or necessary to resolution of the issue submitted is not an improper delegation, as long as the arbitrator carefully evaluates and weighs that evidence himself. *National Bulk Carriers,* 597 F.2d at 824. On remand, the arbitrator must determine the weight, relevancy, and authenticity of any evidence before him, including expert medical testimony.

[16] Finally, we do not find the ordering of a psychiatric examination to be beyond the arbitrator's authority because he had already closed the record. It is common practice in arbitration proceedings for arbitrators to request the production of evidence if there is a reasonable basis to believe that it is germane to the case. *See* ***1296** *How Arbitration Works, supra,* at 309. Furthermore, there are exceptions to the ordinary rule that no new evidence is to be presented after the hearing. *Id.* at 319. In particular, *Courier-Citizen v. Boston Electrotypers Union No. 11,* 702 F.2d 273, 279 (1st Cir.1983), upheld the arbitrator's power to *sua sponte* reopen an award, even absent specific authority to do so:

> While it may be prudent on some occasions for an arbitrator to obtain such an order [of authorization] before reopening an award, *see* F. Elkouri & E. Elkouri, *How Arbitration Works* 240-241 n. 240 (3d ed. 1973), the Company has failed to cite any recent judicial decision vacating a supplementary award in a case where, as here, the arbitrator had sua sponte reopened an incomplete award in appropriate circumstances.

Because the conditional nature of the award rendered it incomplete, this is an appropriate case in which the arbitrator should exercise his authority to reopen the award to supplement the record. On remand, the arbitrator should reopen the award, request whatever additional expert psychiatric evidence he deems necessary to the final resolution of the issue submitted, and then carefully evaluate and weigh that evidence before arriving at a final and complete award.

[17] The only question remaining is whether the arbitrator has the authority to order that the psychiatric examination be paid for by both parties. Article XIV of the collective bargaining agreement provides that "[t]he expense of the Arbitrator shall be paid half by the Company and half by the Union."[5] The arbitrator concluded that psychiatric evidence was a prerequisite to his resolution of the issue submitted for arbitration. It was, therefore, a plausible interpretation of the contractual language to conclude that the psychiatric examination he ordered was an essential part of the "expense of the Arbitrator" to be paid for by both parties. Nevertheless, on remand, each side may want to provide its own psychiatric evidence rather than share payment for one examination.

5 Although it is not binding, Rule 44 of the American Arbitration Association provides that "the expenses of

> any witnesses or the costs of any proofs produced at the direct request of the Arbitrator, shall be borne equally by the parties unless they agree otherwise, or unless the Arbitrator in the award assesses such expenses or any part thereof against any specified party or parties." *See* F. Elkouri and E. Elkouri, *How Arbitration Works*, 309 n. 64 (4th ed. 1985).

We reverse the decision of the district court with instructions to remand the case to the arbitrator for a complete and final determination of the grievance in accordance with the views expressed in this opinion.

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Outline

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United States District Court,
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Trevino HERNANDEZ, S. DE R.L. DE C.V., a Mexican corporation, Petitioner,
v.
SMART & FINAL, INC., a Delaware corporation, Respondent.

Nos. 09–cv–2266 BEN (NLS), 09–cv–2322. | June 17, 2010.

Attorneys and Law Firms

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ORDER DENYING PETITION TO VACATE ARBITRATION AWARD AND GRANTING CROSS–PETITION TO CONFIRM ARBITRATION AWARD

ROGER T. BENITEZ, District Judge.

***1** This matter concerns an arbitration award dated July 9, 2009 (the "Award") by the International Chamber of Commerce, International Court of Arbitration (the "ICC"). The Award relates to a dispute between the parties arising from their joint business operations in Mexico. One of the business owners, Trevino Hernandez, S. DE R.L. DE C.V. ("Tre–Her") moves to vacate the Award. (Docket No. 1.) The other business owner, Smart & Final, Inc. ("SFI") opposes vacatur and moves to confirm the Award. (Docket No. 6.)

For the reasons set forth herein, the Court **DENIES** the Petition to Vacate Arbitration Award and **GRANTS** the Petition to Confirm Arbitration Award.

RELEVANT BACKGROUND

Tre–Her is a Mexico corporation with a principal place of business in Tijuana, Baja California. (Pet., [1] ¶ 4.) SFI is a United States corporation incorporated under Delaware law, with a principal place of business in Commerce, California. (Pet., ¶ 5.)

1 Unless otherwise stated, references to "Pet." or "P. & A." are to Tre–Her's Petition to Vacate Arbitration Award and supporting Memorandum of Points and Authorities, respectively.

On December 15, 1992, Tre–Her and SFI entered into a written Joint Venture Agreement (the "Agreement") wherein they agreed to form a Mexico corporation to establish and operate a chain of stores throughout Northwest Mexico, called Smart & Final de Noroeste S.A. de C.V. ("SFDN") (Pet., Ex. 1.) The Agreement provided that SFI could accomplish this "either directly or through a wholly owned subsidiary to be formed, Smart & Final de Mexico, S.A. de C.V...." (Pet., Ex. 1, pg.2.) As such, SFI formed Smart & Final de Mexico, S.A. de C.V.

("Smart–Mex") which, together with TreHer, incorporated SFDN in Mexico.

The Agreement also contained an arbitration provision stating, in relevant part: "Any dispute, controversy ... shall be finally settled by arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce (ICC)." (Pet., Ex. 1, pgs.29–30.) The Agreement contemplated a three-person arbitration panel with one person nominated by SFI, one person nominated by Tre–Her, and one person nominated by both parties, unless the parties could not agree, at which point the ICC would appoint that person. *Id.*

In 1993, SFDN opened its first store. (Pet., ¶ 10.) According to the parties, SFDN operated successfully over the next thirteen years, until a dispute arose in 2006 from an alleged failure to distribute profits. (Pet., ¶¶ 10–12.) According to Tre–Her, the dispute resulted in various civil actions that are still pending in Mexico's courts. (Pet., ¶¶ 14–21.) Those actions resulted in, among other things, the removal by Tre–Her of SFDN's Operations Director, Anthony Bernardini, and a judgment in favor of Tre–Her in the amount of $11,600,000 which allegedly represents the profits of SFDN that rightfully belong to Tre–Her. *Id.*

On November 7, 2007, SFI filed a Request for Arbitration with the ICC. (Pet., Ex. 6.) The Request asserted claims against Tre–Her arising from or related to the Agreement, including breach of contract, fraud and deceit. *Id.* Pursuant to the Agreement, SFI nominated Wayne I. Fagan as SFI's appointed arbitrator, Tre–Her nominated Stephen V. McCue as Tre–Her's appointed arbitrator, and, because the parties could not agree on the selection of the third arbitrator, the ICC appointed Horacio Alberto Grigera Naon as Chairman of the panel. (Pet., Ex. 20.)

***2** From January 20 to 22, 2009, pursuant to the Agreement, an Arbitration Hearing was held in San Die go, California. SFI presented eight fact and expert witnesses live at the hearing. (Pet., Ex. 20, ¶¶ 40–41.) Due to a scheduling conflict, Tre–Her agreed to a procedure under which its counsel crossexamined SFI's witnesses and introduced written statements from its on expert witnesses, but presented no witnesses live at the hearing. *Id.* Tre–Her claims it had intended to present an expert live at the hearing, but was not able to because it had scheduled its expert to appear on the last day of the arbitration, which it thought would be on day four of the arbitration, but the arbitration was completed on day three and Tre–Her was unsuccessful in rescheduling the expert. (P. & A. [Docket No. 1–1], pg. 7.)

On July 9, 2009, the arbitration panel issued its Award. (Pet., Ex. 20.) Chairman Grigera and Arbitrator Fagan decided in favor of SFI; Arbitrator McCue decided in favor of Tre–Her and wrote a dissenting opinion. (Pet., Exs.20, 21.)

In the Award, the panel determined that, among other things, (1) Tre–Her violated the Agreement by unilaterally taking a "dividend" of over $11,600,000 from SFDN's accounts and was required to return the "dividend;" (2) Tre–Her violated the Agreement by unilaterally removing Anthony Bernardini from his position as Operations Director of SFDN;

and (3) Tre–Her violated the Agreement by refusing to permit SFI access to SFDN's offices, books and records. (Pet., Ex. 20, ¶¶ 130–131, 135–136, 138–139, 153–157.)

In his dissent, Arbitrator McCue opined that SDFN and Smart–Mex were separate legal entities from SFI, and were indispensable and necessary parties to the action. (Pet., Ex. 21.) As such, the panel could not render the relief SFI sought absent SDFN and Smart–Mex's participation in the proceeding. *Id.* Mr. McCue opined the panel was limited to resolving disputes involving the alleged breach of Agreement. *Id.*

On October 13, 2009, Tre–Her filed its Petition to Vacate Arbitration Award in this Court. (Docket No.1.) On November 16, 2009, SFI filed an opposition and also filed a cross-petition to confirm the Arbitration Award. The cross-petition initiated a separate proceeding that was assigned Case No. 09–cv–2322 in this Court. On December 1, 2009, the Court granted the parties' joint motion to consolidate the cases and designated this action as the lead action for all purposes. (Docket No. 7.)

The matter being fully briefed, the Court exercised its discretion to vacate the hearing date and decide the petitions on the merits, without oral argument. See CivLR 7.1.d.1.

JURISDICTION AND VENUE

Although both parties concede jurisdiction and venue in this Court, the Court has an independent duty to analyze these issues. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986); *see also B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1264 (9th Cir.1999) ("[F]ederal courts are required sua sponte to examine jurisdictional issues such as standing.").

I. JURISDICTION IN THE UNITED STATES

***3** The Inter–American Convention on International Commercial Arbitration, 9 U.S.C. § 301 *et seq.* ("Inter–American Convention"), [2] requires courts of member nations to give effect to private agreements to arbitrate and to recognize and enforce arbitration awards made in other member nations. 9 U.S.C. §§ 303, 304. The United States and Mexico are both members of the Inter–American Convention. 4 Thomas H. Oehmke, *Commercial Arbitration* § 175:8 (2010).

2 Also known as the Pan ama Convention. *Int'l Ins. Co. v. Caja Nacional De Ahorroy Seguro*, 293 F.3d 392, 395–96 (7th Cir.2002).

The Inter–American Convention incorporates several provisions of a similar treaty known as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the "New York Convention"), 9 U.S.C. § 201 *et seq.* *See* 9 U.S.C. § 302. Most notably, the Inter–America Convention incorporates Sections 202, 203 and 204 of the New York Convention, which govern jurisdiction and venue. *Id.*

Section 202 of the New York Convention, as incorporated by reference in the Inter–American Convention, provides that United States district courts are vested with original jurisdiction over any action or proceeding

"falling under the Convention," as such action is "deemed to arise under the laws and treaties of the United States. 9 U.S.C. § 203. An arbitration award "falls under the Convention" where the award (1) arises out of a legal relationship; (2) that is commercial in nature; and (3) which is not entirely domestic in scope. 9 U.S.C. § 202. The term "domestic" refers to the domiciliary or principal place of business of the parties and not just to the location where the arbitration award was issued. *Bergeson v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2nd Cir.1983); *see also Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*, 264 F.Supp.2d 926, 932 (N.D.Cal.2003). Therefore, the New York Convention, and hence the Inter–American Convention, may still apply where, as here, the arbitration award was issued in the United States.

Courts have consistently held that "any commercial arbitral agreement, unless it is between two United States citizens, involves property located in the United States, and has no reasonable relationship with one or more foreign states, falls under the Convention." *Yusuf Ahmed Alghanim & Sons v. Toys 'R' Us, Inc.*, 126 F.3d 15, 22–23 (2nd Cir.1997) (internal citation omitted); *see also Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1441 (11th Cir.1998) ("all arbitral awards not 'entirely between citizens of the United States' [are] 'non-domestic' for purposes of Article I of the Convention.")

The dispute in this case arises from Tre–Her's alleged breach of an agreement concerning the parties' business operations. As such, the Court finds that the Award, which resolves the dispute, arises out of a legal relationship that is commercial in nature. The Court also finds the Award is not entirely domestic in that it concerns a domestic corporation, i.e., SFI, on one hand, and a non-domestic corporation, i.e., Tre–Her, on the other hand. Accordingly, the Court finds that the Award falls under the Convention for purposes of the Inter–American Convention and, therefore, jurisdiction in the United States is proper. [3]

3 The Court also finds jurisdiction exists under the New York Convention. However, because both parties are from nations that have ratified or acceded to the Inter–American Convention and are members of the States of the Organization of American States, the Inter–American Convention governs. *See* 9 U.S.C. § 305; *see also Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela*, 802 F.Supp. 1069(S.D.N.Y.1992), *rev'd on other grounds*, 991 F.2d 42 (2nd Cir.1993).

II. JURISDICTION AND VENUE IN THIS COURT

***4** The issue is now whether jurisdiction and venue is proper in the Southern District of California.

Section 204 of the New York Convention, as incorporated by reference in the Inter–American Convention, provides "An action or proceeding over which the district courts have jurisdiction pursuant to Section 203 of this title may be brought in ... such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States." 9 U.S.C. §§ 204, 302. The Agreement designated San Die go, California as the place of arbitration and, in fact, the Award was issued by the ICC while sitting there. (Pet., Exs.1, 20.)

Accordingly, jurisdiction and venue is proper in the Southern District of California.

DISCUSSION

I. STANDARD OF REVIEW

"The Inter–American Convention incorporates the [Federal Arbitration Act's] terms unless they are in conflict with the Inter–American Convention's terms." *Productos Mercantiles E. Industriales, S.A. v. Faberge USA, Inc.*, 23 F.3d 41, 45 (2nd Cir.1994); see also 9 U.S.C. § 307. The Federal Arbitration Act's ("FAA's") terms regarding confirmation, vacatur and modification of an arbitration award under 9 U.S.C. §§ 9, 10 and 11, respectively, do not conflict with the Inter–American Convention's terms. 9 U.S.C. § 307; *Alghanim*, 126 F.3d at 20–23. As such, a court applying the Inter–American Convention, such as this one, may confirm or vacate an arbitration award on the grounds set forth in the FAA. 9 U.S.C. §§ 10(a), 307.

Section 9 of the FAA provides that "at any time within one year after the award is made any party to the arbitration may apply to the court ... for an order confirming the award, and thereupon the court *must* grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." 9 U.S.C. § 9 (emphasis added). The petitions in this case were filed within one year of the Award; therefore, the only remaining issue is whether grounds exist to vacate, modify or correct the Award.

The Ninth Circuit has clearly stated,

> The Federal Arbitration Act, 9 U.S.C. §§ 1–6, enumerates limited grounds on which a federal court may vacate, modify, or correct an arbitral award. Neither erroneous legal conclusions nor unsubstantiated factual findings justify federal court review of an arbitral award under the statute, which is unambiguous in this regard.

Kyocera Corp. v. Prudential–Bache Trade Servs., 341 F.3d 987, 994 (9th Cir.2003).

Section 10 of the FAA provides that a court "may make an order vacating the [arbitration] award ... (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing ... or in refusing to hear evidence ...; or (4) where the arbitrators exceeded their powers ..." 9 U.S.C. § 10(a).

***5** For the reasons set forth below, the Court finds that no grounds exist to vacate, modify or correct the Award.

II. THERE ARE NO GROUNDS FOR VACATUR UNDER 9 U.S.C. § 10(a) (4)

An arbitrator exceeds his or her power where the award is "completely irrational" or exhibits a "manifest disregard of law." *Kyocera*, 341 F.3d at 997 (internal citation omitted). "Manifest disregard ... requires something

beyond and different from a mere error in the law or failure on the part of the arbitrators to understand and apply the law." *Bosack v. Soward*, 586 F.3d 1096, 1104 (9th Cir.2009), *cert. denied* —— U.S. ——, 130 S.Ct. 1522, 176 L.Ed.2d 113 (2010).

Tre–Her argues the ICC arbitrators exceeded their power because the dispute did not fall within the Agreement's arbitration provision. Specifically, Tre–Her argues the dispute concerned SFDN and Smart–Mex, and, because those entities were not signatories to the Agreement, any purported arbitration provision set forth therein did not apply. This same argument was presented to, and rejected by, the ICC. (Pet., Ex. 20., pg.20.)

The ICC rejected Tre–Her's argument, stating in relevant part,

> the JVA Agreements set forth the terms and conditions directly governing the relationship of the Parties and their reciprocal rights and obligations relating to their joint venture and must be read and construed as one single unit. Any infringement by a JVA Party of provisions found either in the JVA, its Exhibit "A" or the SFDN Charter necessarily becomes a violation of the JVA Agreements considered as a whole and entitles the other JVA Party to directly seek relief for breach of contract against the one in breach.

(Pet., Ex. 20, at ¶ 107.)

In sum, the ICC recognized that, although the Agreement was entered into between SFI and Tre–Her, the Agreement expressly permitted SFI to establish and operate SFDN through a separate, newly formed entity known as Smart–Mex. (Pet., Ex 1., pg. 2.) Therefore, SFI had the right to arbitrate disputes involving Smart–Mex and SFDN through ICC arbitration.

The Court notes that, consistent with federal common law requiring enforcement of arbitration agreements, the issue of whether a claim involving a non-signatory is referable to arbitration must be decided by reference to the agreement containing the arbitration clause that is executed by the signatories. *Fisser v. Int'l Bank*, 282 F.2d 231, 233 (2nd Cir.1960). The agreement must be interpreted according to ordinary principles of law and equity, with due regard given to the federal policy favoring arbitration, and any ambiguity as to the scope of the arbitration clause resolved in favor of arbitration. *Id.* In applying these principles, the reviewing court must also afford great deference to the arbitration panel's interpretation and determination of its own jurisdiction and the arbitrability of the dispute. *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 344–45 (2nd Cir.2010); *see also Pack Concrete, Inc. v. Cunningham*, 866 F.2d 283, 285 (9th Cir.1989) ("an arbitrator's interpretation of the scope of the issue submitted to him is entitled to the same deference accorded his interpretation of the [ ] agreement.").

***6** As noted, signatories as well as nonsignatories of an arbitration agreement may be bound by the agreement based on ordinary contract and agency principles. *Letiziav. Prudential Bache Sec., Inc.*, 802 F.2d 1185, 1187–88 (9th Cir.1986). Among these principles are: "1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel." *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir.2006) (citing *Thomson–CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2nd Cir.1995)).

Although Smart–Mex is not a signatory to the Agreement (which contains the arbitration clause), the Agreement identifies Smart–Mex as a wholly-owned subsidiary of SFI, formed for the purpose of creating SFDN with Tre–Her. (Pet., Ex. 1, pg.2.) Subsequent provisions of the Agreement set forth various rights and duties of both SFI and Smart–Mex. (*See, e.g., Id.* at pgs. 3, 5, 9) Tre–Her was a signatory to the Agreement and, therefore, knew of and consented to the formation and participation of Smart–Mex for this purpose. Additionally, based on the parties' petitions, it is clear that any claims asserted by or against Smart–Mex would be the same as those asserted by or against SFI in this case. As such, the Court finds Tre–Her is estopped from denying SFI the benefit of the arbitration clause in this case. *See, e.g. Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir.1993) (holding that because claims against nonsignatory entity were "intimately founded in and intertwined with" a contract containing an arbitration clause, signatory was estopped from refusing to arbitrate those claims); *Hughes Masonry Co. v. Greater Clark County Sch. Bldg. Corp.*, 659 F.2d 836, 840–41 (7th Cir.1981) (finding signatory equitably estopped from repudiating arbitration clause in agreement on which lawsuit against nonsignatory was based). Because the Court finds Tre–Her is estopped from contesting SFI's standing, the Court need not address the other contract and agency principles, including whether it can pierce the corporate veil to confer standing, as those issues are moot.

The absence of SFDN as a party in this case is also not fatal to the enforcement of the arbitration clause. As recognized by the ICC, SFI's claims are based on its contract with Tre–Her, and not on Mexico company law. Whether Smart–Max institutes an action against SFDN as the shareholder of SFDN is not a matter before this Court and is not a circumstance depriving SFI of standing to pursue its claims in arbitration.

In light of the above, the Court finds the ICC's decision that the arbitration clause in the Agreement covers the dispute and SFI had standing to arbitrate the claims was not completely irrational or a manifest disregard of the law. As noted, the ICC's decision is entitled to substantial deference. "As long as [an arbitration ruling] draws its essence from the contract, meaning that on its face it is a plausible interpretation of the contract, then the courts must enforce it." *Sheet Metal Workers' Int'l Ass'n v. Madison Indus., Inc.*, 84 F.3d 1186, 1190 (9th Cir.1996). The ICC's interpretation of the Agreement (and the arbitration clause set forth therein) in this case was, at a minimum, plausible. Accordingly, the Court finds the ICC did not exceed its powers under the Award.

III. THERE ARE NO GROUNDS FOR VACATUR UNDER 9 U.S.C. § 10(a) (2)

***7** Tre–Her claims there was "evident partiality" by Arbitrator Fagan for purposes of 9 U.S.C. § 10(a)(2) because Arbitrator Fagan was the U.S. Chair of the U.S.-Mexico Bar Association, while at the same time a partner at Haynes Boone LLP ("Haynes Boone"), one of the law firms representing SFI, served as the U.S. Vice–Chair of the U.S.-Mexico Bar Association. (P. & A., pg. 24; Pet., Ex. 10.) Tre–Her acknowledges that, at the time of appointment, Arbitrator Fagan disclosed he was "involved in various bar association activities with lawyers in the Haynes & Boone law firm but none involved in this matter." (Pet., Ex. 10.) Tre–Her claims, however, that this disclosure was insufficient because Arbitrator Fagan should have disclosed his specific position as chair vis-a-vis the Hayne Boone's partner's position as vice-chair. This argument was presented to, and rejected by, the ICC. (See Pet., Ex. 10; see also Pet., Ex. 20, ¶ 13.)

Although disclosure enables parties to select an arbitrator intelligently, courts are reluctant to set aside awards on the basis of nondisclosure alone. *Toyota of Berkeley v. Automobile Salesman's Union, Local 1095*, 834 F.2d 751, 755 (9th Cir.1987). Rather, "[e]vident partiality is present when undisclosed facts show a reasonable impression of partiality." *Schmitz v. Zilveti*, 20 F.3d 1043, 1046–47 (9th Cir.1994) (vacating award where arbitrator failed to disclose his law firm's prior representation of arbitrating party's parent corporation). "[T]he possibility of bias [must be] direct, definite and capable of demonstration rather than remote, uncertain and speculative." *See Middlesex Mutual Ins. Co. v. Levine*, 675 F.2d 1197, 1202 (4th Cir.1982); *see also Schmitz*, 20 F.3d at 1046 (citing *Levine* with approval).

Situations involving "evident partiality" for purposes of 9 U.S.C. § 10(a) include an arbitrator's financial interest in the outcome of the arbitration, *Sheet Metal Workers Int 'l Ass 'n Local 420 v. Kinney Air Conditioning Co.*, 756 F.2d 742, 746 (9th Cir.1985), an arbitrator's failure to disclose prior consulting work for a party, *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 146, 89 S.Ct. 337, 21 L.Ed.2d 301 (1968), a family relationship that made the arbitrator's impartiality suspect, *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 85 (2nd Cir.1984), an arbitrator's former employment by one of the parties, *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 677 (7th Cir.1983), and an arbitrator's employment by an entity represented by one of the parties' law firms, *Ormsbee Dev. Co. v. Grace*, 668 F.2d 1140, 1149 (10th Cir.1982).

Those facts are not present here. Tre–Her does not cite any financial or personal relationship between Arbitrator Fagan, the partner at Haynes Boone, or the outcome of the arbitration. There is also no evidence of an employment or familial relationship between Arbitrator Fagan, the partner at Haynes Boone, or any other party to the arbitration. At most, the evidence shows a passive relationship between Arbitrator Fagan and one who is only indirectly, if at all, associated with the case. These circumstances are not sufficient to justify vacatur. *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S.

145, 150, 89 S.Ct. 337, 21 L.Ed.2d 301 (1968) (recognizing that arbitrators who are often effective because of their connections to the marketplace should not be disqualified automatically by a business relationship with parties that is trivial); *Apusento Garden (Guam) Inc. v. Superior Court,* 94 F.3d 1346, 1352–53 (9th Cir.1996) (holding arbitrator's failure to disclose that arbitrator and expert witness for party were "passive investors in a limited partnership" was insufficient to create a "reasonable impression of possible bias"). Accordingly, the Court concludes that whatever possible bias exists from the two individuals serving as board members of the same bar association is too remote, uncertain and speculative to rise to the level of "evident partiality" for purposes of 9 U.S.C. § 10(a)(2).

***8** That Fagan may have requested Tre–Her's expert to testify live one day earlier in the arbitration proceeding also does not evidence "evident partiality." Absent some sort of overt misconduct, a disappointed party's perception of rudeness by the arbitrator is not the sort of "evident partiality" contemplated by the FAA as grounds for vacatur. *Ballantine Books, Inc. v. Capital Distributing Co.,* 302 F.2d 17, 21 (2nd Cir.1962). Additionally, because "the advantages of arbitration are speed and informality, an arbitrator should be expected to act affirmatively to simplify and expedite the proceedings." *Fairchild & Co., Inc. v. Richmond, F. & P.R. Co.,* 516 F.Supp. 1305, 1313 (D.D.C.1981); *Sheet Metal,* 756 F.2d at 746 (citing *Fairchild* with approval). The Court notes that Arbitrator Fagan also did not act alone; rather, according to Tre–Her, Chairman Grigera, the neutral, third arbitrator appointed to the panel, also acted to expedite the arbitration hearing. (P. & A., pg. 7; see also Pet., Ex. 20, ¶ 19.)

Fagan's vote in favor of SFI also does not rise to the level of "evident partiality" justifying vacatur. Evident partiality is "not demonstrated where an arbitrator consistently relies upon the evidence and reaches the conclusions favorable to one party ... the mere fact that arbitrators are persuaded by one party's arguments and choose to agree with them is not of itself sufficient ..." *Fairchild,* 516 F.Supp. at 1313 (citing *Bell Aerospace Co. v. Local 516, UAW,* 500 F.2d 921, 923 (2d Cir.1974).

In light of the above, the Court finds there are no grounds for vacatur under 9 U.S.C. § 10(a)(2).

IV. THERE ARE NO GROUNDS FOR VACATUR UNDER 9 U.S.C. § 10(a)(3)

Tre–Her argues the rescheduling of its expert was tantamount to a refusal to hear evidence because Tre–Her's expert was unable to rearrange his schedule to appear live on the new date and the arbitrators refused to take his scheduling conflict into account.

Vacatur on the grounds of refusal to hear evidence is only justified "if the exclusion of relevant evidence deprive[d] a party from a fair hearing." *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak,* 364 F.3d 274, 301 (5th Cir.2004). "Every failure of an arbitrator to receive relevant evidence does not constitute misconduct requiring vacatur of an arbitrator's award. A federal court may vacate an arbitrator's award only if the arbitrator's refusal to hear pertinent and material evidence prejudices the rights of the parties to the

arbitration proceedings." *Hoteles Condado Beach, La Concha and Convention Ctr. v. Union De Tronquistas Local 901,* 763 F.2d 34, 40 (1st Cir.1985)).

In this case, Tre–Her concedes that its expert, as well as SFI's expert, were each permitted to, and did, present written expert statements to the arbitrators. This procedure appears to conform with the Arbitration Tribunal's "Procedural Order No. 1" which directs each party presenting experts to submit a written statement from its expert, after which live testimony is permitted "so long as the opposing Party has called for cross-examination of such witness." (Petition to Confirm Arbitration Award, Ex. E, ¶¶ 4, 14.) "Fact and expert written witness statements shall serve as examination in chief in lieu of direct testimony at the Hearing." (*Id.* at ¶ 14.) It is clear, therefore, that an expert's written statement, such as the written statement presented by Tre–Her's expert in this case, is intended to be the sole means by which a party presents its expert's opinion;[4] live testimony is intended merely to benefit the opposing party by way of cross-examination and the arbitrators who are allowed to pose questions at any time. *Id.*

4 Although the expert is also allowed a fifteen minute presentation of its opinion at the hearing, that presentation is restricted to a summary of its written statement. (Petition to Confirm Arbitration Award, Ex. E, ¶ 14.)

***9** Although Tre–Her did not present its expert live at the hearing, and therefore did not make its expert available for cross-examination by SFI, the parties and the arbitrators consented to this deviation of Procedural Order No. 1 and permitted Tre–Her to submit its expert's written statement nonetheless. In fact, the arbitrators considered the expert's opinion in the Award. (Pet., Ex. 20, ¶ 41.) That the arbitrators refused to continue the arbitration hearing for an additional day to allow the expert's live testimony is not grounds for vacatur, as it is within the arbitrators' power to control the proceeding and expedite matters, as appropriate. *Fairchild,* 516 F.Supp. at 1313; *Sheet Metal,* 756 F.2d at 746 (citing *Fairchild* with approval).

Because Tre–Her was permitted to present its expert's opinion by way of written statement, and in fact such opinion was considered by the arbitrators, the Court finds Tre–Her was not deprived its right to a fair hearing. Accordingly, no grounds exist for vacatur under 9 U.S.C. § 10(a)(3).

V. THERE ARE NO GROUNDS FOR VACATUR UNDER 9 U.S.C. § 10(a) (1)

Tre–Her alleges the Award was procured through undue means because SFI failed to disclose that its expert on Mexico law "was or had been a partner of one of the attorneys for SFI." (P. & A., pg. 26.) Similar to its claim against Arbitrator Fagan, Tre–Her claims that SFI's failure to disclose this relationship created a false impression of impartiality: "as a matter of fundamental fairness, [disclosure] should have been made." *Id.*

Vacatur due to "corruption, fraud, or undue means" requires more than unfair conduct. Rather, the Ninth Circuit has held that vacatur for "undue means" requires behavior that is immoral, if not illegal. *A.G. Edwards & Sons, Inc. v. McCollough,* 967 F.2d 1401, 1403 (9th Cir.1992). Additionally, a nexus must exist between the alleged fraud and the basis for

the arbitrator's award, as 9 U.S.C. § 10(a) "does not provide for vacatur in the event of any fraudulent conduct, but only 'where the award was procured by corruption, fraud, or undue means.' " *Forsythe International, S.A. v. Gibbs Oil Co. of Texas,* 915 F.2d 1017, 1022 (5th Cir.1990); *see also McCollough,* 967 F.2d at 1404 (the same test for "fraud" applies to "undue means" under 9 U.S.C. § 10(a)(1)). "The requisite nexus may exist where fraud prevents the [arbitrator] from considering a significant issue to which [he] does not otherwise enjoy access." *Id.*

In this case, even if an underlying business or other relationship existed between SFI and its expert, there is no evidence or connotation of illegality or immorality for purposes of 9 U.S.C. § 10(a)(1). *McCollough,* 967 F.2d at 1404. Tre–Her presents no other evidence or authority showing that the failure to disclose such a relationship in this case rises to the level of fraud or undue means to justify vacatur. Accordingly, the Court finds there are no grounds for vacatur under 9 U.S.C. § 10(a)(1).

CONCLUSION

***10** For the reasons stated above, the Court **DENIES** the Petition to Vacate Arbitration Award and **GRANTS** the Petition to Confirm Arbitration Award.

IT IS SO ORDERED.

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Arbitration and Oral Evidence

Dossiers - ICC Institute of World Business Law

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The world business organization

1

Giving evidence:

Some reflections on oral evidence vs documentary evidence and on the obligations and rights of the witnesses

By Antonias Dimolitsa
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INTRODUCTION

It seems advisable to recall some key factors which are to be taken into account during all the discussions we may have on the subject of the present Annual Meeting of the Institute:

- One of the reasons why parties to an international contract decide to have recourse to arbitration is to avoid the uncertainties and problems inherent in national court proceedings.
- The organisation of the proceedings is left to the autonomy of the parties and the arbitrators, who are not under any obligation to apply the rules of procedure of a national law (Art. 15(1) ICC Rules of Arbitration, Art. 14(1) and (2) LCIA Arbitration Rules, Art. 16(1) AAA International Arbitration Rules, Art. 15(1) UNCITRAL Arbitration Rules, Art. 19 UNCITRAL Model Law, Art. 1494 French NCPC, Art. 182(1) and (2) of the Swiss PIL Statute). We are in front of the phenomenon of "*délégalisation*"[1] of arbitration proceedings.
- Experience has shown that there is no categorical divide between civil law and common law in international arbitration[2], and that a specific procedural system has developed which contains distilled influences from both systems.
- The "IBA Rules on the Taking of Evidence in International Commercial Arbitration (1999)" are the result of the actual rapprochement of the two systems as regards taking of evidence in international arbitration. The

The question of sanctions for refusal to appear and testify can only arise when an arbitral tribunal has asked a national court to compel a witness to appear. In such a case, the sanctions will obviously depend on the common procedural law in the country of the court; they will most often take the form of a fine.

False testimony

We need to differentiate between sanctions *stricto sensu* under common criminal law, which are applied against the witness himself, and sanctions *lato sensu* or rather "arbitral" remedies for the effects of false testimony.

The sanctions *stricto sensu* for false testimony are sanctions of criminal law. With the exception of Swiss law, the national provisions of criminal law on false testimony – whether or not an oath was taken – are based on the notion of public service of the national judicial system and do not refer to arbitration. In consideration of the private nature of arbitration, and the autonomy which characterises the arbitration proceedings, one might say that their application by analogy is by no means evident and even add that such an application does not seem advisable: to moralise arbitration, yes, but not through its judiciarization. In any event, it would be easier to conceive the application by analogy of such sanctions, if the testimony was given with the assistance of a court.

Swiss law expressly provides (Art. 309 of the Swiss Penal Code) that the provisions concerning false representations by a party (Art. 306) or false testimony by a third-party (Art. 307) apply also to arbitration proceedings. However, this provision has been criticised by some authors[23], who consider that there is not a sufficiently precise legal basis for indictment of a witness for false testimony or, even more so, against a party for false representations, because the evidentiary process in arbitration is not set in law but is left, to a large extent, to the discretion of the parties. Yet, this unique and actually very harsh[24] provision does not seem to be applied in practice.

Generally speaking, criminal proceedings initiated exclusively for false testimony before an arbitral tribunal, if they exist, must be very rare and there are no examples of any published case law. We can only stop at some questions which may arise and need to be clarified if an action for false testimony is to be brought before a national court:

- The actual possibility of initiating criminal proceedings before the national courts of a given country (would this be the country of nationality of the witness or of the place of arbitration?); applicability of national criminal law to international arbitration; immunity of the witness (USA); only sworn false testimony is punishable (Germany, UK, France);
- Applicable law: normally this would be the law of the place of arbitration as *lex loci delicti commissi* and not the law that applies to the merits of the dispute;
- The necessary elements to establish the crime or offence of false testimony in accordance with the applicable law: is the witness's deliberate distortion of the truth sufficient, or must it be established that the untruthful statements have influenced – or could have influenced – the outcome of arbitration and caused – or could have caused – prejudice? Should the untruthful statements have been made with malicious intent?
- The accused witness's personal lines of defence (such as, he could not have told the truth without seriously and unavoidably jeopardising his freedom or integrity);
- The possibility of filing a criminal complaint accompanied by a civil suit for damages on the basis of other criminal provisions, if the elements establishing other offences or crimes actually exist, such as – and in particular – fraud, deceit, defamation. The clarification of this point is important, because the real interest and objective of the injured party initiating criminal proceedings will normally be to obtain recovery and not to see a witness fined or given a prison sentence.

The answers to all these questions will depend on the applicable criminal law and the solutions in comparative law vary[25].

As regards sanctions *lato sensu* or rather "arbitral" remedies for the effects of false testimony, first and foremost we should not forget that any false testimony may be disregarded by the arbitral tribunal and may even have the opposite to the desired consequences in the award, that is against the party it aimed to favour. This implies, of course, that the untruth is discovered during the arbitration proceedings. In practice, this often happens as a result of effective cross-examination and/or following thorough study of the file and, in particular, following the comparison of oral evidence with documentary evidence by the arbitrators. Needless to say, the arbitrators' qualities, among which their vigilance, will play a very important role.

4

Witness statements

By Anne Véronique Schlaepfer
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INTRODUCTION

Consistent with the common law practice of affidavits and the practice of "*déclarations de tiers*" before some civil law courts[1], arbitration rules often provide that witness testimony may be contained in a statement in writing.

In fact, the production of witness statements has become common practice in international arbitration[2].

Usually, the parties submit witness statements with (or sometimes after) their memorials. Then, in the course of the evidentiary hearings, the witnesses orally confirm their statement and may be cross-examined by the opposing party (and re-examined if the party which submitted the witness statement so wishes).

The advantages of this practice are the following:

- It enables the parties to narrow the issues to be addressed at the evidentiary hearing.
- It assists the parties and the arbitral tribunal to prepare for the evidentiary hearing.
- It assists the arbitral tribunal to determine whether a specific witness testimony is relevant to the dispute (if it is not, the principle of efficiency would suggest that the witness should not be summoned to appear at the hearing), or whether it is sufficiently well-informed through other evidence and does not need to hear the witness. Indeed, arbitrators may decide, given the specific circumstances of the case, not to hear witnesses or all the witnesses a party wishes to examine[3] (see "The Confirmation of the Witness Statement", page 70). For example, Article 20.3 of the ICC Rules

of Arbitration provides that the arbitral tribunal *"may decide to hear witnesses* (...)"; similarly, Article 20.2 of the LCIA Arbitration Rules provides that the arbitral tribunal *"has a discretion to allow, refuse, or limit the appearance of witnesses (whether of fact or expert-witness)"*.

- As a result, it increases the efficiency of the proceedings by reducing the length of the evidentiary hearings.

Even if witness statements are generally accepted in international arbitration, experience shows that parties, counsel and arbitrators not always agree on their purpose, their content and the way they should be used in the proceedings.

Although there is no codification of arbitration procedure, arbitration practitioners may refer to different sources in order to clarify misunderstandings and avoid unjustified expectations. In particular, the 1999 IBA Rules on the Taking of Evidence (the IBA Rules)[4], which are meant to reflect the current practice in international arbitration, constitute a useful tool. However, they do not directly apply, unless the parties have adopted them. In practice, it appears that parties and arbitral tribunals often use them as guidelines in developing their own procedures. Parties and arbitral tribunals may, of course, choose a procedural arrangement that differs from the ones suggested by the IBA Rules.

Some arbitral institutions have adopted specific provisions regarding witness evidence[5]. Moreover, the procedural rules regarding the taking of evidence drafted by arbitral tribunals also often contain useful information.

Given their importance in practice, I will address below some of the issues that arise in the context of the preparation and confirmation (or lack thereof) of witness statements.

Then, in conclusion, I will briefly discuss the efficiency of witness statements. To what extent do arbitral tribunals take witness statements into consideration when deliberating and drafting the award?

THE PREPARATION OF WITNESS STATEMENTS

1. When should it take place?

From counsel's point of view, it should take place as soon as possible, namely, as soon as one knows the issues at stake and the facts to be proven. Indeed, it allows the parties (and counsel):

is to give little credence to witness statements, especially when the witness is not heard in the course of an evidentiary hearing (see "The Impact of Witness Statements on the Result of the Arbitration", page 73).

As a result, the best solution is certainly to authorize both parties to request the appearance of witnesses, even if the parties have agreed or the arbitral tribunal has ordered that witness statements shall serve as the witness's direct testimony. In this case, according to the principle of efficiency of the arbitral proceedings, direct examination may be limited to a confirmation by the witness of the accuracy of his statement with, perhaps, some additional (limited) explanations of some major issues.

In any event, arbitral tribunals should clarify at the beginning of the proceedings whether written statements will be treated as direct testimony. Arbitral tribunals should also make certain that all parties understand the consequences of such a decision.

THE CONTENT OF THE ORAL TESTIMONY

In principle, the scope of direct examination (if there is any) should be limited by the content of the witness statement (unless new issues have arisen since the submission of the statement, or the parties agree otherwise). Otherwise, the submission of such a statement would prove pointless. In fact, direct examination should normally be limited to confirming or explaining in a more detailed manner major issues addressed in the statement (without repeating the content of the statement). Sometimes, it may be sufficient to have the witness merely confirm that the content of the statement is accurate.

Obviously the scope of cross-examination cannot be limited in the same way. Otherwise, a party could prevent the opposing party from asking relevant questions by submitting witness statements dealing with side issues only.

THE IMPACT OF WITNESS STATEMENTS ON THE RESULT OF THE ARBITRATION

One often wonders to what extent arbitral tribunals take into account witness statements when making their decision. Obviously, there is no one answer to this question. Each arbitrator may have a different approach. However, there seems to be a trend not to take witness statements into account, unless the witness gives convincing explanations during the evidentiary hearing or other reliable evidence corroborates them.

Such a result is not surprising. Indeed, since it is widely accepted that witness statements are not written by the witness himself, the only way to ascertain whether the wording of the statement genuinely reflects the message that the witness intended to convey is to hear this witness[12]. Hence, it is understandable that arbitral tribunals are reluctant to refer in their awards to witness statements, which have not been orally confirmed.

In conclusion, it seems that witness statements give rise to contradictory tendencies. There is no doubt that they are widely used in international arbitration. Frequently, they are meant to serve as direct testimony, notwithstanding the fact that they do not look like written statements made by witnesses. At the same time, arbitrators seem to be increasingly reluctant to take them into account as such, unless the credibility of the witness has been tested during the evidentiary hearing or other reliable evidence confirms the accuracy of the statement. In other words, witness statements are supposed to increase the efficiency of the arbitral proceedings but seem to be a rather ineffective means to convince arbitral tribunals.

As a result, counsel and parties would be well advised to make certain that witness statements do not look like lawyers' briefs and that witnesses who submit written statements are given an opportunity to appear at the evidentiary hearings.

8

The lawyer's duty to arbitrate in good faith*

(The 2001 Goff Lecture, published in Arbitration International,
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INTRODUCTION

It is a great honour to be asked to deliver this Goff lecture, not only because it is a privilege to follow in the footsteps of so many distinguished lecturers but also because this lecture bears the name of one of the most respected English jurists of my professional lifetime. There are many stories of Robert Goff: he was one of the greatest advocates I ever heard; he was a creative scholar; he was the most courteous judge; he is now a distinguished arbitrator; but above all else, he was and remains the epitome of fairness and human decency. To listen to his advocate's argument even in the most contentious case provoked no sense of ill-will, just despair at the power of his legal logic; and to lose a case before him as judge left only a strong sense of his intellectual honesty. To Lord Goff, the title of this lecture might seem so self-evident as to preclude any serious debate. Sadly, however, the debate is provoked by growing difficulties which cause the practice of transnational arbitration to fall short of his ideals.

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* This text is a revised version of the author's 2001 Goff lecture delivered in Hong Kong on 5 December 2001 under the auspices of the City University of Hong Kong; and the editors acknowledge with thanks its permission to publish this article. The author is indebted to Mr Neil Hart for assistance in researching materials for this lecture. Any comments are welcome, which may be sent by email to vvveeder@compuserve.com. (The law and practice is here stated as at 1 December 2001.)

> "It is not for one party to keep their cards face down on the table so that the other party does not know the full extent of information supplied. Fairness dictates that a party should not be forced to meet a case pleaded or an expert opinion on the basis of documents he cannot see. Although civil litigation is adversarial, it is not permissible to withhold relevant information, or to delete or amend the contents of a report before disclosure."

The early identification and narrowing of expert issues is increasingly important in international commercial arbitration and, as already mentioned above, the practice of expert meetings is reflected in the IBA Rules. To make these procedures work fairly (and indeed to work at all), they must be played candidly, with open hands. As the English Court of Appeal noted in Naylor vs Preston Area Health Authority (1987)[26], the English courts:

> "have moved far and fast from a procedure where tactical considerations which did not have any relation to the achievement of justice were allowed to carry any weight. [W]hilst a party is entitled to privacy in seeking out the "cards" for his hand, once he has put his hand together, the litigation is to be conducted with all the cards face up on the table."

All this is a sea change from the former practice of lawyers in the English courts. It has all happened within the last 15 years without primary legislation until the Woolf reforms, being driven by English judges and practitioners.

■ Factual witness statements

The practice of taking factual witness statements requires urgent reform. Increasingly, many international arbitrators pay little credence to written witness statements on any contentious issue, unless independently corroborated by other reliable evidence. It is perhaps surprising that many sophisticated practitioners have not yet understood that their massive efforts at reshaping the testimony of their client's factual witnesses is not only ineffective but often counter-productive. Most arbitrators have been or remain practitioners; and they can usually detect the "wood-shedding" of a witness[26]. In England, there is a recent case where wood-shedding was taken to an extreme.

In Aquarius Financial Enterprises vs Lloyds' Underwriters (2001),(28) where the English Commercial Court was concerned with a vessel allegedly destroyed deliberately by fire, Toulson J. held that it was the English solicitor's duty to ensure that any factual witness was interviewed by the solicitor himself, or if that was not practicable, by a person who could be relied upon to exercise the

LES TEMOINS DANS L'ARBITRAGE INTERNATIONAL

FACT WITNESSES IN INTERNATIONAL ARBITRATION

Roland ZIADE et Charles-Henri DE TAFFIN*

LT Facts; International commercial arbitration; Witnesses

INTRODUCTION

L'administration de la preuve, notamment testimoniale,[1] est une source inépuisable de différends entre les parties et de difficultés procédurales pour les arbitres. Cela est d'autant plus vrai que l'arbitrage devient de plus en plus procédurier et conflictuel, s'éloignant ainsi de son esprit d'origine. Comme toute procédure contentieuse, l'arbitrage devient trop souvent un véritable « combat ». Les preuves en sont les armes. C'est pourquoi les parties s'opposent si souvent sur les questions d'administration de la preuve telles que les demandes de production de documents, les expertises et les auditions de témoins. Certes, le « combat » porte sur les arguments juridiques et techniques ainsi que les avis exprimés par les experts ; mais il n'en demeure pas moins que les prétentions des parties reposent nécessairement sur des faits. Il n'est donc pas surprenant que les faits pertinents, dont risque de dépendre l'issue du litige, fassent l'objet de vives contestations, chaque partie présentant sa propre version en fonction de ses prétentions. Il appartiendra alors aux arbitres de mettre en balance les preuves disponibles et de se forger leur conviction.

Bien entendu, il incombe à chaque partie de prouver les faits qu'elle allègue. Outre la preuve documentaire[2]

INTRODUCTION

The taking of evidence, in particular of witness testimony, is often a source of disputes between parties and of procedural difficulties for arbitrators. This is all the more true now that arbitration has become increasingly litigious and conflictual and is thus drifting away from its initial spirit. As with any adversarial proceeding, arbitration too often becomes a true "combat" where evidence is a weapon. This is why the parties so often oppose one another on issues relating to evidence, such as requests for the production of documents, expert opinions and witness testimony. Of course, the "combat" relates to legal and technical arguments and to opinions expressed by experts. It nevertheless remains true that parties' claims must necessarily rely on facts; thus it is not surprising that the relevant ones, on which the outcome of the arbitration is likely to depend, are strongly disputed, each party presenting its own version according to its claims. It rests with the arbitrators to weigh the available evidence and form their own opinion.

Naturally, each party must prove the facts it presents. In addition to documentary evidence and

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independent expert opinions, international arbitration also frequently uses witness evidence, whether from third parties or representatives of the parties, fact witnesses or expert witnesses. Fact witnesses, on whom this article exclusively focuses, testify on a past event of which they have personal knowledge. Witness testimonies are now frequent and often constitute a decisive moment in the proceedings through the convincing force that witness testimony is likely to carry. Arbitration cases may be won or lost based on witness testimony. It is therefore of primary importance for any party involved in an international arbitration to know what mechanisms are customarily implemented to govern witness evidence and to understand the origin and purpose of these mechanisms, in order to better master them.

et l'expertise indépendante, l'arbitrage international recourt largement à la preuve testimoniale, qu'il s'agisse de tiers ou de représentants des parties, de « témoins de faits » (*fact witnesses*) ou d' « experts partie » (*expert witnesses*).[3] Le « témoin de faits », qui fera seul l'objet du présent article, est celui qui relate un évènement passé dont il a eu connaissance.[4] Les auditions de témoins sont désormais fréquentes et constituent souvent des moments déterminants de la procédure en raison de la force de conviction qu'elles sont susceptibles de dégager, les arbitrages pouvant se gagner ou se perdre sur les témoignages. Il devient donc primordial pour toute partie à un arbitrage international de connaître les mécanismes mis en place par la pratique pour régir la preuve testimoniale mais aussi d'en comprendre les origines et les finalités afin de les maîtriser au mieux.

FLEXIBILITY AND POWERS OF THE ARBITRATORS IN MATTERS RELATING TO WITNESS EVIDENCE

SOUPLESSE ET POUVOIRS DES ARBITRES EN MATIERE D'ADMINISTRATION DE LA PREUVE TESTIMONIALE

Strong specific domestic characteristics regarding witness evidence before national courts

Forts particularismes nationaux en matière de preuve testimoniale devant les juridictions étatiques

National courts' practices regarding the conduct of trials, hearings and the presentation of evidence, in particular of testimonial evidence, are marked with local formalities and strong specific characteristics. Though this may be an oversimplification, legal systems inspired by the common law can be distinguished from those of the Romano-Germanic (civil law) tradition. They differ significantly in matters relating to the presentation of evidence and, in particular, to the importance and the treatment of witnesses.

Les pratiques judiciaires nationales en matière de conduite du procès, d'audience et d'administration de la preuve notamment testimoniale sont empreintes de formalismes locaux et de forts particularismes. Même si la comparaison peut s'avérer schématique, on distingue les systèmes juridiques inspirés par la *common law* et ceux de tradition romano-germanique (droit civil). Leur opposition demeure très marquée en matière d'administration de la preuve et particulièrement en ce qui concerne la place et le traitement des témoins.

In civil law jurisdictions, where judges have broad powers to conduct the trial, proceedings are essentially in writing. Documentary evidence is favoured over witness evidence. The claim before the court cannot be subject to any subsequent inquiry into the facts and must thoroughly present the arguments and evidence on which it is relying. The hearing, which is brief and conducted by the judge, mostly consists of the oral pleadings of counsel. Witness' testimonies are rare and generally brief. Judges determine whether to hear a witness — the latter being necessarily independent from the parties — or a party. They examine witnesses themselves.

Dans les pays de droit civil où le juge dispose de larges pouvoirs pour conduire l'instance, la procédure est essentiellement écrite et privilégie la preuve documentaire au détriment de la preuve testimoniale. La demande en justice ne saurait être subordonnée à une investigation de faits ultérieure et doit déjà présenter de manière détaillée les arguments et les preuves qui la fondent. L'audience, qui est de courte durée et dirigée par le juge, comprend essentiellement les plaidoiries des conseils. Les auditions de témoins sont peu fréquentes et généralement rapides. Le juge, qui décide de l'opportunité d'une audition des témoins — nécessairement des tiers indépendants des parties — ou d'une comparution des parties, pose lui-même les questions.

In common law jurisdictions, the procedure allows parties to be fully acquainted with the facts before formulating their claims, so as to put them on even footing. During the fact-finding period preceding the pre-trial hearing, the parties, under the supervision

Dans les pays de *common law*, afin de placer les parties sur un pied d'égalité, la procédure leur permet de connaître entièrement les faits avant de formuler leurs prétentions. Durant cette période de recherche des faits (*fact finding*) qui

précède l'audience (*pre-trial*), les parties se communiquent, sous le contrôle du juge, tous les documents et informations (*discovery*) et recueillent les dépositions des témoins (*pre-trial depositions*). La procédure vise à préparer l'audience (*trial*) qui en est l'aboutissement et sera conduite par les parties sous le simple contrôle du juge. Les témoins sont souvent nombreux et longuement interrogés, d'abord par le conseil de la partie qui les a appelés à témoigner (*direct examination*) puis par le conseil adverse (*cross examination*), en respectant des règles strictes régissant notamment la formulation des questions. Les preuves documentaires sont introduites à l'occasion des interrogatoires. La preuve testimoniale joue donc un rôle fondamental. Toute personne susceptible d'éclairer le juge peut être entendue comme témoin, même si cette personne n'est pas indépendante des parties (par exemple les représentants ou les salariés d'une partie).

of the judge, communicate to each other all the documents and information (discovery) and take the pre-trial depositions of witnesses. The purpose of this procedure is to prepare the trial hearing, which will be conducted by the parties under the mere supervision of the judge. There are often many witnesses who are examined at length. They are first directly examined by the counsel of the party who called them as witnesses and then cross-examined by the opposing counsel. Both counsels must comply with the strict rules that govern, notably, the formulation of questions. Documentary evidence is introduced at the time of the examinations. Witness evidence therefore plays an essential role. Any person likely to enlighten the judge may be heard as a witness, even if this person is not independent from the parties (for instance, a party's representative or employee).

Les acteurs du commerce international qui recourent à l'arbitrage en attendent une procédure adaptée à leur litige et une justice différente de celle des tribunaux étatiques. L'un des avantages de l'arbitrage est précisément de se soustraire aux règles nationales de procédure afin de gagner en souplesse. Il appartiendra donc aux parties et aux arbitres d'exploiter l'autonomie de l'arbitrage et de tirer le meilleur parti de la liberté dont ils disposent pour administrer la preuve testimoniale.[5]

Actors in international commerce who turn to arbitration expect proceedings that are tailored to their dispute and a kind of justice different from that found before national courts. One of the advantages of arbitration is precisely to be able to avoid domestic procedural rules in order to gain flexibility. Thus, it will be up to the parties and to the arbitrators to take advantage of the autonomy of arbitration and to make the most of their freedom with respect to the taking of witness evidence.

Pouvoirs étendus de l'arbitre en matière de preuve testimoniale

Extensive powers of the arbitrators regarding witness evidence

La liberté conférée aux parties, et subsidiairement aux arbitres, pour régler la procédure garantit à l'arbitrage toute sa souplesse.[6] Pour ne pas entraver cette liberté, les lois et les règlements modernes d'arbitrage réglementent généralement très peu la procédure, l'audience ou l'administration de la preuve notamment testimoniale.[7] Les parties sont libres de soumettre la procédure à une loi de procédure nationale, à un règlement d'arbitrage ou à d'autres corps de règles.[8] Elles sont également libres de se mettre d'accord sur des règles en matière de preuve auxquelles l'arbitre devra alors se plier. Cependant, il est rare que les parties prévoient de telles règles dans la convention d'arbitrage ou parviennent à trouver un accord sur ce point une fois le litige né de sorte qu'en pratique l'arbitre dispose de pouvoirs étendus en la matière. Ces pouvoirs s'inscrivent dans sa mission générale de juge privé à qui il appartient de contrôler l'instruction et trancher le litige.[9]

The freedom given to parties and subsidiarily to arbitrators to administer the proceedings guarantees maximum flexibility to the arbitration. In order not to impede this freedom, modern laws and rules of arbitration generally govern the proceedings, the hearing or the taking of evidence leniently (in particular witness evidence). Parties are free to submit the proceedings to a national procedural law, to rules of arbitration or to any other set of rules. They are also free to agree on rules regarding evidence issues, with which the arbitrators must then comply. However, it is unusual for parties to set out such rules in the arbitration agreement or to succeed in reaching an agreement on this point once the dispute has arisen, meaning that in practice, arbitrators have extensive powers in this respect. These powers fall under their general duties as private judges in charge of supervising the investigation and of settling the dispute.

Dans les limites de la convention des parties[10] et des règles spécifiques applicables, il appartiendra aux arbitres de régir l'administration de la preuve testimoniale en respectant les principes fondamentaux de procédure et les règles d'ordre public du lieu où la sentence est susceptible de faire l'objet

Within the limits of the parties' agreement and of any specific applicable rules, it will be up to the arbitrators to manage the taking of witness evidence. Simultaneously they will abide by the fundamental procedural principles and public policy rules of the place where proceedings may be subject to an action to set aside the award or where the award may be

reviewed for enforcement purposes. The tribunal will decide on the admissibility of witness testimony and on the conditions of its production, as well as on the relevance and terms of any hearing. It may decide, before or after the hearings, that the parties will have the option to file post-hearing briefs, and will determine the schedule and the terms of these filings. These questions are often discussed during the course of the proceedings and settled by orders rendered by the arbitral tribunal or its president. In practice, despite the fact that parties are able to agree on certain issues, disputes often arise.

d'un recours en annulation ou le cas échéant d'un examen aux fins d'exécution. Le tribunal détermine la recevabilité des témoignages de même qu'il fixe les conditions de leur production ainsi que l'opportunité et les modalités d'éventuelles auditions. Il pourra décider, avant ou après les auditions, que les parties auront la faculté de déposer de nouveaux mémoires après les auditions de témoins (*post-hearing briefs*) et fixera alors le calendrier et les conditions de leur dépôt. Ces questions sont souvent débattues[11] au cours de la procédure et réglées par des ordonnances rendues par le tribunal arbitral ou son président. Si les parties arrivent en pratique à s'accorder sur certains aspects, il n'en demeure pas moins que les contestations sont fréquentes.

In order to guarantee the parties fair proceedings allowing them to present their case and evidence on an equal footing, the arbitral tribunal will often determine beforehand the rules governing the taking of evidence. It will generally seek a fair balance between flexibility and predictability, leading, for example, to the determination of rules relating to the presentation of evidence as the proceedings progress. Therefore, the arbitral tribunal will initially tend to determine terms and timeframes for the production of any written statements or for the formulation of requests relating to witness hearings. Subsequently, depending on the requests of the parties in this respect and what emerges from the first submissions, exhibits and statements, the tribunal will rule on whether a hearing dedicated to witness examinations is relevant and will often take care to determine beforehand the conditions in which these examinations will take place.

Pour garantir aux parties un procès équitable leur permettant de présenter leurs arguments et leurs preuves sur un pied d'égalité, le tribunal arbitral fixera souvent en amont les règles régissant l'administration de la preuve. Il recherchera généralement un juste équilibre entre souplesse et prévisibilité,[12] le conduisant par exemple à procéder à une élaboration progressive des règles d'administration de la preuve au fur et à mesure de l'avancement de la procédure. Ainsi, le tribunal arbitral aura tendance à déterminer, dans un premier temps, les conditions et délais encadrant la production d'éventuelles attestations écrites ou la formulation de demandes d'auditions de témoins.[13] Puis, en fonction des demandes des parties à cet égard et de ce qui ressortira des premiers mémoires, des pièces et des attestations, le tribunal se prononcera sur l'opportunité d'une audience consacrée à l'audition de témoins[14] et prendra souvent soin de déterminer préalablement les conditions dans lesquelles cette audience se déroulera.

Standardisation of arbitral proceedings regarding witness evidence

The freedom given to parties and arbitrators regarding the presentation of evidence has allowed international arbitral practice to create its own procedures, which draw specific features from different legal traditions in an attempt to make the most of each. In practice, despite cultural divergences, international arbitrations follow a mostly standardised procedural model and system of taking of evidence. Far from being a mere compromise between legal systems, this model aims at synthesis and equilibrium. In fact, this uniform procedure tends to be applied not only in international arbitrations involving opposing parties from different legal backgrounds, but also in arbitrations involving parties with the same legal background.

Uniformisation de la procédure arbitrale en matière de preuve testimoniale

La liberté, dont disposent les parties et les arbitres en matière d'administration de la preuve, a permis à la pratique arbitrale internationale de dégager des procédures qui lui sont propres et qui empruntent des traits caractéristiques aux différentes traditions juridiques afin de tenter de tirer le meilleur parti de chacune. Malgré les divergences culturelles, les arbitrages internationaux se déroulent, en pratique, selon un modèle procédural et un système d'administration de la preuve largement uniformisés. Loin d'être un simple compromis entre les systèmes juridiques, ce modèle poursuit un objectif de synthèse et d'équilibre. On relève d'ailleurs une tendance à appliquer cette procédure uniformisée non seulement dans les arbitrages internationaux opposant des parties issues de traditions juridiques différentes, mais également dans ceux mettant en cause des parties issues d'une même culture juridique.[15]

Cette uniformisation[16] se retrouve à tous les stades de la procédure et concerne tous les modes de preuves : la preuve documentaire,[17] l'expertise et les mesures d'instruction mais également la preuve testimoniale pour laquelle ce mouvement d'uniformisation est particulièrement marqué. De manière générale, si la pratique dégagée en matière de communication des écritures et d'administration de la preuve documentaire paraît surtout inspirée de la tradition civiliste, la pratique en matière de preuve testimoniale semble, quant à elle, davantage influencée par la tradition de *common law.*[18] Afin de proposer une certaine « codification » de la pratique en matière d'administration de la preuve,[19] l'International Bar Association a adopté, le 1*er* juin 1999, les *IBA Rules on the Taking of Evidence in International Commercial Arbitration* (*IBA Rules*) dont une version révisée est en cours d'élaboration.[20] On soulignera que les questions liées aux « témoins de faits » sont largement couvertes par les *IBA Rules* puisque l'intégralité de l'article 4 leur est consacrée. L'objectif d'une telle « codification » est de donner des indications utiles aux praticiens de l'arbitrage et de réduire dans une certaine mesure l'imprévisibilité qui peut résulter de la grande liberté généralement octroyée aux arbitres en matière d'administration de la preuve. A moins que les parties n'aient convenu de s'y soumettre, les *IBA Rules* n'ont cependant aucune valeur contraignante.

This standardisation appears at all stages of the proceedings and relates to all methods of proof: documentary evidence, expert opinions and measures taken to establish the facts of the case (discovery measures), as well as witness testimony, for which this trend towards standardisation is particularly strong. Generally speaking, if the arbitral practice relating to the communication of submissions and the production of documentary evidence seems to have been mostly inspired by the civil law tradition, the practice regarding witness testimony has been more influenced by the common law tradition. In order to offer some "codification" regarding the taking of evidence, on June 1, 1999 the International Bar Association adopted the IBA Rules on the Taking of Evidence in International Commercial Arbitration ("IBA Rules") of which a revised version is currently in development. In particular, article 4 of the IBA Rules covers issues relating to fact witnesses. The purpose of such "codification" is to provide useful guidance to arbitration practitioners and to reduce, to some extent, the unpredictability that can result from the broad freedom granted to arbitrators in matters relating to the taking of evidence. However, unless parties agree to submit the proceedings to the IBA Rules, they have no binding force.

IDENTIFICATION DES TEMOINS

WITNESS IDENTIFICATION

Les droits nationaux définissent différemment les qualités requises pour témoigner. Dans les systèmes de *common law*, toute personne, y compris les parties, leurs salariés et leurs représentants, peut être entendue en tant que témoin. Il en va généralement tout autrement dans les pays de droit civil[21] même si certains, comme le droit français, adoptent une position intermédiaire permettant l'audition des parties, non pas en tant que témoin (tiers indépendant) mais dans le cadre d'une procédure spécifique de comparution personnelle des parties. Ces différentes conceptions de la qualité de témoin peuvent entraîner des malentendus entre intervenants issus de cultures différentes de sorte qu'il appartiendra aux arbitres de se déterminer sur cette question.

Domestic laws diverge on the conditions required for a person to qualify as a witness. In common law systems, any person, including the parties themselves, their employees or their representatives, may be heard as witnesses. Civil law systems generally adopt a very different approach, although some jurisdictions, such as France, adopt an intermediate position which allows the parties to be heard not as witnesses (independent third parties), but in the context of a special procedure for the personal appearance of parties. These different concepts may give rise to misunderstandings between parties originating from different cultures, such that the arbitrators may have to rule on this issue.

Néanmoins, il est généralement admis en arbitrage international que toute personne est susceptible d'être entendue. Sans remettre en cause ce principe, certains arbitres font des distinctions entre les personnes qui sont entendues en qualité de partie et celles qui le sont comme témoin,[22] à savoir les personnes n'étant pas directement intéressées au litige. Inspirée de la conception anglo-saxonne, la tendance actuelle, sous réserve de spécificités des règles procédurales applicables,

Nevertheless, it is generally accepted in international arbitration that any person may be heard. Without questioning this principle, some arbitrators distinguish between parties and witnesses, i.e. persons with no direct interest in the dispute. Inspired by the common law model, the current trend, subject to any specific characteristics of the applicable procedural rules, is to adopt a broad understanding of the concept of witness. Indeed, despite the fact that very few arbitration rules or laws specifically and expressly establish such a conception, arbitrators tend to admit that any person

may be heard as a witness, whether this person is a representative of a party, an employee, an advisor or an expert. The arbitrators may, however, take into account any pre-existing relationship between a witness and a party in assessing the probative value of his or her witness testimony.

est d'adopter une conception large de la notion de témoin. En effet, même si très peu de règlements ou de lois d'arbitrage consacrent expressément une telle conception,[23] les arbitres ont tendance à admettre que toute personne puisse être entendue en qualité de témoin,[24] qu'il s'agisse de représentants des parties, de salariés, de conseils ou de sachants. Les arbitres pourront cependant tenir compte des liens entretenus entre un témoin et une partie lorsqu'ils apprécieront la valeur probante de son témoignage.

Moreover, each party is responsible for identifying its witnesses. In this respect, the custom in international arbitration is to allow counsel or parties to contact potential witnesses. Once the witnesses have been identified and chosen, each party must communicate in writing to the tribunal the identity of the persons it wishes to call as witnesses in support of its allegations. It may do so by sending a letter, by mentioning the witnesses in its briefs or by producing the written statements of the witnesses. The identity of the witnesses must be notified in accordance with the applicable rules. Despite the fact that arbitration laws do not generally cover this point, this is not necessarily true of arbitration rules. Additionally, arbitrators often determine in the course of the proceedings the terms under which witness lists may be notified and completed, if need be.

Par ailleurs, il appartient à chaque partie d'identifier ses témoins. A cet égard, l'usage en arbitrage international est de permettre aux conseils ou aux parties de contacter les témoins potentiels.[25] Une fois les témoins identifiés et sélectionnés, chaque partie devra communiquer par écrit au tribunal l'identité des personnes qu'elle souhaite voir témoigner au soutien de ses prétentions (par lettre, en les mentionnant dans ses mémoires ou encore en communiquant une déclaration écrite du témoin). La notification de l'identité des témoins devra être réalisée conformément aux règles applicables. Or, si les lois d'arbitrage sont généralement silencieuses sur ce point, il n'en va pas nécessairement de même des règlements d'arbitrage.[26] En outre, les arbitres déterminent souvent au cours de la procédure les conditions dans lesquelles les listes de témoins devront être notifiées puis éventuellement complétées.[27]

WITNESS STATEMENTS

If the applicable rules are silent, the parties to an international arbitration are free to produce written statements. Arbitrators, for their part, may, within the limits of the parties' agreement and of the applicable rules, direct the parties to produce written statements of the testimony on which they rely, prior to any hearing of the witnesses. In this case, the arbitrators determine the terms on which these witness statements must be submitted. It is often provided that witness statements will be submitted with the briefs and, more rarely, that they will be produced after the briefs but prior to the hearing. The arbitrators will also decide whether the witness statements must be submitted simultaneously or sequentially. The parties will generally have the opportunity to make written observations, to complete the statements produced and to communicate new statements, possibly drawn up by new witnesses, in response to statements submitted by the opposing party. However, it seems preferable that this be framed by a procedural timetable to guarantee equal treatment of the parties and to avoid disputes and additional delays.

DECLARATIONS ECRITES

Dans le silence des règles applicables, les parties à un arbitrage international sont en principe libres de produire des déclarations écrites (attestations).[28] Les arbitres, de leur côté, peuvent, dans la limite de l'accord des parties et des règles applicables, ordonner aux parties de produire des déclarations écrites des témoignages qu'elles invoquent avant l'éventuelle audition des témoins. Les arbitres fixent alors les modalités de production de ces déclarations. Souvent, il est prévu que les déclarations seront produites avec les mémoires et plus rarement, qu'elles seront communiquées après les mémoires mais avant les auditions de témoins et l'audience. Les arbitres décideront également si les déclarations écrites doivent être produites simultanément ou successivement. Les parties auront, en général, la possibilité de faire des observations écrites, de compléter les déclarations produites et d'en communiquer de nouvelles, éventuellement rédigées par de nouveaux témoins, en réponse aux déclarations produites par la partie adverse.[29] Toutefois, il paraît souhaitable que cette possibilité soit prévue et encadrée par un calendrier procédural afin de garantir l'égalité des parties et d'éviter des contestations et délais supplémentaires.

Les usages relatifs aux conditions de forme des déclarations semblent bien établis[30] même si les règles applicables sont généralement silencieuses sur ce point et qu'en pratique les arbitres prescrivent rarement ces détails.[31] L'objet de la déclaration est de décrire précisément les faits pertinents dont le témoin a eu connaissance. Il peut être souhaitable, dans la mesure du possible, de mentionner la source des informations figurant dans la déclaration.[32] Lorsque les règles applicables prévoient des conditions à respecter, les parties devront s'y conformer. Malgré la disparité des règles procédurales et déontologiques entre systèmes judiciaires nationaux, il est admis en matière d'arbitrage international que les conseils des parties peuvent assister les témoins dans la rédaction des déclarations.[33] Cela permet, en principe, que les déclarations soient plus claires et focalisées sur les faits pertinents.

Formal requirements applicable to witness statements are customarily well-established, despite the fact that applicable rules do not address this point and that, in practice, arbitrators rarely manage these details. The purpose of the statement is for witnesses to give a detailed description of the relevant facts of which they have knowledge. If possible, it may be beneficial to mention the source of the information set out in the statement. When applicable rules provide that certain terms and conditions must be complied with, the parties must conform thereto. Despite the disparity of procedural and ethical rules among domestic judicial systems, it is generally admitted that parties' counsel may assist witnesses with the drafting of their statements in international arbitration. This allows statements to be clearer and more focused on relevant facts.

Tout témoin qui a remis une déclaration écrite doit être disponible pour être entendu.[34] En effet, la partie adverse doit être en mesure de procéder à un contre-interrogatoire[35] afin de pouvoir tester la crédibilité du témoin et contester ses affirmations. Ce procédé issu des pays de *common law* cherche à faire ressortir la vérité. Le défaut de comparution d'un témoin prive la partie adverse de la possibilité de procéder au contre-interrogatoire.[36] Dès lors, si un témoin ayant déposé une déclaration écrite ne comparaît pas à l'audience alors qu'il devait être entendu, la pratique consiste à ne pas prendre en compte ses déclarations écrites, sauf si les arbitres estiment que les circonstances — qui devront généralement être exceptionnelles — le justifient.[37] Le tribunal appréciera librement les circonstances entourant un défaut de comparution mais sera généralement sévère s'il apparaît que le témoin refuse délibérément de coopérer. En pratique, le tribunal évitera souvent de prononcer l'irrecevabilité de la déclaration écrite et de l'écarter du dossier mais préférera en général n'en tenir compte qu'avec prudence et ne lui accorder qu'une force probante toute relative.

Any witness who has delivered a written statement must be available to be heard. The opposing party must be able to cross-examine witnesses in order to challenge their credibility and contest their assertions. This process, which originates from common law jurisdictions, seeks to reveal the truth. The failure of a witness to appear deprives the opposing party of the opportunity to cross-examine. Thus, if a witness who had filed a written statement fails to appear at the hearing at which he or she was to be heard, the practice is not to admit the written statements made unless the arbitrators consider that the circumstances—which must in general be exceptional—justify this absence. The tribunal will be free to assess the circumstances surrounding the failure to appear, but will often be strict if it looks like the witness deliberately refused to cooperate. In practice, the tribunal will often avoid denying the admissibility of the written statement and striking it from the record; instead, it will often prefer to take it into account with caution and to give it only limited weight.

Pour autant, tous les témoins ayant déposé une déclaration écrite ne seront pas nécessairement entendus. D'une part, chaque partie est libre de renoncer au contre-interrogatoire de tout ou partie des témoins adverses, étant précisé qu'une telle renonciation ne saurait être considérée comme une admission des faits contenus dans la déclaration du témoin en question.[38] Certes, la déclaration écrite est un moyen de preuve figurant au dossier mais la partie adverse pourra la contester par d'autres moyens que le contre-interrogatoire, notamment en relevant ses incohérences ou en la confrontant à d'autres moyens de preuve. D'autre part, sous réserve d'éventuelles dispositions contraires du

This does not mean that all witnesses who file a written statement will necessarily be heard. First, each party is free to waive its right to cross-examine some or all of the opposing witnesses, and such waiver cannot be deemed an admission of the facts set forth in the witness statement. While the written statement is evidence included in the record, the opposing party may challenge it by methods other than cross-examination, notably by pointing out its inconsistencies or by confronting it with other means of proof. Second, subject to any stipulations to the contrary provided in the arbitration rules or laws or any applicable public policy provisions, the tribunal is generally under no obligation to hear a witness, even when a party is requesting that he/she be heard and this witness has filed a written statement. This would be the case, for instance, if the

tribunal considers the testimony to be irrelevant or if the opposing party has admitted to the facts related in the statement. Conversely, the tribunal may request to hear a witness having filed a written statement, even if the parties had agreed to waive their right to examination.

règlement ou de la loi d'arbitrage, voire des dispositions d'ordre public applicables, le tribunal n'est en principe pas tenu d'entendre un témoin alors même qu'une partie en demande l'audition[39] et que ce témoin a déposé une déclaration écrite ;[40] ce sera par exemple le cas si le tribunal estime le témoignage non pertinent ou si la partie adverse a reconnu les faits relatés dans la déclaration. A l'inverse, le tribunal peut demander l'audition d'un témoin ayant déposé une déclaration écrite, et ce même si les parties se sont mises d'accord pour renoncer à son audition.

PRE-REQUISITES TO WITNESSES' TESTIMONIES

PREALABLES AUX AUDITIONS DE TEMOINS

Choice of the witnesses to be heard by the arbitral tribunal

Sélection des témoins entendus par le tribunal arbitral

It is generally accepted that the arbitral tribunal is free to choose witnesses it wishes to hear or to refuse to hear certain witnesses, in particular if it considers other evidence to be sufficient. In general, the tribunal may also disallow a testimony that is late or that includes new points or arguments where no reason justifies why they were not previously discussed. More particularly, in cases where it is provided that witnesses are to file prior written statements, only persons having filed such statements are in general likely to be heard and a party will have difficulty getting the tribunal to agree to hear a witness who did not file a statement within the timeframe set by the arbitral tribunal.

Il est généralement admis que le tribunal arbitral est libre de sélectionner les témoins qu'il souhaite entendre et de refuser d'en entendre certains,[41] notamment s'il estime d'autres éléments de preuve suffisants.[42] En principe, le tribunal peut également écarter un témoignage lorsqu'il est tardif ou présente des éléments ou arguments nouveaux alors qu'aucune raison ne justifie que ceux-ci n'aient pas été préalablement débattus. Plus particulièrement, lorsqu'il est prévu que les témoins déposent préalablement des déclarations écrites, seules les personnes ayant déposé de telles déclarations sont en principe susceptibles d'être entendues et il sera difficile pour une partie d'obtenir du tribunal qu'il accepte d'entendre un témoin qui n'a pas déposé de déclaration dans les délais prévus.[43]

Parties in arbitration often feel the need to present witnesses in support of their allegations and some may feel, rightly or wrongly, that they have been deprived of their right to be heard if the arbitrators deny them this opportunity. Failing an agreement between the parties on the relevance of hearing some or all of the witnesses, the tribunal will decide in accordance with the applicable rules. In addition to general procedural principles, the arbitrators must, amongst others, take into account the applicable arbitration rules since some, such as the UNCITRAL rules, provide that the arbitrators must hold a hearing when a party so requests. Within these limits, in practice, the tribunal generally agrees to hear witnesses and would only refuse to hold any hearings in exceptional circumstances. If it deems that there are too many witnesses, it may invite each party to designate the witnesses whose testimony appears crucial or to set a limit on the number of witnesses. The tribunal also has the power to limit the issues on which certain witnesses may be heard or to limit the length of the hearing. Furthermore, it is generally accepted that the tribunal may *sua sponte* request a party to produce any testimony or request the hearing of any witness who, in its view, appears to be relevant. The tribunal often organises a conference before the hearing on the list of witnesses to be heard in order to avoid any subsequent objections.

Les parties à un arbitrage ressentent souvent le besoin de présenter des témoins au soutien de leurs prétentions et certaines pourront, à tort ou à raison, avoir le sentiment d'avoir été privées de leur droit d'être entendues si les arbitres leur refusent cette possibilité.[44] A défaut d'accord entre les parties sur l'opportunité d'auditionner tout ou partie des témoins, le tribunal tranchera conformément aux règles applicables.[45] Outre les principes généraux de procédure,[46] les arbitres devront, entre autres, tenir compte du règlement d'arbitrage applicable puisque certains, tel celui de la CNUDCI,[47] prévoient que les arbitres doivent tenir une audience dédiée à l'audition de témoins lorsqu'une partie en fait la demande. Dans ces limites, en pratique, le tribunal accepte généralement d'entendre des témoins et ce n'est qu'exceptionnellement qu'il refusera toute audition. S'il estime que le nombre de témoins est trop important, il peut inviter chaque partie à désigner les témoins dont l'audition lui paraît cruciale ou fixer un nombre maximum de témoins. Le tribunal dispose également du pouvoir de restreindre les points sur lesquels certains témoins peuvent être auditionnés ou limiter la durée de leurs auditions. Par ailleurs, il est en principe admis que le tribunal peut demander d'office à une partie de produire tout témoignage ou demander l'audition de tout témoin qui lui paraîtrait

pertinent.[48] Souvent, le tribunal organise, avant l'audience, une discussion sur la liste des témoins à entendre afin de purger d'éventuelles contestations.

Organisation de l'audience

Après avoir entendu leurs observations et à défaut d'accord entre les parties, le tribunal fixera les modalités des auditions, notamment le nombre d'audiences, les aspects matériels et logistiques mais aussi la date et le lieu des auditions, leur durée et la période durant laquelle un témoin devra rester disponible pour une éventuelle audition complémentaire ou une confrontation. Tout en poursuivant les impératifs de célérité et d'efficacité, le tribunal veillera, dans la mesure du possible, à organiser les auditions en concertation avec les parties.

Possibilité pour un témoin d'assister à l'audition d'un autre témoin ?

Il appartiendra au tribunal de décider si tout ou partie des témoins peuvent assister à l'audition de tout ou partie des autres témoins. Afin d'éviter tout incident le jour de l'audience, il est préférable que cette question ait été préalablement réglée. Généralement, le tribunal aura tendance à ne pas prévoir de strictes mesures d'isolation des témoins, à moins que des circonstances particulières ne l'exigent ou que les parties n'en conviennent. Néanmoins, il cherchera souvent à éviter que des témoins ne puissent assister aux audiences ou à l'audition d'autres témoins surtout lorsque les mêmes thèmes doivent être abordés. En effet, ceux-ci pourraient ainsi être avantagés par la connaissance des propos tenus par les autres témoins et risqueraient d'adapter leur témoignage. S'agissant des parties et leurs représentants, il est souvent admis qu'ils ont le droit d'assister à l'intégralité des audiences[49] et ce alors même qu'ils pourraient être amenés à témoigner ultérieurement. Le tribunal pourra alors tenter de limiter ce risque d'interférence, par exemple lorsqu'il déterminera l'ordre des auditions.

Ordre des auditions de témoins

L'ordre dans lequel les témoins seront entendus est établi par le tribunal ou les parties. Il n'existe pas de règles préétablies en la matière[50] mais les arbitres prévoient généralement que le demandeur présentera ses témoins en premier, et le défendeur en second.[51] Cependant, lorsque le litige est complexe et que de nombreux faits ou aspects techniques sont contestés, il peut être opportun de prévoir des sessions d'auditions de témoins par thèmes. En fonction des spécificités du litige, les arbitres pourront estimer utile de procéder à l'audition simultanée de plusieurs témoins ou d'organiser une confrontation.[52]

Organisation of the hearing

After hearing the parties' observations, and failing an agreement between them, the tribunal will determine the terms and conditions of the hearings: in particular their number, the logistical aspects, but also the date and place of the hearings, their length and the period of time during which a witness must remain available for any additional hearing or cross-examination. While seeking to comply with speed and efficiency constraints, the tribunal will make sure, to the extent possible, to organise the hearings in consultation with the parties.

Possibility for a witness to attend another witness' testimony?

The tribunal will decide whether all or some of the witnesses may attend the testimony of some or all of the other witnesses. In order to avoid any difficulties on the day of the hearing, this question will ideally have been settled beforehand. The tribunal will usually not provide for strict measures of isolation of the witnesses, unless special circumstances require it or unless the parties so agree. Nevertheless, it will often try to prevent witnesses from attending the hearings or other witnesses' testimonies, especially when the same issues will be addressed. The witnesses might otherwise be given an advantage because of their knowledge of the remarks made by other witnesses and may alter their testimony. It is generally accepted that parties and their representatives are entitled to attend all of the hearings, despite the fact that they might subsequently testify. The tribunal may seek to limit this risk of interference, for instance, when it determines the order of witness examinations.

Order of witness examinations

The tribunal or the parties determine the order in which witnesses will be heard. There are no pre-established rules regarding this matter, but arbitrators generally require that the claimant presents its witnesses first and that the defendant comes second. However, when the dispute is complex and many facts or technical aspects are debated, it may be convenient to organise the examination of witnesses by topic. Depending on the specific characteristics of the dispute, the arbitrators may consider it appropriate to proceed with the simultaneous examination of several witnesses or to organise a confrontation.

The inherent procedural flexibility of arbitration has allowed for the experimentation of a wide variety of methods, including "witness conferencing", which can notably be useful in highly technical matters.

La souplesse procédurale inhérente à l'arbitrage a permis à la pratique d'expérimenter une grande diversité de méthodes, parmi lesquelles figure celle du *« witness conferencing »*[53] qui peut s'avérer utile notamment dans les domaines très techniques.

Language

Langue

The testimony of witnesses must, in general, take place in the language of the arbitration. However, there is no obligation for witnesses to express themselves in this language and they usually may use a language with which they are more comfortable. The parties and the arbitrators can mutually agree that testimony may be given in a language other than the language of the arbitration, in particular when they are sufficiently comfortable in the other language. Interpreters, usually independent, will otherwise have to be called in, so that each witness may answer questions and be understood by all intervening parties.

En principe les auditions de témoins doivent se dérouler dans la langue de l'arbitrage. Cependant, le témoin n'a pour sa part aucune obligation de s'exprimer dans cette langue et pourra en général utiliser une langue qu'il maîtrise davantage. Les parties et les arbitres pourront accepter d'un commun accord un témoignage dans une autre langue que celle de l'arbitrage notamment lorsqu'ils la maîtrisent suffisamment. A défaut, un système d'interprètes, en principe indépendants, devra être mis en place afin que chacun des témoins puisse être compris de tous les intervenants et répondre aux questions.

Transcript

Retranscription

The tribunal may also decide that the hearings shall be transcribed and in what manner. The tribunal will typically set up a process to keep track of the hearings so that arbitrators and counsel are subsequently able to use the statements made at the hearings.

Le tribunal pourra également être amené à décider si les auditions doivent être retranscrites et de quelle façon. Afin que les auditions soient par la suite exploitables par les arbitres et les conseils, le tribunal mettra généralement en place un procédé permettant de conserver une trace des auditions.[54]

Confidentiality

Confidentialité

The issue of confidentiality is sometimes a source of difficulty since witnesses may disclose confidential information during their testimony or since they may have access to such information. In addition to the fact that confidentiality in arbitration is a subject of debate, it must be stressed that even in jurisdictions where this principle is clearly recognised, it applies only to the parties and to the arbitrators, but cannot automatically be extended to third parties, in particular to witnesses. To address this difficulty, tribunals sometimes make specific arrangements, and witnesses may be asked to sign confidentiality agreements.

La question de la confidentialité est parfois une source de difficultés, soit parce que le témoin peut être conduit, durant son audition, à dévoiler des informations confidentielles soit parce qu'il peut avoir accès à de telles informations. Outre que la confidentialité dans l'arbitrage fait débat, on soulignera que même dans les pays où ce principe est clairement reconnu, il ne s'applique qu'aux parties et aux arbitres mais ne saurait être automatiquement étendu à des tiers, notamment aux témoins. Pour remédier à cette difficulté, il n'est pas rare que le tribunal soit conduit à prendre certaines mesures et que les témoins soient amenés à signer des engagements de confidentialité.

Confidentiality also raises the issues of the very admissibility of some testimony. Notably, sensitive questions may arise when some information is likely to be protected by privileges that are recognised in some jurisdictions, mainly common law ones, but whose scope and regime vary between national systems. In this field that often raises the question of applicable law, arbitrators enjoy broad freedom.

La confidentialité pose également la question de la recevabilité même de tout ou partie de certains témoignages. Des questions délicates peuvent notamment surgir lorsque des informations sont susceptibles d'être protégées par des *privileges* qui sont reconnus par certains pays, principalement de c*ommon law*, mais dont les contours et les régimes varient selon les systèmes nationaux. Dans ce domaine qui pose souvent des difficultés quant au droit applicable, les arbitres disposent généralement d'une grande liberté.[55]

Préparation des témoins

Dans la plupart des pays de *common law*, il est admis que les conseils préparent les témoins à leurs auditions. En revanche, dans les pays de droit civil où l'indépendance du témoin fait souvent la valeur du témoignage, la préparation par l'avocat peut être perçue comme une atteinte à l'indépendance du témoin. En matière d'arbitrage international, la pratique admet largement la faculté des conseils de préparer les témoins à leur audition.[56] En effet, la grande majorité des praticiens considère que les règles procédurales ou déontologiques nationales susceptibles de restreindre la faculté des conseils de préparer les témoins n'ont pas vocation à s'étendre à l'arbitrage international. En France par exemple, la pratique a largement admis que dans le contexte des arbitrages internationaux l'avocat peut préparer les témoins.[57] Cette pratique a d'ailleurs été récemment confirmée par une résolution du Conseil de l'Ordre des avocats de Paris levant ainsi toute ambiguïté à ce sujet.[58] L'égalité des parties serait d'ailleurs rompue si le conseil de l'une était libre de préparer des témoins alors que le conseil de l'autre se le voyait interdire.

Les conseils poussent parfois la préparation assez loin en simulant la « *cross-examination* » afin de la dédramatiser. Toutefois, cela risque de s'avérer contre-productif si le témoin est « trop préparé » et donne l'impression de réciter les arguments de la partie qui l'a appelé à témoigner dans la mesure où il perdra vraisemblablement de sa force de conviction. Bien entendu, le conseil ne saurait en aucun cas inciter le témoin à travestir la réalité.[59]

Comparution des témoins

Chaque partie doit s'assurer que les témoins dont elle demande l'audition soient présents à l'audience.[60] Ainsi, il leur incombe notamment de s'organiser avec le témoin pour s'assurer de sa présence ou encore obtenir les autorisations éventuellement nécessaires pour lui permettre de témoigner.[61] Les arbitres étant dépourvus d'*imperium*, ils ne peuvent en principe contraindre un témoin à se présenter à l'audience. Si un témoin ne se présente pas, sans excuse valable, alors que son audition était prévue, le tribunal pourra en tirer toutes les conséquences contre la partie à laquelle il incombait de rendre ce témoin disponible.[62] Certains droits nationaux autorisent les parties à demander l'assistance des tribunaux étatiques pour obtenir la comparution de témoins récalcitrants.[63] Auquel cas, en principe, la partie qui souhaite obtenir l'assistance des juges étatiques demandera préalablement l'autorisation au tribunal arbitral ou demandera à ce dernier de requérir lui-même leur assistance.[64]

Preparation of witnesses

In most common law jurisdictions, it is accepted that counsel prepare witnesses for their testimony. On the contrary, in civil law jurisdictions, where it is precisely the independence of witnesses that often renders the testimony valuable, preparation by counsel may be seen as interfering with the independence of such witnesses. In international arbitration, practice largely accepts that counsel may prepare witnesses for their examination. Indeed, most practitioners consider that national procedural or ethical rules, which are likely to limit the possibility for counsel to prepare witnesses for their hearing, were not intended to apply to international arbitration. In France, for example, in the context of an international arbitration, practice commonly accepts that counsel may prepare witnesses. This practice was also confirmed by a resolution of the *Conseil de l'Ordre des avocats de Paris* (Paris Bar Association), thereby removing any ambiguity. In fact, the principle of equality between parties would be infringed if one party's counsel were free to prepare witnesses, whereas the other party's counsel were prohibited from doing so.

Counsel sometimes extensively prepare witnesses by using a mock cross-examination, even though this may be counter-productive. Since an overly prepared witness will give the impression that he or she is reciting the arguments of the party having called him or her, this witness will probably lose some of his or her credibility. Needless to say, under no circumstances may counsel incite the witness to distort the truth.

Appearance of witnesses

Each party must ensure that witnesses whose oral testimony it has requested are present at the hearing. Therefore, it is the party's responsibility to make arrangements with witnesses to ensure their presence and to obtain any authorisation necessary to allow them to give oral testimony. Since the arbitrators have no *imperium*, they cannot compel witnesses to appear at the hearing. If a witness does not appear at the hearing and has no valid excuse for his/her absence, the tribunal will be entitled to draw the appropriate conclusions against the party responsible for ensuring the availability of this witness. Some laws authorise the parties to request assistance of national courts in order to compel witnesses to appear. In such cases the party who wishes to obtain the assistance of the judge will, in general, first seek the authorisation of the arbitral tribunal or will ask the tribunal to request the court's assistance.

TESTIMONY OF WITNESSES

Conduct of the hearing

Generally speaking, arbitration laws and rules give little guidance as to the manner in which the testimony of witnesses is to unfold. In practice, the tribunal will seek to consult with the parties to organise the oral testimony before ruling on any objections. At all times, the tribunal fully controls the hearing, during which it will endeavour to give each party the opportunity to present its evidence and arguments, to ensure their equal treatment and to respect the right of each party to be heard, while at the same time taking into consideration speed and cost-efficiency. Often, prior to the hearing, the tribunal will set equal time for each party to speak. However, it does not have to comply strictly with this equal speaking time. Provided a general balance is kept and parties are given an equal opportunity to present their case, the principle of equality will be respected. Some circumstances may justify one party needs more time than the other. In practice, if at the end of the hearing the tribunal notes that one of the parties has had significantly less time to speak, it will offer that party to make up this time or it will suggest that this party waive its right to additional time.

Obligation to tell the truth

Domestic laws have adopted different positions as to the prerogative of arbitrators to receive the oath of witnesses appearing before them. In general, international arbitrators do not prompt witnesses to take an oath; witnesses generally have the right not to submit to this formality. On the other hand, whether or not they are testifying under oath, witnesses are under the obligation to tell the truth. It is customary for arbitrators to ask a witness about to be heard to state that he or she will tell the truth and to inform him or her of the consequences arising from any false statement. This practice, which enables the tribunal to satisfy itself with the witness asserting—in the form deemed appropriate by the tribunal—that he or she is telling the truth, allows the tribunal to adapt to circumstances and to applicable rules. Finding of a false statement, in addition to possibly making the witness liable, will impair the credibility of the party having produced this statement and will allow the tribunal to disregard the witness' statement or even to draw adverse inferences against that party.

Examination and cross-examination of witnesses

One of the major differences between civil law and common law jurisdictions probably lies in the

AUDITION DE TEMOINS

Direction de l'audience

De manière générale, les lois et les règlements d'arbitrage donnent peu d'indications sur la façon dont l'audition des témoins se déroule. En pratique, le tribunal cherchera à se concerter avec les parties pour organiser les auditions avant de trancher les éventuelles contestations. Le tribunal conserve à tout moment l'entier contrôle de l'audience[65] durant laquelle il s'emploiera à permettre à chaque partie de présenter ses preuves et son argumentation, à leur assurer un traitement égal et à respecter le principe du contradictoire tout en tenant compte des impératifs de célérité, d'efficacité et de coût. Souvent, le tribunal fixera à l'avance un temps de parole égal pour chacune des parties.[66] Cependant, il n'est pas tenu de respecter scrupuleusement l'égalité de temps de parole, le principe d'égalité étant respecté dès lors qu'un équilibre général est préservé et que chaque partie a été également mise en mesure de présenter utilement son argumentation.[67] En effet, certaines circonstances peuvent justifier qu'une partie ait besoin de plus de temps que l'autre.[68] En pratique, si à l'issue de l'audience le tribunal constate qu'une partie a un déficit significatif de temps de parole, il pourra lui proposer de le rattraper ou lui suggérer de bien vouloir y renoncer.

Obligation de dire la vérité

Les droits nationaux ont adopté des positions différentes sur la qualité des arbitres à recevoir le serment des témoins comparaissant devant eux.[69] En principe, les arbitres internationaux ne font pas prêter serment aux témoins qu'ils auditionnent, ces derniers disposant généralement du droit de ne pas se plier à cette formalité. En revanche, qu'ils soient assermentés ou non, les témoins ont l'obligation de dire la vérité. Il est d'usage que les arbitres demandent au témoin sur le point d'être entendu de déclarer qu'il dira la vérité et l'informent des conséquences d'une fausse déclaration. Cette pratique consistant pour le tribunal à se contenter, dans la forme qu'il estime appropriée, de demander au témoin d'affirmer qu'il dit la vérité permet au tribunal de s'adapter aux circonstances et aux règles applicables.[70] La découverte d'un faux témoignage, outre qu'elle engage la responsabilité du témoin, affectera la crédibilité de la partie qui l'a produit et permettra au tribunal de ne pas tenir compte des déclarations du témoin, voire d'en tirer certaines conséquences à l'encontre de la partie qui l'a produit.

Interrogatoire des témoins

La façon de procéder à l'audition des témoins constitue sans doute l'une des plus grandes différences entre pays

de droit civil et de *common law*. Généralement, les arbitres adoptent une méthode pragmatique largement inspirée des différentes traditions juridiques. Le tribunal peut s'arroger un rôle plus ou mois actif mais laisse souvent aux parties une assez grande liberté pour procéder à l'interrogatoire. Certes, certains arbitres choisiront de commencer à poser eux-mêmes des questions sur les points qu'ils souhaitent clarifier avant de laisser les conseils interroger le témoin. Cependant, le plus souvent, les arbitres préféreront laisser une grande latitude aux conseils pour interroger les témoins, se réservant simplement la faculté de poser d'éventuelles questions complémentaires, de contrôler l'interrogatoire et de trancher d'éventuelles contestations ou objections procédurales. Ainsi, même s'il n'existe pas de règle prédéterminée, l'audience se déroule généralement dans un format largement inspiré par la *common law* bien qu'il soit plus souple et que les arbitres interviennent davantage.

manner in which witness examinations are conducted. Generally, arbitrators adopt a pragmatic approach largely inspired by the different legal traditions. The tribunal may take on a more or less active role, but often leaves broad freedom for the parties to carry out the examination. Some arbitrators will choose to raise their own questions first on points they wish to clarify before they allow counsel to question the witnesses. However, in most cases, arbitrators will prefer to leave broad latitude for counsel to examine the witnesses, simply reserving the right to raise additional questions, to supervise the examination and to settle any disputes or procedural objections. Thus, even if there are no pre-determined rules, the hearing will usually be conducted in a format largely inspired by the common law even though it may be more flexible and arbitrators may intervene more frequently.

Pour commencer, le tribunal invite la partie qui a appelé le témoin à procéder à son interrogatoire (« *direct examination* », « *examination in chief* »). Les questions seront généralement formulées de manière ouverte pour permettre au témoin de s'exprimer. Lorsque le témoin a préalablement déposé une déclaration écrite, ce qui tend à devenir la règle, il pourra être convenu entre les parties ou décidé par le tribunal[71] que la déclaration écrite se substituera à l'interrogatoire dirigé par la partie qui a produit le témoignage.[72] L'interrogatoire se limitera alors généralement à une rapide présentation du témoin et à la confirmation de sa déclaration écrite.[73] Si le nombre de témoins n'est pas trop élevé, le tribunal pourra proposer au conseil un temps de parole, généralement limité, pour procéder à un bref interrogatoire destiné à mettre en lumière les points essentiels de l'attestation avant le contre-interrogatoire. Cependant, l'interrogatoire initial du témoin ne devrait pas, en principe, permettre à la partie qui y procède de présenter de nouveaux éléments. Si une contestation devait surgir à l'audience au motif que l'interrogatoire sort des thèmes prévus ou apparaît comme étant un moyen détourné de présenter des « éléments surprises », il appartiendra au tribunal de trancher cette contestation et de prendre les mesures appropriées.

First, the tribunal will invite the party who called the witness to proceed with direct examination, or examination in chief. Questions are usually open-ended in order to allow the witnesses to express themselves. In cases where the witness has already filed a written statement, which is increasingly the rule, the parties may agree or the tribunal may decide that the written statement will replace the examination conducted by the party producing this testimony. The examination will then usually be limited to a brief introduction of the witness and to the confirmation of his/her written statement. If there are few witnesses, the tribunal may offer counsel some time (generally limited) for a brief examination intended to highlight the main points of the statement, before cross-examination. However, the initial examination of the witness will not usually allow the examining party to present new evidence. Should a dispute arise during the hearing on the grounds that the examination relates to issues that were not provided for or because the examination appears to be a circumvented way of presenting "surprise evidence", it will be up to the tribunal to settle this and to take appropriate measures.

Ensuite, la partie adverse procédera au contre-interrogatoire (« *cross-examination* ») qui est incontestablement la phase la plus importante de l'audition puisqu'elle permet de tester la crédibilité du témoin. Le conseil adverse posera des séries de questions au témoin et confrontera ses affirmations à d'autres éléments de preuve ou tentera de mettre en évidence d'éventuelles contradictions. Les questions sont souvent orientées et fermées afin d'amener le témoin à concéder des admissions. La partie ayant

Subsequently, the opposing party will cross-examine the witness, which unquestionably is the most important stage of the hearing, since it allows testing of the credibility of the witness. Opposing counsel will ask the witness a set of questions and will confront his or her assertions with conflicting items of evidence or will try to point out any inconsistencies. Questions raised are often leading ones (focused and "yes or no questions") in order to push the witness to make admissions. The party having called a person to testify may raise objections if the questions are irrelevant, unnecessarily aggressive or ambiguous. At

the request of a party or *sua sponte*, the tribunal may then ask the author of the question to reformulate it, or may exclude it. The scope of the questions likely to be asked may also be a source of difficulty and arbitrators have different practices in this respect. The prevailing opinion today is that cross-examination may relate to any element of the case, on the basis that the party attempting to provide evidence on a fact by testimony takes the risk of exposing the witness to any question of its opponent. However, some arbitrators believe that cross-examination must be limited to the topic being dealt with by the witness whether in his/her statement or during his/her oral examination to avoid taking the witness or opposing party by surprise.

appelé une personne à témoigner pourra faire des objections si les questions sont dénuées de pertinence, inutilement agressives ou ambiguës. Le tribunal pourra alors, à la demande d'une partie ou d'office, demander à l'auteur de reformuler sa question ou l'écarter.[74] Le périmètre des questions susceptibles d'être posées peut aussi être source de difficultés et les arbitres ont des pratiques diverses en la matière.[75] L'opinion dominante aujourd'hui est que le contre-interrogatoire peut porter sur tout élément du dossier, considérant que dès lors qu'une partie tente de rapporter la preuve d'un fait par voie testimoniale, elle prend le risque d'exposer le témoin à toute question de son adversaire. Toutefois, certains arbitres estiment qu'il doit être limité à la matière traitée par le témoin que ce soit dans son attestation ou lors de son interrogatoire afin de ne pas prendre le témoin et la partie adverse par surprise.

The tribunal will often grant the party having called the witness an opportunity to re-examine (re-direct examination), which will generally be limited to issues addressed during cross-examination. The opposing party is then entitled to a re-cross-examination, which will also be limited to issues addressed during the re-direct. The arbitrators may, at all times, ask witnesses questions and request further details as the examination and cross-examination progress.

Le tribunal accordera souvent à la partie ayant appelé le témoin la possibilité de procéder à un nouvel interrogatoire (« *re-direct* ») qui sera en principe strictement limité aux points abordés lors du contre-interrogatoire. La partie adverse pourra alors procéder à un nouveau contre-interrogatoire (« *re-cross* ») qui lui aussi sera limité aux points traités lors du nouvel interrogatoire.[76] Les arbitres peuvent à tout moment poser des questions et demander des précisions au témoin au fil des interrogatoires et contre-interrogatoires.

PROBATIVE VALUE OF TESTIMONY

As is the case with any evidence, the arbitral tribunal will freely determine the admissibility, relevance and probative value of testimony. Provided general procedural and public policy principles are complied with, this assessment is normally not subject to judicial review and cannot alone be grounds for setting aside an award. Despite the varying importance of witness evidence according to legal traditions, international arbitration practice has largely come to accept witness evidence—the usefulness of which cannot be debated—without prejudice to its probative value. However, it seems that documentary evidence continues to play a predominant role. Although the stage where testimony is gathered may prove relevant facts and find the truth, it usually takes place after the stage dedicated to documents. Even if arbitrators freely determine its probative value, it will be more difficult for them to discard a document than witness testimony, which, in essence, is more subjective and generally designed for the purposes of the arbitration after the dispute has arisen. However, it will all depend on the circumstances of the case and the arbitrators will weigh the evidence available so as to form their personal opinion.

VALEUR PROBANTE DES TEMOIGNAGES

Comme pour tout moyen de preuve, le tribunal arbitral apprécie librement la recevabilité, la pertinence et la force probante des témoignages.[77] Sous réserve du respect des principes généraux de procédure et de l'ordre public, cette appréciation ne fait normalement l'objet d'aucun contrôle des juges étatiques et n'est pas susceptible en elle-même de fonder un recours en annulation. Bien que sa place soit différente selon les traditions juridiques, la pratique de l'arbitrage international a conduit à admettre largement la preuve testimoniale dont l'utilité est incontestable mais sans pour autant préjuger de sa force probante. Cependant, la preuve documentaire semble demeurer prépondérante. D'ailleurs, si la phase de témoignage peut permettre d'établir les faits et de révéler la vérité, cette phase intervient généralement après celle consacrée aux documents. Même si les arbitres en apprécient librement la force probante, ils auront en pratique plus de mal à se départir d'un document que d'un témoignage qui, par essence, est plus subjectif et généralement établi pour les besoins de la cause postérieurement au litige. Cependant, tout dépendra des circonstances de l'espèce et il appartiendra aux arbitres de mettre en balance

les preuves disponibles afin de se forger leur intime conviction.

Pour apprécier la force probante des témoignages, les arbitres font souvent preuve de pragmatisme et de bon sens. Par exemple, ils accorderont en principe plus de poids à un témoignage corroboré par d'autres éléments de preuve comme des documents qu'à un témoignage fondé sur aucun élément matériel, à un témoignage précis qu'à un témoignage vague et dénué d'explication, ou encore à un témoignage portant sur des faits directement constatés par le témoin qu'à un témoignage indirect. D'une manière générale, les arbitres confronteront le témoignage aux autres preuves disponibles.

To assess the probative value of a testimony, arbitrators are often pragmatic and use their common sense. For example, they will usually give more weight to testimony that is corroborated by other pieces of evidence, such as documents, rather than to testimony that does not rely on any documentary evidence, to detailed rather than vague testimony with no explanations, and to testimony relating to facts directly observed by the witness rather than to indirect testimony (hearsay). Generally, arbitrators will compare the testimony to other available evidence.

Le facteur essentiel est sans aucun doute la crédibilité du témoin. Cette crédibilité dépend d'éléments objectifs et subjectifs. Le comportement du témoin aura naturellement un impact non négligeable, de même que sa spontanéité, son caractère ou encore sa façon de s'exprimer. Les arbitres peuvent aussi être sensibles au parcours professionnel du témoin et à ses compétences notamment s'ils ont un lien direct avec les thèmes abordés lors de l'audition. Son indépendance et son objectivité sont également des éléments prépondérants. Ainsi, les arbitres ne manqueront pas d'apprécier le témoignage au regard de l'intérêt (direct ou indirect) que peut avoir le témoin quant à l'issue du litige ainsi que des liens et rapports, présents et passés, qu'entretient le témoin avec les parties ou leurs conseils. La force probante du témoignage pourra être altérée si lors de son audition le témoin ne se souvient plus de certains éléments, manque d'assurance ou se contredit. Il en sera de même si les propos du témoin contredisent les autres témoignages qui ont pu être produits par la partie qui s'en prévaut.

Clearly, the key factor is the credibility of the witness. This credibility depends on objective and subjective elements. Witnesses' behaviour will naturally have a substantial impact, as will their spontaneity, personality or the way in which they express themselves. Arbitrators may be sensitive to witnesses' professional careers and to their expertise, in particular in cases where these directly relate to the subjects dealt with during the hearing. Their independence and objectivity are also prevailing factors. Thus, arbitrators will assess the testimony in light of the (direct or indirect) interest a witness may have in the outcome of the dispute, as well as of past or present connections and relationships witnesses had or still have with respective parties or their counsel. The probative value of testimony may change if the witness does not recall certain items, lacks assurance or contradicts him or herself. The same will be true if the witness' assertions are inconsistent with other witnesses' testimonies possibly produced by the same party.

CONCLUSION

CONCLUSION

Dans de trop nombreux arbitrages, la mise en œuvre d'une procédure uniformisée et quasi-standardisée conduit à cumuler inutilement pour chaque mode de preuve les phases procédurales prévues en droit civil avec celles prévues en *common law,* ce qui risque de générer un alourdissement et un allongement regrettable de la procédure. Les arbitres veilleront donc à être proactifs et à appréhender en amont les enjeux et spécificités d'un litige afin d'ajuster la procédure ainsi que l'étendue et la place des témoignages.

In too many arbitration proceedings, the implementation of standardised procedure leads to unduly cumulative procedural phases contemplated by both civil and common law systems. This often gives rise to more burdensome and lengthier proceedings than are necessary. Arbitrators must therefore be proactive and grasp the issues at stake as well as the specific characteristics of a dispute at the outset, in order to adjust the procedure, as well as the extent and role of testimony.

Quant aux parties et à leurs conseils, il leur appartient d'anticiper les difficultés susceptibles de se poser en matière de preuve testimoniale et de les soumettre au plus tôt aux arbitres afin d'éviter de mauvaises surprises. Ils

As to the parties and their counsel, they should anticipate the hurdles that are likely to arise in relation to witness testimony and should submit them to arbitrators as soon as possible to avoid any unpleasant surprises. They must also seek

to choose potential witnesses according to the specific characteristics of the dispute and to anticipate opposing testimony and arguments. In particular, each party must bear in mind that its witness testimony should fit in with other available evidence, so as to maximise the strength of its case.

devront également s'efforcer de sélectionner les témoins éventuels en fonction des spécificités du litige, mais également d'anticiper les témoignages et les arguments adverses. En particulier, chaque partie devra veiller à articuler ses témoignages avec les autres preuves dont elle dispose afin d'optimiser leur force de conviction.

It would be difficult to dispute that, despite the importance of documentary evidence, witnesses' testimonies are also an essential strategic stage and their examinations are often a crucial moment that can have a decisive impact on the outcome of the arbitration.

Il est difficilement contestable que, malgré l'importance de la preuve documentaire, les témoignages constituent également une phase stratégique essentielle et l'audition des témoins est souvent un moment crucial qui peut avoir un impact déterminant sur l'issue d'un arbitrage.

Notes

1. Sur la preuve testimoniale, V.L. Lévy et V.V. Veeder, *Arbitration and Oral Evidence* (ICC Publishing, 2005) ; M. Bühler et C. Dorgan, « Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbitration: Novel or Tested Standards? », J. Int. Arb. 2000 17(1), 3 ; C. Oetiker, « Witnesses before the International Arbitral Tribunal », ASA Bull. 2007, 25(2), 253 ; A. Mourre, « L'administration de la preuve orale dans l'arbitrage international: état actuel de la pratique et perspectives d'évolution » in J. Rosell, *Les arbitres internationaux: colloque du 4 février 2005 — Centre français de droit comparé* (Société de législation comparée, DL, 2005), p.153 ; D.P. Roney, « Effective Witness Preparation for International Commercial Arbitration: A Practical Guide for Counsel », J. Int. Arb. 2003, 20(5), 429 ; G. Von Segesser, « Witness Preparation in International Commercial Arbitration », ASA Bull. 2002, 20(2), 222 ; Lord Wilberforce, « Written briefs and oral advocacy », Arbitration Int. 1989 5(4), 348 ; M. Hwang, A. Chin, « The role of witness statements in international commercial arbitration », ICCA Congress series n° 13 (2007), p.650 ; L. Lévy et L. Reed, « Managing fact evidence in international arbitration », ICCA Congress series n° 13 (2007), p.633 ; B.M. Cremades, « The oral presentation of fact witnesses in international commercial arbitration », ICCA Congress series n° 13 (2007), p.645 ; W. Peter, « Witness "Conferencing" », Arbitration Int., 2002 18(1), 47 ; G. Lorcher, « Improving procedures for oral and written witness testimony », ICCA Congress series n° 7 (1996), p.145 ; G. Blanke, « Whether arbitrators can be called as witnesses: the position under English law », Arbitration 2008 74(2), 114 ; S.I. Strong et J.J. Dries, « Witness Statements under the IBA Rules of Evidence: What to Do about Hearsay? », Arbitration Int. 2005, 21(3), 301 ; T. J. Tallerico et J.A Behrendt, « The Use of Bifurcation and Direct Testimony Witness Statements in International Commercial Arbitration Proceedings », J. Int. Arb, 2003, 20(3), 295. Pour une présentation générale de la question, v. notamment les ouvrages suivants : E. Gaillard and J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer, 1999), n° 1277 ; G. Born, *International Commercial Arbitration* (Kluwer, 2009) Vol. II, p.1828 ; J.F. Poudret et S. Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell, 2007), n° 656 ; M. de Boisséson, *Le droit français de l'arbitrage interne et international* (Joly, 1990), n° 752 ; R. David, *L'arbitrage dans le commerce international* (Economica, 1981), n° 321 ; K.P. Berger, *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration* (Kluwer, 2006), Vol. II, n° 26-7 ; W.L. Craig, W.W. Park et J. Paulsson, *International Chamber of Commerce Arbitration* (Oceana, 2000), n° 24-05 et 25-01 ; Y. Derains et E.A. Schwartz, *A Guide to the ICC Rules of Arbitration* (Kluwer, 2005), p.270 ; J. Lew, L. Mistellis et S. Kröll, *Comparative International Commercial Arbitration* (Kluwer, 2003), n° 21-32 ; M.J. Mustill et S.C. Boyd, *Commercial Arbitration* (Butterworths, 2000), p.345 ; A. Redfern, M. Hunter, N. Blackaby et C. Partasides, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, 2009), n° 82 ; Ph. Fouchard, *Ecrits — Droit de l'arbitrage — Droit du commerce international,* (Comité français de l'arbitrage, 2007), p.416. Parmi les études sur la preuve en arbitrage international, v. notamment : Y. Derains, « La pratique de l'administration de la preuve dans l'arbitrage commercial international », Rev. arb. 2004, 781 ; P.A. Karrer, « Freedom of an arbitral tribunal to conduct proceedings », Bull. CCI, 1999, 10(1), 14 ; B. Cremades, « Powers of the arbitrators to decide on the admissibility of evidence and to organize the production of evidence », Bull. CCI, 1999, 10(1), 49 ; C. Dieryck, « Procédure et moyens de preuve dans l'arbitrage commercial international », Rev. arb. 1988, 267 ; W.W. Park, « Arbitration's protean nature: the value of rules and the risks of discretion », Arbitration Int. 2003, 19(3), 279 ; R. Pietrowski, « Evidence in International Arbitration », J. Int. Arb, 2006, 22(3), 373 ; A. Marriott, « Evidence in International Arbitration », Arbitration Int., 1989 5(3), 280 ; G.M. Von Mehren et C.T. Salomon, « Submitting Evidence in an International Arbitration: The Common Lawyer's Guide », J. Int. Arb. 2003 20(3), 285 ; P.R. Griffin, « Recent Trends in the Conduct of International Arbitration », J. Int. Arb. 2000 17(2), 19 ; W. Melis, « Presentation of documentary evidence and witness », ICCA Congress series n° 5 (1991), p.511.

2. A. de Lotbinière Mcdougall et N. Bouchardie, « L'arbitrage international et la preuve documentaire », RDAI 2008, 4, 509 ; A. Dimolitsa, « Giving Evidence: Some reflections on oral evidence vs documentary evidence and on the obligations and rights of the witnesses » in L. Lévy et V.V. Veeder, précité, 11 ; J.F. Poudret et S. Besson, précité, n° 649 et s.

3. Bien que tous les experts puissent être entendus, il convient de distinguer l'expert désigné par une partie, dont le régime est à certains égards assez proche de celui du « témoin de faits », de l'expert désigné par le tribunal arbitral dont le régime est spécifique et la valeur probante plus grande. Sur l'expertise dans l'arbitrage, v. M. Feutrill et N. Rubins, « La préparation des preuves expertales en arbitrage commercial international : aspects pratiques », RDAI 2009, 3, 307 ; D. Brown, « Oral evidence and experts in arbitration », in L. Lévy et V.V. Veeder, précité, p.77 ; R. H. Kreindler, « Benefiting from oral testimony of expert witnesses : Traditional and emerging techniques », in L. Lévy et V.V. Veeder, précité, p.87 ; A.J. Faurés, « Improving procedures for expert testimony », ICCA Congress series n° 7 (1996), p.154 ; les différentes contributions in ICCA Congress series n° 5 (1991), p.525 et s. ; E. Jolivet, « Le recours à l'expertise dans les procédures d'arbitrage commercial international », Gaz. Pal., 22 mai 2004, n° 143, p.3. Plus particulièrement sur l' « expert partie » (*expert witness*), v. K.P. Berger, Vol. II, précité, n° 26-7 ; D. Brown, précité, p.77.

4. Le témoin doit être distingué de *l'amicus curiae* (ami de la cour) : v. les définitions de G. Cornu, *Vocabulaire juridique* (PUF, 2007), p.55 et du *Black's Law Dictionary* (West Publishing, 1990), p.82. V. aussi L. Mistellis, « Confidentiality and Third Party Participation », Arbitration Int. 2005, 21(2), 21.

5. Même si les dispositions régissant le procès judiciaire ne sont généralement pas applicables en matière d'arbitrage international, les différents intervenants — parties, conseils, arbitres — sont empreints du bagage culturel et juridique du système judiciaire national dont ils sont issus. Il appartiendra donc à chacun de se détacher de sa tradition d'origine et de s'adapter à celles des autres intervenants.

6. Les lois et les règlements d'arbitrage modernes consacrent le principe de liberté et d'autonomie des parties dans la détermination des règles applicables à l'instance arbitrale et, à défaut, confèrent aux arbitres le pouvoir de régler librement la procédure. V. à cet égard : CPC, art.1494 ; LDIP, art.182 al.1 ; CPC néerlandais, art.1036 ; CCI, art.15 ; LCIA, art.14. V. aussi : Fouchard, Gaillard, précité, n° 1171 et s. ; J. Lew, L. Mistellis et S. Kröll, précité, n° 21-5 et s. ; G.Born, précité, p.1748 et s. ; B. Cremades, précité, p.49. Le pouvoir des arbitres en matière de preuve est souvent présenté comme une conséquence de leur pouvoir en matière procédurale et notamment de gestion d'instance et d'instruction de la cause. Cependant, il serait réducteur de considérer comme purement procédurales toutes les questions en matière de preuve. V. sur ce point : Poudret, Besson, précité, n° 643-644.

7. V. notamment : P.A. Gelinas, « Evidence through witnesses » in L. Lévy et V.V. Veeder, précité, pp.29-30. En la matière, les lois et les règlements d'arbitrage sont particulièrement silencieux, les textes les plus explicites se limitant à prévoir que les arbitres peuvent procéder à l'audition de témoins. V. par exemple : CCI, art.20.3 ; LCIA, art.20 ; CPC néerlandais, art.1039. V. aussi : Fouchard, Gaillard, précité, n° 1287 ; IBA Rules, arts. 4 et 8.

8. Par exemple, les IBA Rules. Pour un commentaire, v. M. Bühler et C. Dorgan, précité, p.3.

9. M. de Boisséson, précité, n° 744.

10. Si la convention des parties est généralement présentée comme une limite aux pouvoirs des arbitres dont la mission juridictionnelle a une origine contractuelle, il ne faut pas pour autant nécessairement en déduire que les arbitres doivent se plier à toutes les exigences des parties. Sur la question de l'équilibre entre le pouvoir des arbitres et la volonté des parties dans la procédure arbitrale, v. notamment : Ph. Pinsolle et R. H. Kreindler, « Les Limites du rôle de la volonté des parties dans la conduite de l'instance arbitrale », Rev. arb. 2003, 41 ; Ch. Jarrosson, « Qui tient les rênes de l'instance arbitrale ? Volonté des parties et autorité de l'arbitre », note ss. Paris 19 mai 1998, 3 déc. 1998 et 19 janv. 1999, Rev. arb. 1999, 615 ; S. Lazareff, in *Improving International Arbitration—The need for speed and trust—Liber Amicorum M. Gaudet* (ICC Publishing No. 598, 1998), p.137.

11. Le tribunal invite généralement les parties à s'exprimer sur ces questions par écrit ou à l'occasion d'une audience procédurale, d'une conférence téléphonique ou d'une vidéoconférence.

12. Sur ce point, v. : W.W. Park, précité, pp.283-284.

13. Certains praticiens souhaitent accroître la prévisibilité des règles régissant les témoignages en préconisant que celles-ci soient définitivement fixées dans l'acte de mission ou à l'occasion d'une audience préparatoire afin de pallier le silence des lois et règlements d'arbitrage en la matière (v. *Aide-mémoire de la CNUDCI sur l'organisation des procédures arbitrales*, point 9 ; M. Bühler et C. Dorgan, précité, p.6). Cependant, de telles pratiques semblent demeurer assez rares, la plupart des arbitres estimant que de telles discussions risqueraient d'être source de batailles procédurales dès le début de l'arbitrage et qu'une telle réglementation risquerait de nuire à la souplesse et à l'efficacité de la procédure.

14. Il est de pratique courante de dissocier les audiences de témoins des audiences de plaidoiries afin de permettre aux parties d'exploiter ce qui ressortira des auditions et de répondre aux arguments adverses. Il n'existe toutefois aucune obligation en la matière et il peut parfois s'avérer plus efficace et moins coûteux de regrouper les audiences notamment lorsque les intervenants à l'arbitrage viennent de pays différents, que le litige le permet et que celui-ci porte sur de faibles montants.

15. Y. Derains, précité, p.789.

16. Ce mouvement d'uniformisation ne se cantonne pas au monde de l'arbitrage. V. les Principes ALI-UNIDROIT adoptés par l'American Law Institute en 2003 et par UNIDROIT en 2004 (F. Ferrand et T. Moussa, « Le projet de l'American Law Institute et d'Unidroit de Principes et Règles de procédure civile transnationale : vers une procédure civile mondiale modélisée ? » in Mélanges Buffet, *Petites Affiches* (2004), p.199).

17. A. de Lotbinière Mcdougall et N. Bouchardie, précité, p.509.

18. Y. Derains, précité, p.796.

19. Emboîtant le pas à ce mouvement, la CNUDCI a adopté en 1996 l'*Aide-mémoire de la CNUDCI sur l'organisation des procédures arbitrales* dont le paragraphe 15 est consacré aux témoins. Disponible sur http://www.uncitral.org/pdf/french/texts/arbitration/arb-notes/arb-notes-f.pdf (Vu le 14 fevrier 2010).

20. Disponible sur *http://www.ibanet.org/About_the_IBA/IBA_resolutions.aspx* (Vu le 14 fevrier 2010). Pour un commentaire des IBA Rules, v. notamment : G. Born, précité, p.1793 ; M. Bühler et C. Dorgan, précité.

21. Certains droits nationaux, tels que le droit allemand, ne semblent pas permettre que les parties puissent être entendues comme témoin. D'autres droits, tels que ceux d'origine hispanique, excluent le témoignage des personnes intéressées au litige ou considèrent leur témoignage comme dénué de toute force probante.

22. Certains arbitres, notamment de traditions civilistes, autorisent l'audition des parties, de représentants légaux ou de salariés mais pas en tant que témoin. Cette approche a également été retenue par le tribunal des différends irano-américains qui a admis que les représentants des parties pouvaient être entendus sans pour autant leur reconnaître le statut de témoin. Si de telles distinctions n'ont en pratique qu'une

importance limitée puisque les arbitres apprécient librement la valeur probante des témoignages, elles peuvent néanmoins avoir certaines conséquences procédurales, notamment sur la faculté d'une personne d'assister ou non aux audiences.

23. Hormis le Règlement LCIA (art.20.7) qui précise que « [t]oute personne physique ayant l'intention de témoigner devant le tribunal arbitral sur une question de fait ou comme expert sera considérée comme un témoin », les Règlements AAA et CNUDCI évitent soigneusement la question. De la même manière, le Règlement CCI se contente d'énoncer que les arbitres ont le pouvoir d'entendre, d'une part, les parties (art.20.2), et d'autre part, les experts, les témoins et « toute autre personne » (art.20.3). Ainsi le Règlement CCI permet explicitement aux arbitres d'auditionner toute personne (y compris celles, comme les dirigeants ou les employés, qui ne sont ni des experts ni des témoins au regard de certains droits nationaux) mais ne se prononce pas pour autant sur le statut sous lequel ces personnes sont entendues. Des discussions entre les parties concernant la distinction entre représentants des parties et témoins ne sont donc pas exclues de sorte qu'il appartiendra aux arbitres de décider s'il est opportun ou non de procéder à une telle distinction.

24. V. IBA Rules, art.4.2 qui confirme cette tendance.

25. Cette pratique est d'ailleurs confirmée par les IBA Rules (art.4.3). V. notamment : G. von Segesser, précité, p.224 ; A. Mourre, précité, n° 11. Même dans les pays interdisant aux conseils de se rapprocher des témoins pressentis dans le cadre de procédures judiciaires, il est généralement admis que cette restriction ne s'applique pas en matière d'arbitrage international. A cet égard, v. : A. Redfern, M. Hunter, N. Blackaby et C. Partasides, précité, n° 6-139-6-140 ; M. Bühler et C. Dorgan, précité, p.11.

26. V. notamment : AAA, art.20.2; LCIA, art.20 et CNUDCI, art.25.2.

27. En fonction des litiges, il sera préférable de déterminer ces conditions plus ou moins tôt dans le courant de la procédure, par exemple lors de l'établissement du calendrier procédural. En fixant ces règles à l'avance, l'arbitre garantit aux parties une certaine prévisibilité de la procédure et évite les éventuels « témoins surprises ».

28. A.V. Schlaepfer, « Witness Statements » in L. Lévy et V.V. Veeder, précité, p.65.

29. Pour éviter toute contestation, il sera également opportun de préciser si à cette occasion les parties pourront ou non produire de nouveaux documents au soutien de leurs attestations ou de leurs écritures et dans quelles conditions. Auquel cas, il sera généralement prévu que chaque partie aura la faculté de faire des observations sur les nouveaux éléments communiqués par la partie adverse.

30. A cet égard, v. : IBA Rules, art.4.5.

31. En général, la déclaration mentionne l'état civil du témoin, ses relations passées et présentes avec les parties, notamment si la personne est salariée, représentant ou consultant d'une partie ou d'une société du groupe, son cursus et son expérience professionnelle qui seront plus ou moins détaillés en fonction de leur pertinence au regard du litige et du contenu de la déclaration.

32. Généralement, la déclaration écrite est présentée sous forme narrative en numérotant les paragraphes. Cependant, il n'existe aucune règle rigide en la matière et certains éléments peuvent par exemple être présentés sous forme de tableau ou de graphique. La déclaration doit être signée et mentionner la date et le lieu de signature. Elle contient souvent une affirmation selon laquelle les déclarations sont vraies (IBA Rules, art.4.5(c)). Cependant, les déclarations écrites ne sont généralement pas des déclarations sous serments (*affidavits*) comme c'est le cas dans certains pays de *common law*.

33. V. notamment : A.V. Schlaepfer, précité, p.68 ; C. Oetiker, précité, p.256 ; W.L. Craig, W.W. Park et J. Paulsson, précité, n° 24-05 ; M. Bulher, C. Dorgan, précité, p.14. Par ailleurs, il existe plusieurs écoles quant à la préparation des déclarations écrites. Certains conseils se contentent d'expliquer aux témoins ce qu'est une déclaration écrite et en quoi leur témoignage est susceptible de constituer une preuve au soutien des allégations de la partie qui requiert leur témoignage, puis les laissent rédiger la déclaration avec leurs propres mots. Le conseil intervient le cas échéant postérieurement en suggérant des clarifications ou des précisions. D'autres conseils, surtout anglo-saxons, s'impliquent d'avantage dans la rédaction des déclarations, voire les rédigent souvent eux-mêmes, après avoir recueilli oralement le témoignage. Il leur appartient alors de retranscrire les propos du témoin et de s'assurer que ce dernier est à l'aise avec chacun des termes utilisés avant qu'il ne signe la déclaration.

34. Cette pratique a d'ailleurs été reprise par les IBA Rules (art.4.8).

35. Certains règlements d'arbitrage prévoient qu'une partie peut demander l'audition de tout témoin sur lequel la partie adverse entend s'appuyer — notamment par les déclarations écrites qu'il a pu soumettre — pour procéder à son contre-interrogatoire (*cross examination*) (v. : LCIA, art.20.4 ; CNUDCI, art.15.2). En pratique, dans l'acte de mission ou plus généralement dans l'ordonnance de procédure régissant la production des déclarations écrites, le tribunal prévoira souvent une règle comparable, tout en précisant parfois qu'il se réserve le droit de refuser l'audition de témoins qu'il jugera inutile ou de demander l'audition d'un témoin bien que les parties y aient renoncé.

36. Ainsi privée de l'un des principaux moyens de contester le témoignage, la partie adverse pourrait avoir le sentiment de subir une rupture d'égalité. D'un autre côté, si le tribunal adopte la position radicale consistant à retirer du dossier la déclaration du témoin qui ne s'est pas présenté, la partie qui l'a produite pourrait avoir le sentiment que son droit d'être entendu a été violé, surtout si un motif valable justifie le défaut de comparution.

37. IBA Rules, art.4.8.

38. IBA Rules, art.4.9. V. aussi : M. Bühler et C. Dorgan, précité, p.16 et C. Oetiker, précité, p.16.

39. R. David, précité, n° 323.

40. Cette pratique a été confirmée en Suisse par le Tribunal Fédéral qui a jugé, dans le cadre d'un arbitrage CCI, que le refus du tribunal arbitral d'entendre un témoin ayant déposé une déclaration écrite n'est pas constitutif d'une violation du droit d'être entendu dès lors que le Règlement CCI ne confère pas aux parties un droit automatique à bénéficier d'une audience (TF, 7 janv. 2004, 4P.196/2003, ASA Bull. 2004, 600). Il n'en demeure pas moins que c'est généralement avec prudence que le tribunal envisagera de refuser l'audition d'un témoin ayant déposé une déclaration écrite, surtout si son audition est demandée par la partie adverse qui entend procéder à un contre-interrogatoire.

41. Tant dans des pays de *common law* où la preuve testimoniale joue un rôle fondamental que dans des pays de droit civil, la jurisprudence admet généralement que le refus des arbitres de procéder à l'audition de témoins ne saurait en lui-même constituer un motif d'annulation de la sentence. Pour une illustration, v. : CA Paris, 17 juin 1999 (JurisData : 1999-023876). Le tribunal peut écarter un témoignage (déclaration écrite ou orale) notamment sur les fondements suivants : absence de pertinence ou de matérialité, obstacles légaux ou privilèges résultant des règles applicables, confidentialité, caractère particulièrement sensible de l'information au regard de raisons politiques ou institutionnelles ou encore de considérations de loyauté ou d'égalité entre les parties (IBA Rules, art.9.2).

42. Fouchard, Gaillard, précité, n° 1277. La liberté dont dispose le tribunal arbitral en matière de témoignage est prévue par certains règlements d'arbitrage (CCI, art.20 ; LCIA, art.20 ; AAA, art.20). V. en ce sens : IBA Rules, art.4, 8 et 9. Le Règlement CNUDCI, art.25, quant à lui, n'accorde pas aux arbitres autant de liberté.

43. Après avoir recueilli les observations des parties, il appartiendra au tribunal de se prononcer sur la demande d'audition du témoin en tenant compte, notamment, des raisons ayant pu empêcher la production préalable de la déclaration écrite dans les conditions prévues, de la pertinence du témoignage ainsi que du temps séparant l'audience de l'annonce du témoin surprise, tout en veillant au respect des principes généraux de procédure.

44. Poudret, Besson, précité, n° 659.

45. S'agissant d'une décision de procédure ayant trait à la conduite de l'instance, une telle décision généralement rendue sous forme d'ordonnance ne devrait donc pas, en elle-même, être susceptible de recours en annulation.

46. Le tribunal veillera à ce que sa décision respecte les principes du contradictoire, des droits de la défense et de l'égalité de traitement entre les parties mais s'assurera aussi du respect du droit des parties d'être entendues.

47. CNUDCI, art.15.2.

48. V. IBA Rules, art.4.11. Par exemple, il est généralement admis que le pouvoir de l'arbitre de demander d'office l'audition de témoins est implicitement énoncé dans le Règlement CCI, art.20.3. Il n'en demeure pas moins qu'en pratique le tribunal n'auditionne que rarement un témoin dont aucune des parties n'a demandé la comparution.

49. Certains règlements d'arbitrage tels que le Règlement CCI le prévoient d'ailleurs expressément (art.20.3) alors que d'autres règlements semblent laisser davantage de liberté en la matière (LCIA, art.19 ; SCC, art.27).

50. L'ordre des auditions pourra également être influencé par les disponibilités des témoins.

51. IBA Rules, art.8.2.

52. Cette diversité des méthodes et cette souplesse procédurale sont retranscrites dans les IBA Rules (art.8.2).

53. Cette méthode consiste à regrouper autour d'une table l'ensemble des témoins ayant des connaissances sur des thèmes prédéterminés et de les confronter. V. notamment : G. Von Segesser, précité, p.222 ; A Mourre, précité, n° 23-25.

54. En fonction des circonstances, il peut s'agir par exemple d'un simple procès-verbal rédigé par le tribunal ou son secrétaire à la suite de l'audience ou d'un « *verbatim transcript* » qui présente l'avantage de figer tout ce qui a pu être dit lors de l'audition et donc de faciliter l'usage de la preuve testimoniale et de réduire les risques de contestations ultérieures. Une solution alternative moins coûteuse que les transcripts consiste à enregistrer sur cassette ou sur vidéo l'audition. L'enregistrement permettra alors de trancher les éventuelles contestations relatives aux propos tenus par le témoin lors de son audition.

55. La tendance consiste généralement à appliquer uniformément aux parties le bénéfice d'un *privilege* quand bien même ledit *privilege* n'existerait pas dans le système juridique de l'autre partie. V. sur cette question : R. Mosk and T. Ginsburg, « Evidentiary Privileges in International Arbitration », Int'l & Comp. L.Q. 2001, 50, 345.

56. Cette pratique est d'ailleurs confirmée par certaines lois et règlements d'arbitrage (par exemple LCIA, art.20.6) de même que par les IBA Rules (art.4.3). V. notamment : D.P. Roney, précité, pp.429-431.

57. S. Lazareff, « Déontologie et Arbitrage », Gazette du Palais, 24 avril 2007, n° 114, p.3.

58. La Résolution du Conseil de l'Ordre des avocats de Paris du 26 février 2008 précise que « [d]ans le cadre des procédures arbitrales internationales, situées en France ou à l'étranger, il entre dans la mission de l'avocat de mesurer la pertinence et le sérieux des témoignages produits au soutien des prétentions de son client, en s'adaptant aux règles de procédure applicables. Dans cet esprit, la préparation du témoin par l'avocat avant son audition ne porte pas atteinte aux principes essentiels de la profession d'avocat et s'inscrit dans une pratique communément admise où l'avocat doit pouvoir exercer pleinement son rôle de défenseur » (Bulletin du Barreau de Paris, 4 mars 2008, n° 9). A cet égard, v. le rapport ayant précédé l'adoption de cette résolution : Rapport et projet de résolution du 13 novembre 2007, « Le témoin dans l'arbitrage international — préparation et production », Sous-Commission Arbitrage International du Barreau de Paris (resp. : L. Degos et L. Kiffer).

59. Non seulement il en va de la crédibilité du témoignage et de la partie qui l'a produit, mais le conseil peut le cas échéant faire l'objet de poursuites disciplinaires, voire pénales (H. Van Houtte, « Counsel-Witness relations and professional misconduct in Civil Law systems », in L. Lévy et V.V. Veeder, précité, p.110). En outre, la sentence pourrait, selon les pays et sous certaines conditions, être remise en cause dans le cadre de recours en annulation, en révision ou en rétractation sur le fondement de l'ordre public ou de la fraude.

60. En général, chaque partie prendra provisoirement à sa charge les frais engagés par ses témoins pour se rendre à l'audience. Par la suite, ces frais seront inclus dans les demandes des parties au titre de leurs frais de défense.

61. Par exemple, lorsque le témoin est un ancien salarié d'une partie, il sera généralement nécessaire d'obtenir l'autorisation préalable du nouvel employeur. Il peut également être nécessaire d'obtenir un visa.

62. Si un tel témoin avait préalablement déposé une déclaration écrite, le tribunal n'en tiendra pas compte ou ne lui attachera qu'une faible force probante.

63. Fouchard, Gaillard, précité, n° 1336-1338.

64. Une telle solution, constante dans les pays de *common law,* est également reçue dans certains pays de droits civils tels que la Suède ou la Suisse. D'ailleurs, la loi type de la CNUDCI prévoit une disposition comparable. Cette pratique est en outre reprise dans les IBA Rules (art.4.10).

65. Ce principe, consacré par certains règlements d'arbitrage, est aussi très fortement ancré dans la pratique de l'arbitrage international (IBA Rules, art.8.1). V. également : P.A. Karrer, précité, p.14.

66. En outre, la question de la computation des temps de parole peut être source d'incident. C'est pourquoi, il peut être souhaitable que le tribunal détermine avant l'audience la méthode qui sera appliquée.

67. Fouchard, Gaillard, précité, n° 1654.

68. Par exemple le nombre de témoins présentés peut être inégal, certains témoignages peuvent être plus pertinents que d'autres, certaines déclarations et certains faits plus ou moins contestés.

69. La plupart des pays de *common law*, tels que l'Angleterre et les Etats-Unis, reconnaissent à l'arbitre le pouvoir de recevoir le serment des témoins comparaissant devant lui, de même que la Belgique, à l'inverse de beaucoup de pays de droit civil comme l'Allemagne, la France ou l'Italie. L'assermentation peut jouer un rôle dans les pays où elle constitue une condition nécessaire pour punir pénalement de faux témoignages, comme en Angleterre. Dans d'autres pays, le serment n'est qu'une cause d'aggravation de la peine.

70. Cette pratique est d'ailleurs consacrée par les IBA Rules (art.8.3).

71. Il sera préférable de clarifier ce point dès le début de l'arbitrage afin que les conseils et les témoins tiennent compte de ce facteur dans la préparation des déclarations et s'assurent de leur exhaustivité.

72. Fouchard, Gaillard, précité, n° 1287 ; B. Cremades, précité, p.53.

73. Dans des cas exceptionnels, le témoin précisera qu'il désire compléter ou modifier sa déclaration écrite. Il devra alors expliquer les raisons de ces modifications tardives et il appartiendra au tribunal de décider, en tenant compte de l'importance de ces modifications, s'il les autorise et dans quelles conditions. Afin de préserver le contradictoire et l'égalité des parties, le tribunal pourra par exemple accorder à la partie adverse l'opportunité de répondre.

74. Dans le cadre d'un arbitrage international, les objections sont généralement formulées par les parties dans des conditions moins formelles que dans les systèmes de *common law.* Toutefois, ces objections sont plus rarement retenues par les arbitres.

75. D'ailleurs, les IBA Rules ont bien pris soin de ne pas prendre position sur cette question afin de ne pas nier la diversité des pratiques existantes.

76. Cette pratique consistant à restreindre le périmètre du second round d'interrogatoire et de contre-interrogatoire est consacrée par les IBA Rules (art.8).

77. IBA Rules, art.9.1.

6. Conduct of the Proceedings

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A. Overview

a. Introduction

6.01 An international arbitration may be conducted in many different ways. There are no fixed rules of procedure. Institutional (and *ad hoc*) rules of arbitration often provide an outline of the various steps to be taken; but detailed regulation of the procedure to be followed is established either by agreement of the parties or by directions from the arbitral tribunal—or a combination of the two. The flexibility that this confers on the arbitral process is one of the reasons that parties choose international arbitration over other forms of dispute resolution in international trade.

6.02 The only certainty is that the parties' counsel should not bring the rule books from their home courts with them. The rules of civil procedure that govern proceedings in national courts do not apply in arbitrations unless the parties expressly agree to adopt them.

6.03 An arbitral tribunal must conduct the arbitration in accordance with the procedure agreed by the parties. If it fails to do so, the award may be set aside or refused recognition and enforcement.(1) However, the freedom of the parties to dictate the procedure to be followed in an international arbitration is not totally unrestricted. *page "363"* The procedure they establish must comply with any mandatory rules(2) and public policy requirements of the law of the juridical seat of the arbitration.(3) It must also take into account the provisions of the international conventions on arbitration that aim to ensure that arbitral proceedings are conducted fairly.(4) Accordingly, a balance must be struck between the parties' wishes concerning the procedure to be followed and any overriding requirements of the legal regime that governs the arbitration.

6.04 In some respects an international arbitration is like a ship. An arbitration may be said to be ‘owned’ by the parties, just as a ship is owned by ship-owners. But the ship is under the day-to-day command of the captain, to whom the owner hands control. The owners may dismiss the captain if they wish and hire a replacement, but there will always be someone on board who is in command;(5) and, behind the captain, there will always be someone with ultimate control.

6.05 At the beginning of an international arbitration the parties are firmly in control of the process. In *ad hoc* arbitration, where there is no institution involved, they may—and sometimes do—write a complete set of procedural rules to govern the way in which the proceedings are to be handled. When they subsequently appoint an arbitral tribunal, by whatever method they have agreed, that tribunal is constrained by that agreed procedural framework. In institutional arbitration the procedural framework is provided by the institution's rules, to which the parties agreed when they signed the arbitration agreement and put into effect when they referred the resolution of disputes between them to the rules of the institution concerned.

6.06 When the arbitral tribunal is established, day-to-day control of the proceedings begins to pass to the tribunal. However, the transfer of control is not total and is not immediate. The tribunal usually engages in a dialogue with the parties on procedural matters, and often a 'Procedural Order No 1' is issued to design the essential elements of the process and the time limits within which each stage is to take place.

6.07 Many tribunals make considerable efforts, often adopting compromises in the process, to enable 'Procedural Order No 1' to carry the sub-heading 'By Consent'. However, whether or not the Procedural Order is made by consent, once it is made the procedure will acquire a desirable degree of predictability and authenticity. *page "364"* The tribunal will be more firmly in control, to ensure that the procedural steps are completed on time, and will have a firm basis for determining the almost inevitable procedural issues that will arise between the parties as the arbitration moves forward. By the time the witness hearings are reached the tribunal is fully in command (in the 'captain of the ship' sense); and, in any event, by that stage the parties usually find it easier to ask the tribunal for directions on disputed procedural issues than attempt to reach agreement between themselves.

b. Party autonomy

6.08 Party autonomy is the guiding principle in determining the procedure to be followed in an international arbitration. It is a principle that is endorsed not only in national laws, but by international arbitral institutions worldwide, as well as by international instruments such as the New York Convention and the Model Law. The legislative history of the Model Law shows that the principle was adopted without opposition;(6) and the text of the Model Law itself contains the following provision:

> Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.(7)

This principle follows the 1923 Geneva Protocol, which provides that 'the arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties …';(8) and the New York Convention, under which recognition and enforcement of a foreign arbitral award may be refused if 'the arbitral procedure was not in accordance with the agreement of the parties'.(9)

6.09 The ICC Rules, historically a champion of the principle of autonomy of the parties, provide:

> The proceedings before the Arbitral Tribunal shall be governed by these Rules and, where these Rules are silent, any rules which the parties or, failing them, the Arbitral Tribunal, may settle.(10)

Adopting the same approach, the LCIA Rules state:

> The parties may agree on the conduct of their arbitral proceedings, and they are encouraged to do so …(11)

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In the field of investment treaty arbitrations, ICSID adopts a similar approach, requiring that:

> As early as possible after the constitution of a Tribunal, its President shall endeavour to ascertain the views of the parties regarding questions of procedure(12)

c. Limitations on party autonomy

6.10 In the exercise of their autonomous authority, the parties may confer upon the arbitral tribunal such powers and duties as they consider appropriate to the specific case. They may choose formal or informal methods of conducting the arbitration; adversarial or inquisitorial procedures; documentary or oral methods of presenting evidence, and so forth. The exercise of this autonomy is, however, limited by certain requirements that may be categorised under the following headings.

i. Equal treatment

6.11 If party autonomy is the first principle to be applied in relation to procedure in international arbitration, equality of treatment is the second—and it is of the same importance. This principle is given express recognition both in the New York Convention(13) and in the Model Law, which states: 'The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.'(14)

6.12 The concept of treating the parties with equality is fundamental in all civilised systems of civil justice. The provision in the UNCITRAL Rules to the effect that the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate(15) is qualified by the proviso that it must treat the parties equally. The same concept underlies other sets of arbitration rules.(16)

6.13 The requirement that the parties must be treated equally thus operates as a limitation on party autonomy. For instance, a provision in a submission agreement that only one party should be heard by the arbitral tribunal might well be treated as invalid (for instance, by an enforcement court) even if both parties had agreed to it. page "366" The UNCITRAL Secretariat recognised the dilemma in its report leading to the Model Law:

> … [i]t will be one of the more delicate and complex problems of the preparation of a Model Law to strike a balance between the interests of the parties to freely determine the procedure to be followed and the interests of the legal system expressed to give recognition and effect thereto.(17)

ii. Public policy

6.14 The parties must not purport to confer powers upon an arbitral tribunal that would cause the arbitration to be conducted in a manner contrary to the mandatory rules or public policy of the State in which the arbitration is held. One important mandatory rule that has already been considered requires that each party should be given a fair hearing or, as the Model Law expresses it, 'a full opportunity of presenting his case'.

6.15 At first sight the word 'full' is somewhat disconcerting. It conjures up visions of a party demanding the opportunity to present duplicative testimony for days or even weeks. But in this context the word 'full' must be given an objective, not a subjective, meaning; and in practice it seems unlikely that a national court would set aside an award where the tribunal had taken a clearly reasonable and proportionate approach to limiting the scope of the evidence a party wished to present.

6.16 Any agreement between the parties purporting to confer power on the arbitral tribunal to perform an act that would be contrary to a mandatory rule (or to the public policy) of the country in which the arbitration is taking place would be unenforceable in that country, at least to the extent of the offending provision. So would any provision that purports to give the arbitral tribunal power to perform an act that is not capable of being performed by arbitrators under the law applicable to the arbitration agreement, or under the law of the seat of arbitration.(18)

iii. Arbitration rules

6.17 Limitations may also be introduced by the operation of the arbitration rules chosen by the parties. Such rules usually contain few mandatory provisions in relation to the conduct of the proceedings. For example, the version of the UNCITRAL Rules current at the date of writing specifies only four:

- under Article 15(1), the parties must be treated with equality, and each party must be given a full opportunity of presenting his case; *page "367"*
- under Article 15(1), the tribunal must hold a hearing if either party requests one;
- under Articles 18 and 19, there must be one consecutive exchange of written submissions (a 'statement of claim' and a 'statement of defence') which must include certain features;
- under Article 27, if the tribunal appoints an expert, it must give the parties the opportunity to question that expert at a hearing, and the parties must be given an opportunity to present their own expert witnesses on the points at issue.

iv. Third parties

6.18 The parties may not validly agree to confer powers on an arbitral tribunal that directly affect persons who are not parties to the arbitration agreement, unless a special provision of the applicable law enables them to do so. This is rare.(19) This principle applies to matters of substance as well as procedure. For example, an arbitral tribunal cannot direct a person who is not a party to the arbitration agreement to pay a sum of money or to perform a particular act.

6.19 Concerning procedural matters, an arbitral tribunal may direct the *parties* to produce documents, to attend hearings, or to submit to examination; but it usually has no power to compel third parties to do so, even if the parties to the arbitration have purported to confer such a power on the tribunal. The participation of third parties in arbitration proceedings, whether by giving evidence or producing documents, may usually be compelled only by invoking the assistance of a national court of competent jurisdiction. This is considered in more detail in Chapter 7.(20)

d. International practice

6.20 There is no universally recognised comprehensive set of detailed procedural rules governing international arbitrations. As described in Chapter 1, each arbitral tribunal is different, each case is different, and each case deserves to be treated differently. But there are basic underlying structures, built on three elements: first, the international conventions (and the Model Law) to which reference has been made; secondly, the various established sets of international arbitration rules; and, thirdly, the practice of experienced arbitrators and counsel.

6.21 The international conventions and the Model Law do not prescribe the way in which an international arbitration should be conducted, but merely establish *page "368"* general principles intended to ensure a fair procedure and an award that is enforceable both nationally and internationally.

6.22 Even the established sets of international rules—for instance, those of the ICC, the ICDR, and the LCIA and, for *ad hoc* arbitrations, those of UNCITRAL—do not describe in any detail the way in which an international arbitration should be conducted. This means that, in practice, it is for the arbitral tribunal and the parties to work together to establish procedures suitable to the circumstances of the particular case. The aim is to avoid unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined. In doing so, the arbitral tribunal and the parties should consider and find answers to a series of practical questions. For example:

- Is this a case in which it would be helpful for the Tribunal to determine preliminary issues and if so, what type of issue or issues?
- If, as is usual, there are to be written submissions, should they be exchanged sequentially or simultaneously?
- How is the production of documentary evidence to be handled?
- How is the evidence of witnesses to be presented? Are there to be written witness statements and reply statements; if so, are

there are any special considerations to take into account, apart from the timing of such statements?

- Is a confidentiality agreement required?
- Should there be a pre-hearing conference and, if so, at what stage of the proceedings?
- How much time should be reserved for the witness hearing; and when is it likely to be possible to fix dates and make the necessary bookings of hearing rooms, break-out rooms, court reporters, and so forth?

These are all important practical questions which are discussed in this chapter. First, however, it is useful to consider the way in which the procedural 'shape' of an international arbitration differs from that of civil dispute resolution in national courts.

e. The procedural structure of a typical international arbitration

6.23 Two elements in particular distinguish the procedural shape of an international arbitration from civil dispute resolution procedures in national courts. The first is that, unlike judges, it would be unusual for all the arbitrators to be resident at the seat of the arbitration. This means that it is not possible to convene a hearing, or procedural meeting, at short notice and at relatively low cost. Assembling the arbitral tribunal, the parties, and their counsel is often a time-consuming and costly exercise.

6.24 The second element is that time spent at hearings is 'premium time' in terms of cost to the parties. Not only is the cost of each day that the tribunal is in session page "369" extraordinarily costly, but the longer the arbitrators and the parties' counsel are expected to spend together, the more difficult it will be to find a date (or dates) on which all concerned can be assembled.

6.25 The result is that, in formulating a Procedural Order No 1,[21] arbitral tribunals routinely try to ensure that the procedure is able to continue smoothly without convening the people involved in an additional in-person meeting prior to the witness hearing. While there are many different variations, depending on a wide range of factors, a typical modern international arbitration will usually proceed along a path such as that shown in the flow chart in Figure 6.1:

Request for (or Notice of) Arbitration[22]

|

Establishing the Tribunal

|

Procedural Order No 1

|

Initial Written Submissions

(unless already delivered with RforA and Response)

|

Exchange of Memorials

(sequential or sequential? one round or two? Usually accompanied by documents, written statements and expert reports on which the parties rely)

|

Requests for production of additional documents

(typically, after the first round of memorials and before a second round)

|

Pre-hearing administrative conference by telephone or video conference

|

Witness Hearing

|

Post-Hearing Briefs

(sequential or simultaneous? one round or two?)

|

Closure of the proceedings by the arbitral tribunal

|

Award

|

Proceedings after the Award

(correction, interpretation, or additional awards)

Figure 6.1

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6.26 This chapter is concerned with the stages that take place after the arbitral tribunal has been established until the proceedings are closed by the arbitral tribunal following delivery of the parties' last submissions. Starting the arbitration and establishing the arbitral tribunal have been covered in an earlier chapter;[23] the award, and proceedings after the award, are covered in a later chapter.[24]

B. Preliminary Steps

a. Introduction

i. Preliminary meetings

6.27 Preliminary meetings at a very early stage of an international arbitration are not customary in some countries, notably the Russian Federation, Japan, and the Arab countries.(25) Nevertheless, especially where the parties and their representatives come from different legal systems or different cultural backgrounds, it is sensible for the tribunal to convene a meeting with the parties as early as possible in the proceedings. This ensures that the arbitral tribunal and the parties have a common understanding of how the arbitration is to be conducted and enables a carefully designed framework for the conduct of the arbitration to be established.(26) In modern times it is common practice for preliminary meetings to be conducted by telephone or video conference. This saves the costs inevitably incurred when one or more of the arbitrators or counsel has to travel across national boundaries, or even across oceans, in order to be present in person. However, there is no real substitute for all the players coming together in one room as soon as possible after the arbitration has started.

6.28 Some lawyers refer to such a meeting as a ‘preliminary hearing’. There is no magic in the precise form of words, but the phrase ‘preliminary meeting’ is probably more appropriate, so as to emphasise the informality and intended lack of adversarial character of the event. In principle the word ‘hearing’ should be reserved to identify a session at which the objective is for the arbitral tribunal to receive oral submissions and/or evidence in relation to disputed issues.

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6.29 There may be preliminary hearings, for example, in relation to issues of jurisdiction or evidence gathering. It is sound practice for tribunals to start the first procedural meeting in the format of a ‘case management meeting’, at which the procedural structure is discussed informally; and then convert the session into a preliminary hearing when the parties are ‘heard’ in a structured way on any disputed issues—such as a request for interim measures.

6.30 Apart from ICSID, none of the world's more prominent international arbitration institutions mention preliminary meetings, and they thus neither impose an obligation to hold one nor prohibit it.

6.31 In practice, a preliminary meeting proceeds through various stages. The members of the arbitral tribunal usually arrange to meet privately, before meeting the parties. This is partly to effect introductions, and partly to discuss provisional views as to the organisation of the arbitration.

6.32 Similarly, substantial benefits may be gained if the representatives of the parties meet with each other before attending the preliminary meeting with the arbitral tribunal. This is particularly important in *ad hoc* arbitrations, since matters such as the fees and expenses of the arbitrators are normally dealt with at this stage. To avoid embarrassment, in *ad hoc* arbitrations it is important that the representatives of the parties should be able to present an agreed position to the arbitral tribunal on the question of the arbitrators' fees and expenses.

ii. Representation at preliminary meetings

6.33 In order to obtain the maximum benefit from a preliminary meeting with the arbitral tribunal, each party should be represented by persons with sufficient authority and knowledge of the case to take 'on the spot' decisions, both in discussion with the other party's representatives and during the course of the meeting with the arbitral tribunal itself. This means that it is usually necessary for the leader of each party's team of lawyers, as well as a person with appropriate executive authority from each side, to attend. It is common practice, particularly where a government is involved, for an 'agent' to be nominated.(27) The agent is the person to whom both the arbitral tribunal and the other party are entitled to address communications and from whom they may seek an authoritative statement on behalf of the government concerned.

iii. Items to be covered at preliminary meetings

6.34 The specific points that need to be determined at a preliminary meeting depend partly on the law governing the arbitration (for example, in some jurisdictions it page "372" may be necessary to establish a submission agreement or *compromis*),(28) and partly on whether the parties have already subjected the arbitration to a set of international or institutional rules, either for administered or for non-administered arbitration. If the arbitration is subject to the rules of one of the major international arbitration institutions it will not be necessary, for example, for the parties to deal directly with the arbitrators in connection with their fees. This is handled by the institution concerned. In an *ad hoc* arbitration, however, it is important to deal not only with fees, but also to establish the manner and timing for presenting the following key elements of the case to the arbitral tribunal:

- initial written pleadings;
- evidentiary documents on which the parties intend to rely;
- written and/or oral testimony for the purpose of fact-finding; and
- written and/or oral arguments on law and fact.

iv. 'Time out'

6.35 As mentioned earlier, a private meeting of the arbitral tribunal, and a private meeting between the parties themselves, may take place before the main case management meeting between the arbitral tribunal and the parties. It is not uncommon for the main meeting to be adjourned, or even for there to be several short adjournments, while the arbitrators confer in private (or 'caucus', as lawyers sometimes describe it). This also gives the parties' representatives an opportunity for further private discussions. In this way, and with the guidance of the arbitral tribunal, the parties are often able to agree on the basic framework and organisation of the proceedings. In some cases the preliminary meeting may turn out to be the first step towards settlement negotiations.

6.36 Arbitral tribunals usually prefer to avoid making rulings on disputed procedural matters in the early stages of the arbitration.

Where there is disagreement between the parties, arbitrators often suggest compromise solutions. This appears to derive from the complexities of tribunal psychology,[29] as a result of which individual members of the arbitral tribunal (and particularly the presiding arbitrator) are reluctant to make rulings at the start of the arbitration that one of the parties may regard (however unjustifiably) as amounting to unfair treatment.

6.37 Nevertheless, if at the end of a case management meeting there are still matters outstanding upon which the parties are unable to agree, the arbitral tribunal has no alternative but to make a decision. Sometimes this is done immediately. More often the decision is reserved and notified to the parties later. It is unusual for a preliminary meeting to extend beyond one day, as a maximum; and it may well be page "373" disposed of within half a day. This means that, with careful planning, it is sometimes possible to hold a preliminary meeting without the need for any of the participants to make an overnight stay in a hotel unless intercontinental travel is involved.

v. UNCITRAL Notes on Organizing Arbitral Proceedings

6.38 It may be useful, at the beginning of an arbitration, for the parties to consult the UNCITRAL Notes on Organizing Arbitral Proceedings which are set out in Appendix I. These Notes provide a list of matters that the parties and the tribunal may wish to consider in establishing the procedural rules for their arbitration. Some of these matters—such as establishing the language of the arbitration—may be thought to be fairly obvious; but others are helpful, including arrangements to protect the confidentiality of proprietary information, arrangements for the exchange of memorials and other written submissions, means of communication between the parties, including the extent to which email, fax, or other electronic forms of communication should be used, and so forth.

vi. Procedural Order No 1

6.39 Many international arbitrators have their own checklists and model forms of procedural orders, and send them to the parties' counsel as a first step towards discussing with them the terms of a Procedural Order No 1 designed to establish an overall procedural scheme for the arbitration in question. Such a checklist usually includes dates (or time limits) for the delivery of memorials, document production, witness statements, and experts' reports, as well as at least provisional dates for the witness hearing.

6.40 Some international arbitrators consider it useful to start by sending the parties' counsel a ‘procedural questionnaire’, requesting them to state their preferences for the various steps that will take place prior to the witness hearing. These questionnaires are, by their nature, tailored individually to the tastes and cultures of the international arbitrators concerned. However, if the replies disclose sufficient common ground, they enable the tribunal to send out a draft ‘Procedural Order No 1’ for the parties' comments. The responses to that draft usually enable the tribunal to assess whether the need for an in-person preliminary meeting may be unnecessary.

b. Preliminary issues

6.41 One of the elements that may emerge from the answers to such a questionnaire is whether or not there are some issues that should be decided as 'preliminary issues' or 'separate issues'. Apart from jurisdictional issues,[(30)] other questions may arise page "374" that either should be determined as preliminary issues before the arbitral tribunal considers the substance of the claims or, alternatively, may be dealt with more conveniently at an early stage as separate issues, in order to facilitate the efficient and economical conduct of the proceedings.

i. Applicable law(s)

6.42 Amongst the most common examples of preliminary issues (other than those relating to jurisdiction) are those which involve the determination of the law governing the arbitration, and the law applicable to the substantive issues between the parties. Both issues arose in the *Aminoil* arbitration, where they were dealt with as *separate* issues (as the first item during the main hearing) but not as *preliminary* issues (since there was no preliminary award in respect of them). It is preferable to decide on the applicable law before proceeding with the rest of the arbitration, but sometimes this is not practicable (because issues of fact are involved) and so the arbitration proceeds on the basis of alternative submissions as to which law is the applicable substantive law.

ii. 'Bifurcation' of liability and quantum

6.43 Another question that often arises is whether or not issues of liability and quantum should be dealt with separately. In many modern disputes arising out of international trade, particularly in relation to construction projects, or intellectual property disputes, the quantification of claims is a major exercise. It may involve both the parties and the arbitral tribunal in considering large numbers of documents, as well as complex technical matters involving experts appointed by the parties, or by the arbitral tribunal, or both. In such cases, it may involve savings in costs and overall efficiency if the arbitral tribunal determines questions of liability first. In this way, the parties avoid the expense and time involved in submitting evidence and argument on detailed aspects of quantification that may turn out to be irrelevant following the arbitral tribunal's decision on liability.[(31)]

6.44 It is easy to see the arguments in favour of separating issues of liability from issues of quantum in a large and complex case. For example, a claimant may have suffered a substantial loss (including loss of profit) through the breakdown or failure of an important piece of plant or equipment. The claimant seeks to recover this loss by way of arbitration proceedings against the respondent, who was responsible for the manufacture and/or installation of the equipment. In his defence, the respondent may allege, first, that it is a sub-supplier nominated by the claimant who is liable for any breakdown or failure in the plant or equipment supplied; secondly, that liability is limited under the terms of the contract to a sum much page "375" smaller than the amount claimed; and, thirdly, that in any event, some of the losses claimed (such as loss of profit) are irrecoverable (because of the conditions

of contract) and others are not fully recoverable, because they have been quantified on the wrong basis.

6.45 This is a common situation in international disputes, with the respondent putting forward a succession of defences, any one of which, if successful, may limit—or even defeat—the claim. How should an arbitral tribunal deal with such a situation?

6.46 There are various possibilities. First, the tribunal might decide to hear legal argument as to the effect of the clause limiting liability—on the basis that, if the clause is found to be effective, the respondent may pay the limited amount stated in the clause and the case will then be concluded.

6.47 At first sight, this seems to be an attractive option for both parties. There is no point in spending time and money on a complicated factual investigation if the dispute may be resolved by the determination of a legal point as a preliminary issue. It may emerge, however, that the correct legal interpretation to be put upon the clause which limits, or purports to limit, liability depends on the facts; and that, in order to ascertain and understand the factual situation, it is necessary to enquire fully into all the circumstances of the case, with the assistance of both fact and expert witnesses on each side. Thus, the findings of the arbitral tribunal on the *legal* issue might be so dependent on its finding on the *fact* issues as to make it difficult (and indeed undesirable), to disentangle them. In this event, it would be appropriate for the arbitral tribunal to investigate the relevant facts, rather than attempt to deal with the legal issue in isolation.

6.48 Although in practice issues of liability and quantum may from time to time prove to be inextricably interwoven, it is sometimes possible to see a broad division between them. It is also sometimes possible to determine the *principles* on which damages should be awarded, while leaving the pure *arithmetical* calculations to a second stage.

iii. Separation of other issues

6.49 It is more rare for an arbitral tribunal to separate issues where there is no clear dividing line—to say, in effect, 'there are only a limited number of issues on which we wish to hear evidence and argument from the parties, and these are as follows'. In making such a ruling, an arbitral tribunal isolates certain issues that appear to be of decisive importance to the outcome of a case, and asks the parties to concentrate on these issues.

6.50 This course involves risk of injustice, and should not be attempted lightly. Before an arbitral tribunal can safely isolate some of the issues for its attention, it must be satisfied that it has been adequately informed of all the issues that are relevant or *page "376"* likely to be relevant to its decision. This stage is not likely to be reached until the written proceedings have been concluded. Even then, it is not often that an arbitral tribunal takes the initiative in this way. Most arbitral tribunals, even when all its members are from countries that follow the so-called inquisitorial method of procedure, seem content to sit back and allow the parties to develop the case as they wish. However, where an arbitral tribunal is satisfied that it has been adequately briefed on all the issues, and that the time has come for it to take the initiative in this way, the effect can be dramatic in terms of saving both time and money.

6.51 The *Aminoil* arbitration provides a classic example.[32] Many hundreds of millions of dollars were at stake, depending upon whether the Kuwait Government's act of nationalisation was unlawful (as claimed by Aminoil), thereby giving rise to the possibility of an award of damages on a full indemnity basis, which would have a punitive effect; or lawful (as claimed by the Government), and thus susceptible to resolution by the payment of fair compensation.

6.52 At the close of the written stage of the proceedings, the arbitral tribunal convened a meeting with the parties and their counsel to consider various procedural matters relating to the forthcoming oral hearings. Following this meeting, the arbitral tribunal made an order fixing the hearing date in Paris and specifying, amongst other things, seven specific issues that the parties should address, the order in which they would be taken, and which side should speak first on each issue. This is how the hearing was conducted; and there is no doubt that this positive intervention by the arbitral tribunal led to a significant saving in time and money for both parties—and, in the end, to an outcome that both parties regarded as fair.[33]

6.53 At that time, in the early 1980s, it was relatively rare for an arbitral tribunal to take control of the proceedings in this way. However, since that time, international arbitrations have become more complex and costly. As both arbitral tribunals and practitioners search for quicker and more cost-effective ways of handling them it seems essential that arbitrators should seek to direct the conduct of arbitrations from an early stage; and, in particular, that they should seek to cut through the surrounding foliage in order to reach the essential issues as quickly as possible. Although, like the ship-owner referred to earlier,[34] the parties can agree to 'fire' the arbitrators if they jointly lose confidence in them, in twenty-first century international arbitrations it is no longer appropriate for arbitrators to sit passively behind page "377" their tables and say to themselves, 'this is clearly the wrong way of conducting this case, but the parties have agreed to do it like this so we will go along with it'.

C. Written Submissions

a. Introduction

6.54 In *ad hoc* international arbitrations, when the procedure to be followed has been established, the first step taken in almost all cases is an exchange between the parties of some form of written pleadings, or submissions.

6.55 Exceptionally, an international arbitration may proceed without any such documents; but this is only practicable where both the parties and the arbitrators are fully aware of the issues in dispute and are able to evaluate the rival contentions either by going straight to an oral hearing, or by inspection of the subject matter of the dispute. In practice, these cases are limited to the so-called 'look-sniff ' type of arbitrations, which arise from trading in commodities on international markets and to other similar situations.

6.56 The Model Law contains a mandatory provision to the effect that each party *shall* state the facts supporting his claim or defence, as the case may be, and *may* submit documents or references to the evidence that will be relied upon.(35) It is not easy to see how commodity arbitrations fit into this apparently mandatory scheme, although Article 23 does not provide expressly that the statements shall be in writing.

i. The function of written submissions

6.57 It is important to understand the function of written submissions in an international arbitration, which may not be precisely the same in every case. Unless the parties have themselves already drawn up a detailed submission agreement, containing a list of the issues to be determined, the most immediate function of the initial exchange of written submissions is to identify the scope of the arbitral tribunal's mandate.

6.58 Another reason why it is important for the arbitral tribunal to have an adequate definition of the issues to be determined is to enable it to devise an appropriate procedural structure. As the arbitration progresses and the evidence emerges, it is not unusual for the parties to adjust the way in which their arguments are presented. Some contentions may be abandoned and new ones may be put forward as a result of the evidence produced by the other party. This is a legitimate *page "378"* and indeed necessary process, provided that the issues before the arbitral tribunal do not become so distorted that they are in substance completely different from those defined at the start of the arbitration.

6.59 Yet another function of the written pleadings is to present a summary of the facts and arguments in support of the parties' positions. In fulfilling this function, the written material submitted by the parties may take a wide variety of forms. At one extreme, they may contain very full arguments as to the issues of law and fact and be accompanied by documentary evidence and the written testimony of witnesses upon which the parties rely, as well as copies of the relevant legal authorities. This form of written submission is used primarily where it is envisaged that there will be no oral hearing, or only a relatively short hearing at which the arbitral tribunal will ask the parties to clarify, quite briefly, certain aspects of their arguments, or to provide further information.

6.60 At the other extreme, the written submissions may be a mere overture to a substantial hearing, at which the arbitral tribunal receives the oral testimony of witnesses and the arguments of the parties presented by advocates. In this event, the secondary function of the written submissions is effectively limited to that of informing the members of the arbitral tribunal, and the other party, of the parties' respective cases so that there will be no surprises at the hearing.(36) However, given the extent of ‘premium time’ that is taken by oral advocacy at hearings, it is desirable that the hearing time should be limited as far as practicable to hearing oral witness testimony rather than speeches from the parties' counsel.

6.61 The 1976 edition of the UNCITRAL Rules(37) clearly envisages that the initial written statements delivered by the parties are not to be considered as definitive of the parties' respective positions. Articles 18 and 19 of those rules make reference to

'documents or other evidence he *will* submit', presumably at a later stage in the proceedings. The UNCITRAL Rules do not impose any strict time limits, although they do give guidelines:

> The periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defence) should not exceed forty-five days. However, the arbitral tribunal may extend the time limits if it concludes that an extension is justified.(38)

6.62 In *ad hoc* international arbitrations it is particularly important that the arbitral tribunal should make absolutely clear to the parties the form of written submissions it expects. The parties must understand what is intended. Otherwise the arbitration may be delayed by inadequate written submissions or, alternatively, *page "379"* time and money may be wasted in making voluminous and exhaustive written presentations when the arbitral tribunal intends to hold a full oral inquiry into the evidence and arguments at hearings that will take place later in the proceedings.

ii. Written submissions in institutional arbitration

6.63 Under the ICC Rules, the claimant must submit with its Request for Arbitration a 'description of the nature and circumstances of the dispute giving rise to the claims', and a 'statement of the relief sought'; and the respondent must submit an Answer with its comments as to the 'nature and circumstances of the dispute giving rise to the claims', and its 'response to the relief sought'.(39)

6.64 The next stage in an ICC arbitration (assuming that there is no counterclaim) is for the arbitral tribunal to draw up its 'Terms of Reference' for signature by the parties and the arbitrators. It is important, therefore, that all of the claims and counterclaims are identified with adequate specificity at an early stage. If a claimant omits to refer to some claims in its initial written submission, or fails to identify a disputed element with sufficient clarity, they may not be adequately set out in the Terms of Reference and there will be a risk of a successful plea at a later stage that the arbitral tribunal has no jurisdiction to determine that particular claim or group of claims.

6.65 In institutional arbitration, the immediate purposes of the parties' initial statements are to facilitate the appointment of the arbitral tribunal; to guide the institution concerned in establishing the amount of the deposit to be paid by the parties to secure the costs of the arbitration; to enable the arbitral tribunal to identify the issues; to make appropriate procedural orders for the next steps; and (in ICC cases) to draw up its Terms of Reference. In nearly all cases of any substance, the arbitral tribunal orders the exchange of further written pleadings as well as an appropriate level of evidence gathering before the oral stage of proceedings is reached.

6.66 The 1998 edition of the LCIA Rules provides that, after the parties have delivered the Request for Arbitration and Answer, written pleadings consisting of a 'Statement of Case', 'Statement of Defence', and 'Statement of Reply' (and further equivalent written pleadings in the event of a counterclaim) follow each other within

certain time limits. It is clear from these Rules that (subject to any directions to the contrary from the arbitral tribunal) the written statements are intended, in principle, to be the *only* written submissions in the arbitration,[40] and page "380" they are to be accompanied by copies of 'all essential documents on which the party concerned relies … and … by any relevant samples or exhibits'.[41]

6.67 The ICDR Rules provide for the exchange of initial statements of claim and defence,[42] and state that the arbitral tribunal may 'decide whether the parties shall present any written statements in addition …'[43]

6.68 The ICSID Arbitration Rules characterise the documents that are to be filed by the parties as a 'memorial' and a 'counter-memorial', followed if necessary by a reply and a rejoinder. These Rules also allow for simultaneous exchange of written submissions, if the request for arbitration was made jointly.[44] The Rules provide that a memorial should contain a statement of the relevant facts, a statement of law, and a submission; and that the counter-memorial, reply, or rejoinder should respond to these statements and submissions and add any additional facts, statements of law, or submissions of its own.[45] The explanatory note states that the scope of these pleadings represents:

> … an adaptation of common law practice to the procedure of the civil law. These provisions, tested by international arbitral practice, are designed to prevent procedural arguments concerning the scope of pleadings, even if the parties have differing legal backgrounds. Where, however, the parties share a common experience with an identical or similar system of procedure, they may agree on different contents and functions for the pleadings.[46]

iii. Sequential and simultaneous exchanges

6.69 Written pleadings are usually exchanged sequentially, so that the claimant fires the first shot and the respondent answers. The respondent normally submits any counterclaim at the same time as its answer to the claimant's claim; this document is often known as an 'answer and counterclaim', or 'defence and counterclaim'. The claimant then submits its reply to the respondent's counterclaim; and may also be allowed to submit a 'rejoinder' to the respondent's answer.

6.70 Exceptionally, however, the arbitral tribunal may direct that the parties should submit their written pleadings simultaneously, so that each party delivers a written submission of its claims against the other on a set date, and then on a subsequent date the parties exchange their written answers and so forth. This usually happens where there is a disagreement about which party should be the claimant, with neither party wishing to be categorised as the respondent. In practice, it is most page "381" likely to occur where a government is a party, and considers that its dignity would be offended if it were to be cast in the role of respondent.[47]

b. Terminology

6.71 Many different expressions are used to describe written submissions. Examples are ‘statement of claim’, ‘statement of case’, ‘memorial’, and ‘points of claim’. These lead to corresponding expressions such as ‘statement of defence’, ‘statement of reply’, ‘counter-memorial’, ‘points of defence’, ‘replique’, and so forth, with ‘rejoinder’, ‘duplique’, ‘counter-rejoinder’, ‘second rejoinder’, ‘rebuttal’, and similar phrases being used for additional rounds of written submissions—since each side may wish to reply to fresh material produced by its opponent in subsequent written submissions.

6.72 It sometimes happens that further written submissions are made after the witness hearing, in order to comply with a request from the arbitral tribunal for clarification, or where the allotted time for the hearing has expired without the parties having had an adequate opportunity to cover all items comprehensively. Again, where a party has produced fresh evidence or a novel argument at the hearing, and the other party has asked for an opportunity to respond, the arbitral tribunal is usually reluctant to refuse. Rather than make an order that involves the time and expense of a further hearing, the arbitral tribunal usually permits a further rebuttal in writing.

6.73 The different expressions used to describe written submissions are not wholly interchangeable, and none are capable of precise definition. In general, it may be said that the term ‘points of claim’ indicates a relatively short document, the primary purpose of which is to define the issues and state the facts upon which the claimant's claims are founded.

6.74 By contrast, the expressions ‘statement of case’ and ‘memorial’ imply a more comprehensive documentary submission, intended to include argument relating to the legal issues as well as incorporating (in annexes or appendices) the documentary evidence relied upon and the written testimony of witnesses, together with any experts' reports on matters of opinion.

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6.75 There is more ambiguity in the term ‘statement of claim’. Some international arbitration practitioners expect such a document to include, in appendices, evidentiary documents, witness statements, and expert reports. Others expect the evidentiary materials to follow later. This emphasises that practitioners should not regard any general indications as conclusive; if there is any doubt as to what is required, this should be clarified by consulting the relevant rules of arbitration; and, if they are not clear, by addressing an appropriate enquiry to the arbitral tribunal.

i. Time limits

6.76 The practice of arbitral tribunals varies greatly. Sometimes, a tribunal will fix time limits for the submission of written pleadings that are tacitly accepted from the beginning as being unrealistic, and serve merely as targets to make sure that the parties start their preparatory work without delay. Such arbitral tribunals expect applications for extensions of time to be made and will grant them readily. Other arbitral tribunals regard this approach as both artificial and inappropriate, and prefer to assess realistic time limits at an early stage in the hope that they will be observed. In

principle, the second approach is to be preferred. Unfortunately, this sometimes leads to the parties requesting extensions to what were intended to be realistic time limits. This naturally leads to greater overall delay in the conduct of the arbitration.

6.77 While a claimant should know how long it will take to prepare its initial written pleading (and indeed will often delay starting the arbitration until it is ready to do so) the respondent may not be able to make a realistic evaluation of how long it will take to prepare its answer until it has seen the written material delivered by the claimant. On the other side of the equation, the claimant cannot assess how much time will be needed to prepare any rejoinder and, if applicable, a reply to any counterclaim, until it sees the respondent's first written submissions.(48)

ii. Counterclaims

6.78 Jurisdiction in relation to a counterclaim is occasionally contested by a claimant on the grounds that the respondent's claims do not arise out of the contract that contains the arbitration clause. If this is so, the arbitral tribunal has no option but to exclude it. The arbitral tribunal may not exercise jurisdiction over claims that are not within the scope of the arbitration agreement.

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6.79 The position is similar for claims of set-off, under which a respondent may resist payment of a debt on the basis that the claimant is in arrears with respect to contractual payments owing to the respondent. However, if the set-off is in relation to the same contract, or a contract with a sufficiently close connection to the main contract, then the arbitral tribunal may well have jurisdiction to consider the claim. This is a question of interpretation of the arbitration clause.

6.80 Sometimes a respondent seeks to introduce a counterclaim at a very late stage. This may place the arbitral tribunal in great difficulty, depending on the circumstances and the type of arbitration. In an ICC arbitration the problem is solved by the terms of reference. If the counterclaim does not fall within those terms of reference, it may be admitted only if the arbitral tribunal so authorises having regard to 'the nature of such new claims or counterclaims, the stage of the arbitration and other relevant circumstances'.(49) If the arbitral tribunal determines that such a claim should not be admitted, the respondent is forced to initiate separate proceedings.

6.81 In *ad hoc* arbitrations, the question is a practical matter for the arbitral tribunal to determine, assuming that there is no detailed submission agreement defining the issues. The arbitral tribunal must decide whether the introduction of new claims would be an abuse of process that will lead to unnecessary delay and expense, or whether (assuming the counterclaim falls within its jurisdiction) the legitimate interest of resolving all issues in dispute between the parties in the proceedings should prevail.(50)

D. Evidence Gathering

a. Introduction

6.82 It is impossible to collect reliable statistics in relation to private international commercial arbitrations, but the eventual outcomes in the majority of international arbitrations (perhaps 60 to 70 per cent) probably turn on the facts rather than the application of the relevant principles of law. A good proportion of the remainder turn on a combination of facts and law, and only in a minority of cases is the outcome dependent solely on issues of law, with the underlying facts being undisputed or irrelevant.

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6.83 It follows that fact-finding is one of the most significant functions of an arbitral tribunal, and it is a function that all tribunals take seriously. The relevant facts are determined by international arbitral tribunals *either* following the presentation by the parties (usually through experienced counsel) of documentary and/or oral evidence, *or* by arbitral tribunals making their own efforts, with the assistance of the parties, to collect the evidence that they consider necessary to establish the relevant facts.

i. Civil law and common law procedures

6.84 In court procedures in most common law countries, the initiative for the collection and presentation of evidence is almost wholly in the hands of the parties.(51) The judge acts as a kind of referee to administer the applicable rules of evidence, and to give a decision at the end on who has 'won' the argument in a combative sense. The judge listens to the evidence and may question the witnesses; in general, however, common law judges leave it to the parties to present their respective cases and then form a judgment on the basis of what the parties elect to present to the court.

6.85 By contrast, in the courts of most civil law countries the judge takes a far more active role in the conduct of the proceedings and in the collection of evidence, including the examination of witnesses.(52) It follows that the courts of civil law countries do not need to be regulated by the same technical rules of evidence as exist in an adversarial forum. For example, if a judge in Germany considered that it would assist the court to have a witness examined on a matter that would be inadmissible in a US court, it would not be open to either party to block the reception of such testimony by invoking a rule of evidence.

6.86 The impression given by these brief summaries of the two systems is that the differences are fundamental. However, there is a considerable risk of over-generalisation in drawing distinctions between the so-called 'common law' and 'civil law' systems. Each system has many variations. The rules of procedure in the US are different from those in England, just as the German and French rules of procedure are different.

6.87 Emphasising this point, a distinguished Swiss international arbitration specialist stated:

> … My first remark is that there is no such thing as 'Civil Law Procedure' in civil and commercial litigation. In common law countries, there are undoubtedly certain page "385" common basic

> principles of procedure, which go back to the procedure practised in the English courts. In continental Europe, there is no such common origin. In each country, one finds a different blend of civil procedure, largely influenced by local custom, the legal education received by judges and by counsel, and, to a varied extent, by the influence of the procedure practised in the old ecclesiastical courts, although such courts were abolished, in Protestant countries, at the time of the Reformation.
>
> …
>
> The result of this is that there is possibly as much difference between the outlook and practice of a French avocat and of a German Rechtsanwalt as between those of an English and of an Italian lawyer. The same applies within my own country, Switzerland, where civil and criminal procedure remain in the realm of the 26 sovereign states of the Confederation, thus leading to the existence of 26 different codes of civil or criminal procedure, plus a Civil Procedure Act for the Federal Supreme Court. There is as much difference between the type of civil procedure practiced in Geneva and that practised in Zurich as between those featured in Madrid and Stockholm.
>
> These differences are experienced daily in international arbitration, where they are sometimes the source of great difficulties. Certainly these difficulties are due, to a large extent, to the different patterns of civil procedure law but, in my experience, to a far greater extent to the undisclosed assumptions and prejudices of municipal lawyers faced for the first time in their lives with a system of which they are not aware. Just to take a simple example, a common lawyer expects the claimant as a matter of course to have the last word at the end of the day, whereas a continental lawyer considers it a requirement of natural justice that the defendant should be the last to address the Court.[(53)]

6.88 Nevertheless, it is suggested that there is sufficient uniformity in the general approach to questions concerning the presentation of evidence to justify using the expression ‘civil law countries’ by way of contrast to the ‘common law countries’ when discussing the presentation of evidence to international tribunals. Where there are differences between the two systems, they are most noticeable in the area of the procedures that lead to fact-finding. The most important elements include the following.

ii. Admissibility

6.89 In practice, arbitral tribunals composed of three experienced international arbitrators from different legal systems approach the question of the reception of evidence in a pragmatic way. Whether they are from common law or civil law countries, they tend to focus on establishing the facts necessary for the determination of the issues between the parties, and are reluctant to be limited by

technical rules of evidence that might prevent them from achieving this goal. This is especially so where the rules in question were originally designed for use in jury trials, page "386" centuries ago, at a time when many jurors were not able to read or write, so that it was necessary for documents to be read out aloud at hearings.

6.90 It is essential for practitioners who have been raised in the common law tradition, to appreciate this and to learn not to place reliance on technical rules concerning the admissibility of evidence during the course of the proceedings, particularly at witness hearings. Conversely, where all three arbitrators come from a common law background, and especially if they are relatively inexperienced in the field of international arbitration, practitioners from civil law countries should take care that their cases do not depend on proving facts that can only be established by the presentation of evidence that may be technically inadmissible under the system with which all members of the arbitral tribunals concerned are familiar.

6.91 Most international arbitration tribunals that practitioners are likely to encounter are 'hybrid', in the sense that they will be comprised of members whose backgrounds are from different systems of law. Where a 'non-hybrid' arbitral tribunal is established, the team of lawyers retained to represent each party should preferably include a member who is familiar with the approach to the presentation and reception of evidence that the arbitral tribunal is likely to apply. This precaution should not be necessary where the arbitral tribunal is 'hybrid' because, as stated above, such tribunals nearly always adopt a flexible approach to admissibility of evidence; and there will be at least one member of the tribunal who is familiar with the legal system from which it is unlikely that a party will be prevented from submitting evidence that may genuinely assist the arbitral tribunal in establishing the facts, where they are disputed.(54)

iii. Burden of proof

6.92 Another aspect of the presentation of evidence is the question of the burden of proof. In litigation in national courts the usual rule is that the claimant bears the burden of proof. The practice of nearly all international arbitral tribunals is to require each party to prove the facts upon which it relies in support of its case. This practice is recognised explicitly in the UNCITRAL Rules:

> Each party shall have the burden of proving the facts relied on to support his claim or defence …(55)

The only exceptions relate to propositions that are so obvious, or notorious, that proof is not required.

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iv. Standard of proof

6.93 The degree of proof that must be achieved in practice before an international arbitral tribunal is not capable of precise definition, but it may be safely assumed that it is close to the

'balance of probability'. This standard is to be distinguished from the concept of 'beyond all reasonable doubt' required, for example, in countries such as the US and England to prove guilt in a criminal trial before a jury.(56)

6.94 The practice of arbitral tribunals in international arbitrations is to assess the weight to be given to the evidence presented in favour on any particular proposition by reference to the nature of the proposition to be proved. For example, if the weather at a particular airport on a particular day is an important element in the factual matrix, it is probably sufficient to produce a copy of a contemporary report from a reputable newspaper, rather than to engage a meteorological expert to advise the tribunal.

6.95 In general, the more startling the proposition a party seeks to prove, the more rigorous the arbitral tribunal will be in requiring that proposition to be fully established. A classic example of this general rule is that an arbitral tribunal will be reluctant to find an executive of a company guilty of fraudulent activity in the exercise of his ordinary commercial activities, unless this is proved conclusively. In deciding what evidence to produce, and the means by which it should be presented, the practitioner should therefore make an evaluation of the *degree* of proof that the tribunal is likely to require, before being sufficiently satisfied to make a finding of fact that his client is seeking.

b. Categories of evidence

6.96 The evidence presented to arbitral tribunals on disputed issues of fact derives from a synthesis of party autonomy, discretion of the arbitral tribunal, and court control at the stage of enforcement. These methods may be divided into four categories:

(i) production of contemporary documents;
(ii) testimony of witnesses of fact (written and/or oral);
(iii) opinions of expert witnesses (written and/or oral); and
(iv) inspection of the subject-matter of the dispute.

These methods may be used, or combined, in many different ways for the purpose of discharging the burden of proof to the satisfaction of an arbitral tribunal. It is *page "388"* important to recognise that each different arbitral tribunal may adopt a different approach not only to the manner in which it wishes the evidence to be presented, but also to the weight that it is willing to give to any particular type of evidence.

6.97 It can be stated with some confidence that, in relation to disputed facts, modern international arbitral tribunals accord greater weight to the contents of contemporary documents than to oral testimony given, possibly years after the event, by witnesses who have manifestly been 'prepared'(57) by lawyers representing the parties. In international arbitrations, the best evidence that can be presented in relation to any issue of fact is almost invariably contained in the documents which came into existence at the time of the events giving rise to the dispute.(58) (This contrasts with the presentation of evidence in national courts in common law systems where most facts are proved by direct oral testimony, and even documentary evidence must in principle be introduced by a witness.)

6.98 It is not difficult to appreciate why reliance on documentary evidence is favoured by international arbitral tribunals. Its presentation is easier and less time-consuming; and, in an environment in which cross-examination may not be regarded as a reliable method of testing the evidence of a witness, the evidentiary weight of contemporary documentary evidence is clearly more substantial than that of oral evidence that is not tested by an effective challenge, either through lack of expertise on the part of the opposing party's advocate or lack of time during the course of the hearings.

i. Best evidence rule

6.99 However, the main reason for the practice of international arbitration tribunals in relying primarily upon evidence contained in contemporary documents is that the application of the so-called 'best evidence rule'(59) applies primarily to the *weight* of the evidence rather than to its *admissibility*, and the evidence of contemporary documents will invariably be regarded as being of great weight. The authenticity of documents must be capable of proof if challenged by the other party; but it is not usually necessary to produce original documents, or certified copies, unless there is some special reason to call for the original.(60)

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6.100 Unsurprisingly, in international arbitrations the evidence-gathering activity usually takes place in the period after the facts in dispute have been identified, through the initial written pleadings delivered by the parties, and before the witness hearings begin. While there are many different ways of undertaking this exercise, the two most common evidence-gathering models are illustrated by the flow charts in Figures 6.2 and 6.3:

Figure 6.2

Figure 6.3

c. Documentary evidence

i. Documents on which the parties rely

6.101 Essentially, the parties produce the documents on which they intend to rely at an early stage in an international arbitration. This will be either with their initial *page "390"* written statements, which has the merit of placing the principal documents 'on the table' at the earliest practicable moment; or, alternatively, immediately after the initial written statements have been exchanged, which has the merit of avoiding the necessity for producing large quantities of evidence that relates to issues that are not disputed, once the initial written statements have been delivered.

6.102 The first alternative is favoured by most of the world's major international arbitration institutions, such as the ICC, the ICDR, and the LCIA. For example, the LCIA provision states:

> … All statements referred to in this Article shall be accompanied by copies (or, if they are specially voluminous, lists) of all essential documents on which the party page "391" concerned relies and which have not previously been submitted by any party, and (where appropriate) by any samples and exhibits.(61)

This practice is also reflected in the UNCITRAL Rules, in permissive form, which provide:

> The claimant *may* annex to his statement of claim all documents he deems relevant or may add a reference to the documents or other evidence he will submit.(62)

ii. Unfavourable documents

6.103 Thus far, the document production story is uncontroversial. In international arbitrations, the problem arises at the second stage of document production, which concerns additional documents requested from one (or both) of the parties by the other party, and/or by the arbitral tribunal.

6.104 This problem is unique to international arbitration. In litigation in national courts the applicable civil procedure rules apply, and should offer clear solutions to questions relating to the production of documents that a party is reluctant to disclose. In domestic (national) arbitrations the document production procedure is usually also clear, either under applicable rules or by custom and practice operated by the local arbitrators and bar.

6.105 However, international arbitrations exist under an entirely different procedural regime, as explained in an earlier chapter.(63) Whatever the position may be in domestic arbitrations, it is (or should be) an uncontroversial proposition that the rules of civil procedure of neither (a) the applicable substantive law (*lex causa*), nor (b) the procedural law of the juridical seat of the arbitration (*lex arbitri*) govern the procedural aspects of the arbitration *unless* the parties so agree.(64)

6.106 Nevertheless, the rapid expansion in the number of international arbitrations that was reported by international arbitral institutions around the world as the first decade of the twenty-first century was drawing to a close have had the result that the hitherto relatively small worldwide constituency of international arbitrators and arbitration practitioners has grown out of proportion to the ability of the international arbitration community to train new participants in the practices that have evolved, many of which are set out in rules or guidelines that have gained international recognition.

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6.107 It is thus not unusual for US lawyers to come to hearings in European (and other) prominent arbitration venues, carrying with

them the US Federal Court Rules and stating that they are 'entitled' to 'discovery'(65) of a certain document or groups of documents. By contrast, in some civil law countries it may be professional malpractice for a lawyer to disclose such documents to the arbitral tribunal or to the opposing party.(66) The result was that, by the end of the twentieth century, a huge amount of time and expense was incurred in dealing with disputes concerning document production. In the late 1990s, building on experience learned from the (not particularly successful) 1985 edition of its 'Rules for the Taking of Evidence in International Commercial Arbitration', the International Bar Association embarked on a project to produce a new more 'internationalised' version. This project led to the 1999 edition, which has become almost universally recognised as the international standard for an effective, pragmatic, and relatively economical document production regime. The remainder of this section of the current chapter is therefore presented by reference to the principles, and provisions, that the 1999 edition contains.(67)

iii. Document request procedures

6.108 Article 3 of the 1999 edition of the IBA Rules deals with document production. Its main provisions are as follows:

1. Within the time ordered by the Arbitral Tribunal, each Party shall submit to the Arbitral Tribunal and to the other Parties all documents available to it on which it relies, including public documents and those in the public domain, except for any documents that have already been submitted by another Party.
2. Within the time ordered by the Arbitral Tribunal, any Party may submit to the Arbitral Tribunal a Request to Produce.
3. A Request to Produce shall contain:
   (a) (i) a description of a requested document sufficient to identify it, or
   (ii) a description in sufficient detail (including subject-matter) of a narrow and specific requested category of documents that are reasonably believed to exist;
   (b) a description of how the documents requested are relevant and material to the outcome of the case; and
   (c) a statement that the documents requested are not in the possession, custody or control of the requesting Party, and of the reason why that Party assumes page "393" the documents requested to be in the possession, custody or control of the other Party.
4. Within the time ordered by the Arbitral Tribunal, the Party to whom the Request to Produce is addressed shall produce to the Arbitral Tribunal and to the other Parties all the documents requested in its possession, custody or control as to which no objection is made.

These provisions are admirably clear and self-explanatory. They establish the principle, referred to earlier, that the parties should produce the evidentiary documents on which they rely as the first stage. Then they make provision for requests by each party to the other(s) for further documents, with appropriate limitations. The most significant limitation is in the expression 'relevant and material to the outcome of the case' in paragraph 3.3(a).

6.109 Most legal practitioners are accustomed to the obligation to satisfy a court, or arbitral tribunal, as to the question of relevance of documents or other information that they are seeking from the opposing party. But the requirement of showing 'materiality to the outcome of the case' is a greatly increased burden. It also enables arbitral tribunals to deny document requests where, although the requested documents would clearly be relevant, they consider that production of them will not affect the outcome of the proceedings.

6.110 Dealing with disputed document production requests can be a laborious and time-consuming process for all concerned, and different arbitral tribunals adopt various different techniques to cut through the detail involved in resolving such disputed requests. Article 3 of the IBA Rules, quoted above, contains the following relevant provisions:

> 3.5 If the Party to whom the Request to Produce is addressed has objections to some or all of the documents requested, it shall state them in writing to the Arbitral Tribunal within the time ordered by the Arbitral Tribunal. The reasons for such objections shall be any of those set forth in Article 9.2.
>
> 3.6 The Arbitral Tribunal shall, in consultation with the Parties and in timely fashion, consider the Request to Produce and the objections. The Arbitral Tribunal may order the Party to whom such Request is addressed to produce to the Arbitral Tribunal and to the other Parties those requested documents in its possession, custody or control as to which the Arbitral Tribunal determines that (i) the issues that the requesting Party wishes to prove are relevant and material to the outcome of the case, and (ii) none of the reasons for objection set forth in Article 9.2 apply.(68)

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6.111 This feature of the IBA Rules is widely considered to be a good step forward by the international arbitration community in combating the delays and additional costs that are incurred by excessive document production exercises. Where practicable, the arbitral tribunal convenes a management meeting with the parties' counsel with the objective of working out a compromise on most of the categories of documents requested. This usually involves side meetings between the parties, during which—with the encouragement of the tribunal—they attempt to limit the scope of their requests to manageable proportions.

6.112 If successful, this usually leaves only a few categories of documents that remain disputed. The tribunal may then convert the case management meeting into a hearing at which the parties make their arguments in respect of the remaining categories. The tribunal then makes its determinations on those categories. Experience shows that a day spent in this manner by the tribunal and the parties often cuts through what can otherwise be a lengthy document production phase that has the potential to delay the overall procedural schedule the tribunal originally designed for the arbitration in consultation with the parties.

6.113 A further refinement, which has the advantage of saving the time and money spent on a case management conference, is to use the so-called Redfern Schedule, named after one of the authors. When one party issues a 'Request to Produce' to the other an exchange of views takes place between the parties' lawyers, usually by correspondence, but sometimes at a meeting. During this exchange, the parties' positions become more clear. For example, the 'Requested Party' may say: 'we are prepared to produce documents covering this period of time, but not longer, because that would be oppressive'; or 'we don't have the management committee minutes, but we are prepared to disclose the relevant board minutes'. In this way, the nature of the requests and the objections may change as the discussion proceeds.

6.114 The purpose of the Redfern Schedule is to crystallise the precise issues in dispute, so that the arbitral tribunal knows the position that the parties have reached *page "395"* following the exchanges between them. This makes it possible for the arbitral tribunal to make an informed decision as to whether or not a particular document or class of documents should be produced, without having to be involved in the details of the exchanges between the parties' lawyers and, usually, without the need for a meeting.

6.115 To achieve this purpose, a schedule with four columns is drawn up. Each column of the schedule is completed as briefly as possible by the parties' lawyers. In the first column, the 'Requesting Party' sets out (i) a brief description of the requested document in sufficient detail to identify it, or (ii) a description in sufficient detail to identify a narrow and specific category of documents that are reasonably believed to exist. In the second column, the Requesting Party states why the requested document or documents are both relevant and material to the outcome of the arbitration. In the third column, the 'Requested Party' states the extent to which, if at all, it is prepared to accede to the request and, if it objects, the grounds on which it does so. The fourth column is left blank for the arbitral tribunal's decision. If the tribunal considers that the Schedule as it stands does not contain sufficient information for the tribunal to make a properly informed decision, the arbitral tribunal will either (i) call for additional information, or (ii) exceptionally, arrange a meeting with the parties to consider the disputed requests in more detail.

6.116 The main advantage of this technique is that it may avoid the need for a case management meeting, or telephone/video conference, which in turn involves a saving in costs and reducing the delays in finding dates that are convenient for the arbitral tribunal and the parties' counsel.

iv. Production of electronic documents

6.117 It is said that at least 80 per cent of documents, correspondence, and other information generated in the course of business is stored in electronic form.(69) It is therefore not surprising that there has been much discussion concerning the ways in which such materials (known generically as electronically stored information, abbreviated to 'ESI') may or should be used in commercial litigation.

6.118 In national court procedures in civil law countries there is generally no obligation on the parties to produce documents other than those on which they rely unless, exceptionally, the judge orders a party to produce documents as part of his investigation of the facts. It follows that, in the civil law system, the existence of many hundreds of thousands of pages of ESI relating to a transaction does not give rise to practical problems.

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6.119 However, in most common law countries, as explained earlier,(70) the rules of procedure in civil litigation place an obligation on the parties to disclose all documents relevant to the issues in dispute. The sheer scale of complying with this obligation may place an intolerable burden in terms of cost and effort not only on the producing party but also on the opposing party, and on the judges who have to make the findings of fact on which their judgments are based.

6.120 In the litigation context a partial solution was developed through the so-called *Sedona Principles*,(71) which are aimed primarily at containing to a reasonable level the extent of the human resources that parties would be obliged to expend in identifying documents that would be required to be disclosed in litigation.

6.121 As stated earlier in this chapter,(72) rules of court do not apply in international arbitrations unless either the parties agree to adopt them or the arbitral tribunal imposes them by a procedural direction.(73) It follows that, absent agreement of the parties, the basis for production of documents is in the discretion of the arbitral tribunal. This is in keeping with the concept of flexibility, which is perhaps the most important element of the international arbitration process.

6.122 Nevertheless there is pressure from some international arbitration practitioners for 'rules' rather than 'guidelines' in order to achieve relative certainty. The IBA Rules, the source of which was the practices adopted by experienced arbitrators, have the advantage of offering clear guidelines at the same time as retaining a sufficient degree of flexibility for arbitral tribunals to make procedural orders that reflect the inherent flexibility required for cost-effective and efficient solutions.

6.123 It is therefore appropriate to assess the question of production of ESI against the background of the current version of the IBA Rules. First, the IBA Rules define the term 'document' as follows:

> 'Document' means a writing of any kind, whether recorded on paper, electronic means, audio or visual

recordings or any other mechanical or electronic means of storing or recording information.[74]

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This is clearly sufficient to encompass any currently known form of ESI, and no change or amplification is required to the present version of the IBA Rules in this respect.

6.124 Next, the document request procedure contained in Article 3.3[75] states:

> 3. A Request to Produce shall contain:
>
> (a) (i) a description of a requested document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist;
>
> (b) a description of how the documents requested are relevant and material to the outcome of the case; and
>
> (c) a statement that the documents requested are not in the possession, custody or control of the requesting Party, and of the reason why that Party assumes the documents requested to be in the possession, custody or control of the other Party.

The key phrase in this provision is '… relevant and material to the outcome of the case'. This is in stark contrast to the term used in the civil procedure rules for civil litigation in the US, England, and most other common law countries, which simply apply the test of relevance. Furthermore, it is clear, from the way Article 3 is written, that the requesting party carries the burden of satisfying the arbitral tribunal as to the 'materiality to the outcome' of the requested documents.

6.125 In the context of production of documents pursuant to Article 3 of the IBA Rules it seems clear that there is no difference in principle between 'hard copy' documents and 'soft copy' documents. It follows that the same general criteria should apply to the approach by arbitral tribunals to resolving disputes between the parties as to whether or not they should order the production of requested documents. The most important of these are 'unreasonable burden', 'proportionality', and 'considerations of fairness and equality'. To a certain extent these elements are intertwined. It is for the arbitral tribunal to weigh the 'materiality to the outcome' against 'proportionality' (including the cost and burden involved in complying with the contemplated procedural order).

6.126 It is not easy to contemplate how achieving this balance in the international arbitration process can co-exist with the desire amongst some international arbitration practitioners for rules (rather than guidelines[76]) while at the same time maintaining the flexibility of the process that the ultimate users of the process wish

to retain, and indeed enhance, in order to reduce delays and cost.(77)

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v. Documents in the possession of third parties

6.127 An arbitral tribunal lacks power to order production of documents in the possession of a third party, even where such documents may be relevant to the matters in issue. However, in some countries a third party may be compelled by *subpoena* to attend at the hearings to give evidence, and the courts can assist the arbitral tribunal in enforcing the attendance of such witnesses. In England, a party may apply to a court to compel the attendance of a witness who is within the jurisdiction of the court and to bring with him any material documents in his possession.(78) In the US, the Federal Arbitration Act provides that the arbitrators may summon a person to attend before them and to produce any material documents.(79) There are conflicting authorities, from different circuits in the US, as to whether or not arbitrators in non-US arbitrations may order non-parties to produce documents.(80)

6.128 It sometimes happens in arbitration proceedings that a third party appears voluntarily at the request of one of the parties to provide testimony helpful to that party. Then, on questioning by the other party's counsel, the witness may object to the production of requested documents. The arbitral tribunal does not usually have to order such a witness to produce documents, but if it does make such an order an adverse inference may be drawn in respect of the evidence of the witness in question if it appears to the tribunal that the witness is deliberately withholding documents without good reason.

vi. Adverse inferences

6.129 A technique followed by arbitral tribunals coming from different systems and cultures is to draw an ‘adverse inference’ from the silence of a party or failure to comply with an order of the arbitral tribunal without reasonable excuse, for the production of documentary or witness evidence.(81) This is covered in Articles 9.4 and 9.5 of the IBA Rules, which state:

> 9.4. If a Party fails without satisfactory explanation to produce any document requested in a Request to Produce to which it has not objected in due time or page "399" fails to produce any document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.
>
> 9.5. If a Party fails without satisfactory explanation to make available any other relevant evidence, including testimony, sought by one Party to which the Party to whom the request was addressed has not objected in due time or fails to make available any evidence, including testimony, ordered by the Arbitral Tribunal to be produced, the Arbitral Tribunal may infer that

such evidence would be adverse to the interests of that Party.

Thus, two important limitations apply where the IBA Rules are applicable. The first is that there must have been an order of the arbitral tribunal for production of the documents or other testimony concerned; the second is that the requested party must have failed to provide a 'satisfactory explanation' for not having produced the material in question. Whether or not an explanation to the effect that the material 'does not exist' or 'no longer exists' is satisfactory is a matter for the arbitral tribunal to decide after taking all the relevant circumstances into consideration.

6.130 For example, if a document had been destroyed pursuant to a well-established (and reasonable) corporate document retention policy, before the dispute arose, most arbitral tribunals would consider such an explanation to be reasonable. However, if a document had been destroyed soon after a new document retention policy had been implemented, particularly if the policy was devised after the dispute arose, it would not be surprising if the tribunal took a sceptical view of the explanation.

vii. Presentation of documents

6.131 It is of considerable assistance to the arbitral tribunal if the parties are able to present the documentary evidence in the form of a volume (or volumes) of documents, in chronological order with each page numbered like a book, for use at the hearing. In this way, each member of the arbitral tribunal, and each party, has a complete set of documents with identical numbering. If there is a huge number of documents, it may be a good idea to identify the most important documents and include them in a separate volume or volumes (sometimes known as 'the core bundle'). This has the additional benefit of avoiding tiresome and unnecessary duplication of documents.

6.132 Much valuable time may also be saved at hearings by using techniques such as colour-coded volumes of documents in order to avoid the delay that takes place while each member of the arbitral tribunal, the witnesses, and the lawyers representing both parties find the volume and the page to which the speaker is referring at any given time. Assistance given to the arbitral tribunal in these simple ways enables the arbitration to be conducted more speedily and efficiently.

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6.133 The use of the word 'agreed' in the context of volumes of documents occasionally gives rise to misunderstanding. The word is not intended to indicate that the parties are agreed on the meaning of the contents of the document, or its evidentiary weight, or even its admissibility. It simply indicates that the authenticity of the document is 'agreed', in the sense that each party agrees that it is an accurate copy of an existing document.

6.134 When the authenticity of documents is disputed, the arbitral tribunal usually orders that the originals (or certified copies, when appropriate) must be produced for inspection. This may be carried out by forensic experts if necessary. If the originals are not produced, the arbitral tribunal may disregard the documents in

question as unreliable.

viii. Translations

6.135 It is usually necessary to provide translations of any documents that are not already in the language of the arbitration. Such translations should, if possible, be submitted to the arbitral tribunal jointly by the parties as 'agreed translations'. The most convenient practice is to include the document in its original language first, immediately following it in the volume with the translation into the language of the arbitration. If the correctness of the translation is disputed, each party's version may be inserted following the original. Where there is no specific dispute as to the accuracy of a translation, but nevertheless there is no agreed translation (either for lack of time or lack of cooperation between the parties) it is advisable but not essential for the parties presenting the translation to have it notarially certified.

d. Fact witness evidence

6.136 The role of fact witnesses is to supplement the evidentiary documents in assisting the arbitral tribunal perform its fact-finding function. In commercial transactions, compared with accident cases, for example, most of the witnesses are likely to have had some connection with the transaction on one side or the other. They therefore tend to have a direct or indirect interest in the outcome of the case. It is not surprising that most arbitral tribunals regard the testimony of fact witnesses as relatively unreliable, compared with the documents that were brought into existence at the time of the events that gave rise to the dispute, at least unless the oral witness testimony is tested by cross-examination and/or corroborated by contemporary documents.

6.137 Article 4 of the IBA Rules deals with the presentation of fact witness evidence. It provides, in part, as follows:

1. Within the time ordered by the Arbitral Tribunal, each Party shall identify the witnesses on whose testimony it relies and the subject-matter of that testimony. *page "401"*
2. Any person may present evidence as a witness, including a Party or a Party's officer, employee or other representative.
3. It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses.
4. The Arbitral Tribunal may order each Party to submit within a specified time to the Arbitral Tribunal and to the other Parties a written statement by each witness on whose testimony it relies, except for those witnesses whose testimony is sought pursuant to Article 4.10 (the 'Witness Statement'). If Evidentiary Hearings are organized on separate issues (such as liability and damages), the Arbitral Tribunal or the Parties by agreement may schedule the submission of Witness Statements separately for each Evidentiary Hearing.

5. Each Witness Statement shall contain:
   a. the full name and address of the witness, his or her present and past relationship (if any) with any of the Parties, and a description of his or her background, qualifications, training and experience, if such a description may be relevant and material to the dispute or to the contents of the statement;
   b. a full and detailed description of the facts, and the source of the witness's information as to those facts, sufficient to serve as that witness's evidence in the matter in dispute;
   c. an affirmation of the truth of the statement; and
   d. the signature of the witness and its date and place …
6. [omitted]
7. Each witness who has submitted a Witness Statement shall appear for testimony at an Evidentiary Hearing, unless the Parties agree otherwise.
8. If a witness who has submitted a Witness Statement does not appear without a valid reason for testimony at an Evidentiary Hearing, except by agreement of the Parties, the Arbitral Tribunal shall disregard that Witness Statement unless, in exceptional circumstances, the Arbitral Tribunal determines otherwise.

9.10. 11. [omitted]

In effect, this scheme codifies the procedures that have been developed by international arbitrators and arbitral institutions(82) over the years, during which it has gradually become common practice to present the evidence-in-chief ('direct testimony') of fact witnesses in writing in advance of the witness hearing.

i. Presentation of witness evidence

6.138 Sometimes the written witness statements are submitted on oath in the form of affidavits. More frequently, the statements are simply signed by the witnesses. Each party then indicates to the arbitral tribunal which of the other party's witnesses should be required to attend the hearing for oral examination; and the arbitral tribunal itself indicates to the parties which, if any, of the other witnesses  *page "402"* it wishes to hear in person. It is relatively rare for the arbitral tribunal to require a witness to be present if neither party requires that witness to attend, but this occasionally happens.

ii. Preparation of witnesses

6.139 An important aspect of the presentation of witness evidence is the question of whether, and if so to what extent, it is permissible for a party, its employees, or counsel to interview and prepare the witnesses whose testimony they intend to present to

the arbitral tribunal. This is largely a cultural matter, although the rules of some national courts (and/or bar associations) forbid or make it unethical for witnesses to be contacted by the parties or their counsel before they give their testimony in person.

6.140 In international arbitration it is well recognised that witnesses may be interviewed and prepared prior to giving their oral testimony. This is confirmed by at least two of the sets of rules in common use. The LCIA Rules expressly permit it, subject to any mandatory provisions of the law governing the arbitration,(83) and the IBA Rules provide:

> It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses.(84)

However, it is generally accepted that there are certain limits. For example, it is considered to be inappropriate for written witness statements to be written by the lawyers in a form that tracks the wording of the written submissions of the party concerned. This inevitably irritates the arbitrators, who wish to read (and, later, hear) the witness's story in his or her own words. More importantly, it would be gross professional misconduct for a lawyer to try to persuade a fact witness to tell a story that both the lawyer and the witness in question knew to be untrue, and to prepare the witness to make such a story sound as credible as possible. It would also almost always be counterproductive. Experienced arbitral tribunals tend to have good 'noses' for sniffing out inaccuracies in stories told by witnesses, and invariably cross-check oral testimony against the available corroborative documentary and other evidence.

iii. Parties as witnesses

6.141 Another cultural division arises between lawyers from jurisdictions where a party cannot be a 'witness' as such. This stems from the rules of court in some, but not all, civil law countries under which a person (or officers or employees in the case page "403" of corporate entities) cannot be treated as witnesses in their own cause.(85) However, even in the courts of these countries a party can be heard—the rule merely forbids them from being categorised as *witnesses*.

6.142 As in the case of other rules of national court procedure, this rule does not apply in international arbitrations, unless the parties have expressly agreed that such rules should be applied.(86) It may be that an arbitral tribunal will tend to give greater weight to the testimony of a witness who has no financial or other interest in the outcome of the arbitration, but that is a different question.

iv. Evidentiary weight of witness evidence

6.143 An arbitral tribunal has discretion to determine the evidentiary weight to be given to witness evidence.(87) This arises from the general principles applicable to arbitration proceedings, and is expressly affirmed, for example, in the UNCITRAL Rules.(88)

6.144 In general, arbitral tribunals tend to give less weight to uncorroborated witness testimony than to evidence contained in contemporary documents. Arbitral tribunals also give greater weight to the evidence of a witness that has been tested by cross-examination, or by an examination by the arbitral tribunal itself. Similarly, although in some legal systems(89) a party is not permitted to give evidence, the evidence of a party is rarely excluded in international commercial arbitration. However, the untested evidence of a witness who has a clear interest in the result of the case may be given less evidentiary weight than the evidence of a witness who is truly independent.

6.145 Thus, arbitral tribunals usually reject any submission that they should not hear the evidence of any particular witness, even if it is secondary evidence. However, an arbitral tribunal will give less weight to secondary evidence if, in its opinion, the party calling that evidence could have produced a witness who would have been able to give direct first-hand evidence on the factual issue in question.

v. Admissibility of written witness evidence

6.146 The rules concerning admissibility of witness testimony are in principle the same for written testimony as are applied to witnesses when they are giving oral testimony *page "404"* at a hearing before the arbitral tribunal.(90) In practice it is rare for an arbitral order written witness testimony to be withdrawn. Written witness evidence that is the subject of an admissibility objection from the opposing party will be addressed on the basis of the *evidentiary weight* to be accorded the contents of the witness statement concerned.

6.147 The procedure adopted when fact witnesses are examined at the witness hearing is discussed in the next section of this chapter.

vi. Taking evidence overseas

6.148 Problems arise when an arbitral tribunal wishes to obtain evidence from outside the State where the arbitration takes place. In most countries the arbitrators do not have *subpoena* powers and thus have to request the assistance of courts if they want to compel the attendance of third party witnesses or to compel the production of documents in the possession of third parties who are not located within the seat of the arbitration.(91)

6.149 The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters(92) streamlines procedures for obtaining evidence to request for assistance from 'judicial authorities'. But an arbitral tribunal is not a judicial authority. Accordingly, a request made from an arbitral tribunal does not fall within the scope of the Hague Convention. Nonetheless, many of the signatory States to the Hague Convention lend their judicial assistance to an arbitral tribunal with its judicial seat in another contracting State.(93)

6.150 The Model Law also deals with court assistance.(94) However, it was determined that questions of international

cooperation in the taking of evidence should not be governed by a model law but through bilateral or multilateral conventions. Thus it is limited to obtaining evidence where both the State where the arbitration takes place and the State in which the evidence is located are Model Law countries.

6.151 Therefore, the most common way of compelling the production of evidence in arbitration is *indirectly*, through the ability of arbitrators to draw adverse inferences from unexcused failure to produce the requested evidence.(95)

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e. Experts

i. Role of experts in international arbitration

6.152 The third method of presenting evidence to an arbitral tribunal is by the use of expert witnesses. Some issues of fact can only be determined by the arbitral tribunal becoming involved in the evaluation of elements that are essentially matters of opinion. Thus, in a construction dispute, the contemporary documents, comprising correspondence, progress reports, and other memoranda, and the evidence of witnesses who were present on the site may enable the arbitral tribunal to determine what actually happened. There may then be a further question to be determined; namely whether or not what actually happened was the result of, for example, a design error or defective construction practices. The determination of such an issue can only be made by the arbitral tribunal with the assistance of experts, unless it possesses the relevant expertise itself. Equally, in shipping arbitrations, the performance of a vessel or its equipment may need to be evaluated by experts, so that the arbitral tribunal may make the relevant findings of fact.

6.153 There are two basic methods of proceeding in a situation where the arbitral tribunal itself does not have the relevant expertise. The first is for the arbitral tribunal to appoint its own expert or experts. The second is for the parties to present expert evidence to the tribunal and, since this evidence will presumably be in conflict, for the arbitral tribunal to evaluate it. This evaluation is usually carried out after it has been tested by cross-examination, or by some other method which may include the appointment by the arbitral tribunal of its own expert.

6.154 As many cases are determined on the basis of expert evidence, it often falls to the arbitral tribunal to draw the lines of battle by limiting the number of experts each side may present. This is usually agreed by the parties at a pre-hearing conference so that a protracted battle of experts may be avoided.

ii. Experts appointed by the arbitral tribunal

6.155 In international commercial arbitration, the arbitral tribunal is usually composed of lawyers.(96) Where matters of a specialist or technical nature arise, such an arbitral tribunal often needs expert assistance in reaching its conclusions, in order ‘to obtain any technical information that might guide it in the search for truth’.(97)

For example, expertise in cryogenics may be required to determine why a metal storage tank cracked; or civil engineering experience may be required to determine why an airport runway became unusable. Expert help may be needed to page "406" investigate the quantification of a claim.(98) The arbitral tribunal may, for example, need quantity surveyors to assist in evaluating claims for measured work under a civil engineering contract; or accountants, to assist in determining the value to be put on a company's balance sheet.

6.156 International arbitral tribunals rarely appoint experts unless the power to make such an appointment is expressly conferred on them, either in the arbitration agreement, through the law governing the arbitration, or by the applicable international or institutional arbitration rules.(99) In the absence of such an express power, a question may arise as to whether or not an arbitral tribunal has implied power to appoint an expert under the law governing the arbitration.(100)

6.157 It is a well-established principle of most national systems of law that, unless authorised to do so by the terms of his appointment, someone to whom a duty has been delegated must not delegate that duty to someone else. So long as it is plain, however, that the arbitral tribunal is merely taking advice from an expert (and not attempting to delegate its task to him) it is difficult to see any objection in principle to the appointment of an expert by an arbitral tribunal.(101)

6.158 If an arbitral tribunal needs expert technical assistance in order to understand complex technical matters, and it needs to understand these matters in order to arrive at a proper decision, there is no good reason to prevent it from obtaining such assistance. It follows that, in the absence of an express provision of the governing law to the contrary, or of an equivalent agreement of the parties, an international arbitral tribunal may generally assume that it has power to call upon expert assistance if needed.(102) As a corollary to this power, the arbitral tribunal page "407" must give the parties an opportunity to comment on any expertise upon which the arbitrators have relied, including their own, if any.

6.159 The selection of an expert, or experts, and the formulation of his assigned tasks are matters on which the arbitral tribunal may or may not wish to consult the parties. Involving the parties may lengthen the process; however, their involvement may have the effect of reducing later objections to the expert's report. The measures adopted by the Iran–US Claims Tribunal in certain of its cases are instructive. In naming an expert the Tribunal has first given the parties the opportunity to agree on an expert, then presented the parties with a list of individuals and institutions from which to choose, stating that if the parties are still unable to agree, the Tribunal would choose the expert itself. Similarly, the Tribunal has also sought input from the parties concerning the expert's terms of reference, and instructed the expert to submit a preliminary report, upon which the parties may then comment. The expert is expected to take these comments into account when preparing his final report.(103) In this way the parties can assist the expert in making the report complete, while being reassured that important aspects of the case are not being decided without their involvement.

iii. Expert witnesses presented by the parties

6.160 One of the least satisfactory features of modern international arbitrations is the prevailing practice of presenting conflicting expert evidence of opinion on matters of great technical complexity. However well the advocates for the parties are able to test evidence of expert opinion presented by the other side through cross-examination:

> … how can the jury judge between two statements each founded upon an experience confessedly foreign in kind to their own? The truth of either combating proposition lies just in its validity as an inference from a vast mass of experience, not usually in any great degree that of the witness, certainly in no part that of the jury, as to the truth of which trained powers of observation are quite essential, the result themselves of a life of technical training.(104)

6.161 It is rare for members of an arbitral tribunal to have the ability to make a reasoned evaluation between two wholly opposed professional opinions on complex technical matters. Nevertheless, this is by far the most common method employed by agreement between the parties, or on the directions of the arbitral tribunal, in the conduct of arbitral proceedings, regardless of where the arbitration takes place.

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6.162 Expert evidence is normally delivered initially in the form of written expert reports, usually at the same time as any written statements of witnesses of fact, or shortly thereafter, but in any event well in advance of the hearing.

6.163 Article 5 of the Rules also provides a useful summary of the contents of a party-appointed expert report:

> … Expert Report shall contain:
>
> (a) the full name and address of the Party-Appointed Expert, his or her present and past relationship (if any) with any of the Parties, and a description of his or her background, qualifications, training and experience;
>
> (b) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;
>
> (c) his or her expert opinions and conclusions, including a description of the method, evidence and information used in arriving at the conclusions;
>
> (d) an affirmation of the truth of the Expert Report; and
>
> (e) the signature of the Party-Appointed Expert and its date and place.

iv. Admissibility of expert evidence

6.164 Where expert evidence is introduced by the parties, the rules regarding the admissibility of expert evidence applied by arbitral tribunals will be, in general, the same as those applied to other forms of evidence in the same arbitration. If the evidence of technical opinion is conflicting (which is usually the case), the expert witnesses must be prepared to appear in person before the arbitral tribunal for examination. The IBA Rules provide that party-appointed experts shall appear for testimony at an evidentiary hearing unless the parties agree otherwise.(105)

6.165 Additionally, arbitral tribunals usually give procedural directions that ensure that each party will have sufficient advance notice of the substance of the evidence of expert opinion to be presented by the other at the hearing, so that neither party will be taken by surprise.

6.166 It follows that if, at the hearing, an expert witness gives oral evidence of matters of opinion beyond that contained in the written report submitted to the arbitral tribunal and to the other party, this additional evidence should strictly speaking be ruled inadmissible. However, in practice, arbitral tribunals tend to allow such additional evidence to be given, on terms that the other party will be allowed adequate time to prepare and present its own further expert evidence in reply.

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v. Categories of expert evidence

6.167 The evidence of experts is presented in relation to all kinds of matters of opinion. Engineers and scientists are frequently called upon to present reports, and give evidence, in relation to disputes where the quality of building work or the performance of plant and equipment is in issue. Accountants are called upon to give evidence as to the *quantum* of claims; and lawyers may sometimes be required to give evidence where provisions of a 'foreign' system of law have to be explained to the arbitral tribunal.

6.168 In addition, it is not unknown for handwriting experts, or other persons expert in the forensic examination of documents, to be called upon where the authenticity of a document is in question.

vi. Experts on 'foreign' law

6.169 In the common law system judges sitting in their national courts expect the substantive law of a foreign country to be 'proved as fact' by expert evidence. This convenient fiction has worked satisfactorily for hundreds of years in the court system, and it appears to work reasonably well in domestic arbitration, although in a domestic arbitration it is not likely that the system of law governing the substance of the parties' relationship will be 'foreign' either to the place of arbitration or to the arbitral tribunal.

6.170 It takes only a brief moment of reflection to appreciate that the convenient fiction that 'foreign law is fact' does not work in the context of an international arbitration. Imagine three French lawyer arbitrators, sitting in England, with French *avocats* presenting arguments on the applicable French substantive law. Any suggestion that English procedural law would require the relevant French substantive law to be proved as 'fact' would surely be

greeted with some hilarity.

6.171 Equally, if a hybrid tribunal composed of one French lawyer, one Egyptian lawyer, and one Canadian lawyer were sitting in London applying the substantive law of Kuwait, how would the Kuwaiti law issues be handled? Would experts on Kuwaiti law give oral evidence to the tribunal, and solemnly change places to cross-examine each other? This would be absurd.

6.172 In practice, the international arbitration community has solved this dilemma in a pragmatic and efficient way. In the twenty-first century, in almost all international arbitrations, 'law' is treated as 'law'. Each party usually has a duly qualified lawyer, often an academic, from the relevant jurisdiction in its team of counsel. Written expert opinions on disputed issues of the applicable law will be submitted with the memorials (with replies if necessary), and the relevant counsel from each team are ready to answer questions from the tribunal and to make oral submissions by reference to legal authorities from the relevant jurisdiction.

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f. Inspection of the subject matter of the dispute

6.173 The fourth method of presenting evidence to an arbitral tribunal, as stated earlier, is for the arbitral tribunal to inspect the subject-matter of the dispute. This is usually a site inspection and mainly arises in connection with construction contracts and disputes arising out of the performance of process plant and so forth. However, it may also apply in other types of case. For example, it is common in commodity arbitrations for the arbitrator to inspect the cargo or consignment, if the dispute concerns the quality of the goods supplied. Article 7 of the IBA Rules provides as follows:

> … Subject to the provisions of Article 9.2, the Arbitral Tribunal may, at the request of a Party or on its own motion, inspect or require the inspection by a Tribunal-Appointed Expert of any site, property, machinery or any other goods or process, or documents, as it deems appropriate. The Arbitral Tribunal shall, in consultation with the Parties, determine the timing and arrangement for the inspection. The Parties and their representatives shall have the right to attend any such inspection.

6.174 Historically, site visits in civil law procedure were:

> … designed … mainly for use in actions involving land, but it is now used in many other situations in which judicial inspection of an object may be of value. Thus, courts frequently view the site, and may even proceed to a fairly elaborate reconstruction of an accident … in passing upon a request for a *descente sur les lieux*, the court is guided by the usual principles determining the admissibility of evidence.(106)

Nevertheless, arbitral tribunals do not often use this opportunity to supplement the information and evidence available to them,

probably because the additional expense involved is likely to be substantial in relation to the benefit gained. It is more common, in modern practice, for models, photographs, drawings, or even videotape films to be used to fulfil the purpose that would have been served by a site inspection. For example, in an ICC arbitration, it was proposed to charter a helicopter to make a video showing the terrain in which a road was constructed over a length of some 60km.(107) And in a public international law case between two States, involving a boundary dispute, videos were made to be shown at the hearings.

i. Power of the arbitral tribunal to inspect the subject-matter

6.175 Although there is little direct authority on the question, an arbitral tribunal may generally assume that it has power to make a site inspection, or require the parties to produce the subject-matter of the dispute for examination, unless the parties have agreed to the contrary. Such an agreement, which would be rare, might be contained expressly in a detailed submission agreement. If it were so included, no *page "411"* doubt the motivation of the parties would be to prevent the arbitral tribunal from incurring the expense of an exercise that they themselves regard as being of little value.

ii. Procedure for inspection

6.176 An arbitral tribunal has broad discretion as to the manner in which it undertakes an inspection of the subject-matter of the dispute. Unless the parties specifically agree otherwise, the arbitral tribunal will normally be careful to ensure that the principle of equality of treatment is strictly observed. In particular, the arbitral tribunal will not normally make a site inspection except in the presence of representatives of both parties; and the arbitrators will not normally put questions directly concerning the case to persons working on the site, unless the advocates for the parties also have the right to ask additional questions of those persons.

6.177 Occasionally, parties may agree that the arbitral tribunal should inspect a site, or the subject-matter of the dispute, without being accompanied at all. However, it would be inappropriate, and potentially dangerous when the award comes to be enforced, if the arbitral tribunal were to make an inspection in the presence of one party alone. If a site inspection is to be made, it is good practice for the arbitral tribunal to issue a procedural direction.

6.178 Who is to be present? Who will make the arrangements? Will questions and answers or any discussion be transcribed and form part of the record? In general it is suggested that the best practice is to direct that there will be no transcript, and that what is said should not form part of the record. Otherwise much of the usefulness of the inspection may be lost as a result of the inevitable formality that accompanies the presence of a reporter to make a transcript.

iii. Inspection under institutional rules of arbitration

6.179 The UNCITRAL Rules and the ICC Rules are silent on the question of inspection of the subject-matter of the dispute, although the UNCITRAL Rules refer to the obligation of the parties to make available to any experts appointed by the arbitral tribunal

any relevant information for inspection.[108] The LCIA Rules,[109] the American Arbitration Association (AAA) Rules,[110] and the WIPO Rules[111] make specific provision for any inspection or investigation that the arbitral tribunal may require.

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6.180 Each of these sets of rules provides that the parties may be present at such inspection if they wish. The ICSID Arbitration Rules contemplate that a site inspection may be necessary. They contain power for the arbitral tribunal to 'visit any place connected with the dispute or conduct inquiries there' if the arbitral tribunal deems it necessary; and they call upon the parties to cooperate in this, with the expenses forming part of the expenses of the parties.[112]

6.181 The WIPO Rules also provide for experiments to be conducted and for the provision by the parties of 'primers' and 'models'.

E. Hearings

a. Introduction

6.182 It has been said many times that the only thing wrong with 'documents only' arbitrations is that there are not enough of them. Such arbitrations are commonplace in certain categories of domestic arbitrations, notably in relation to small claims cases involving, for example, complaints by holidaymakers against tour operators and claims under insurance policies. In the international context, the main examples of 'documents only' arbitrations are those conducted under the rules of the London Maritime Arbitrators Association in connection with disputes arising out of charterparties and related documents.

6.183 However, in the mainstream of international arbitration, it is unusual for the arbitral proceedings to be concluded without at least a brief hearing at which the representatives of the parties have an opportunity to make oral statements to the arbitral tribunal, and the arbitral tribunal itself is able to ask for clarification of matters contained in the written submissions and in the written evidence of witnesses.

6.184 All the rules of the major international arbitration institutions provide for a hearing or hearings to take place at the request of either party, or at the instigation of the arbitral tribunal itself. Whilst an arbitral tribunal must proceed to make its award without a hearing if the parties have expressly so agreed, such an agreement would be unlikely to be contained in a simple arbitration clause in a contract involving international trade; and it would be most unusual in a detailed submission agreement prepared after a dispute has arisen.

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b. Organisation of hearings

6.185 Hearings are normally held on a date fixed by the arbitral tribunal, either at the request of one or both of the parties, or on its

own initiative. The administrative arrangements may be made by one of the parties, normally the claimant, with the agreement of the other. Alternatively, they may be made by the sole or presiding arbitrator, or, if there is one, by the administrative secretary or registrar appointed by the arbitral tribunal.

6.186 In fully administered arbitrations, the institution itself sometimes makes the arrangements, for example, the AAA and the LCIA, but in others (sometimes referred to as semi-administered arbitrations) these matters are left to the arbitral tribunal and the parties. The ICC Secretariat is usually willing to make the necessary arrangements if requested to do so by the arbitral tribunal.

6.187 The task of organising hearings in a major international commercial arbitration should not be underestimated. Nor should the cost. A suitable hearing room must be provided, with ancillary break-out rooms and facilities for the parties and the arbitral tribunal. Access to a photocopying machine, and to telephones and fax lines, is invariably essential, and facilities are required for each party to have documents typed, checked, and copied. A verbatim record of the proceedings may be required; but it is an expensive item, particularly if the transcript is to be provided on a daily basis. Accommodation is also required for witnesses, experts, and the parties' legal teams.(113)

6.188 UNCITRAL Notes on Organizing Arbitral Proceedings contain useful advice, as follows:

> Whether one period of hearings should be held or separate periods of hearings
>
> 76. Attitudes vary as to whether hearings should be held in a single period of hearings or in separate periods, especially when more than a few days are needed to complete the hearings. According to some arbitrators, the entire hearings should normally be held in a single period, even if the hearings are to last for more than a week. Other arbitrators in such cases tend to schedule separate periods of hearings. Advantages of one period of hearings are that it involves less travel costs, memory will not fade, and it is unlikely that people representing a party will change. On the other hand, the longer the hearings, the more difficult it may be to find early dates acceptable to all participants. Separate periods of hearings are easier to schedule and they leave time for analysing the records and for negotiations between the parties aimed at narrowing the points at issue by agreement.
>
> and:
>
> > Whether there should be a limit on the aggregate amount of time each party will have for oral arguments and questioning witnesses

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78. Some arbitrators consider it useful to limit the aggregate amount of time each party has for any of the following: (a) making oral statements, (b) questioning its witnesses, and (c) questioning the witnesses of the other party. In general, the same aggregate amount of time is considered appropriate for each party, unless the arbitral tribunal considers that a different allocation is justified. Before deciding, the arbitral tribunal may wish to consult the parties as to how much time they think they will need.
79. Such planning of time, provided it is realistic, fair and subject to judiciously firm control by the arbitral tribunal, will make it easier for the parties to plan the presentation of the various items of evidence and arguments, reduce the likelihood of running out of time towards the end of the hearings, and avoid that one party would unfairly use up a disproportionate amount of time.

i. Representation

6.189 Arbitration is a private process between the parties and the members of the arbitral tribunal. Accordingly, hearings are held *in camera*, and outsiders may only be present if the parties agree.(114) In general, the arbitral tribunal has wide discretionary powers with regard to permitting representation of the parties. Unless the parties have expressly agreed that they will *not* be represented by lawyers, an arbitral tribunal always permits a party to be represented by a lawyer, or a team of lawyers. Indeed, it would be risky for an arbitral tribunal to proceed otherwise since, on an application for enforcement, such a course might lead to an argument that the losing party had not had a proper opportunity to present its case, even if the parties were treated with equality in this respect.

6.190 In general, the parties may also be represented by engineers, or commercial men, for the purpose of putting forward the oral submissions, and even for the examination of witnesses. It is not uncommon, where a case involves technical issues, for an engineer or other professional man to be part of the team of advocates representing a party at a hearing, although it is more usual for such technical experts to be called as witnesses in order that their opinions and submissions may be tested by cross-examination. However, it may sometimes be convenient and save time if technical experts address the arbitral tribunal directly as party representatives.(115)

6.191 The Supreme Court of California held in 1998 that representing a party in an arbitration without its seat in California was 'engaging in the practice of law' in that state. It followed that a New York lawyer, not a member of the Californian *page "415"* Bar, was not qualified to represent his client in a Californian arbitration; and was thus unable to recover his fee when he sued for it.(116) Fortunately the court stated that the rule did not apply in international arbitration. In England there is not, and never has been, any danger of a similar situation arising.(117) A party to an arbitration may, in theory, be represented by his plumber, his

dentist, or anyone else of his choosing, although the choice usually falls on a lawyer or specialist claims consultant in the relevant industry.(118)

6.192 An arbitral tribunal may not exclude a party who wishes to be present from any session of the hearing. However, an exception to this general principle probably exists where a party so disrupts the course of the hearing as to make it impossible for the arbitral tribunal to conduct the proceedings in an orderly manner. In such a case, the proper course seems to be for the arbitral tribunal to treat that party as being unwilling to participate in the hearing, thus enabling the arbitration to proceed *ex parte*. In principle, however, a party may rely on the right to be present, and the right to be accompanied by a representative of his choice, throughout all hearings.

ii. Pre-hearing conferences

6.193 In large and complex cases, a properly planned pre-hearing meeting or conference can pay substantial dividends in terms of saving time and money at the hearing itself. Such conferences should be organised efficiently, both as to timing and content. They are the responsibility of the sole or presiding arbitrator. The timing is extremely important. If a pre-hearing conference takes place too near to the hearing itself, it will be too late for the 'shape' of the hearing to be influenced. However, if it takes place too early, the arbitral tribunal is not sufficiently well informed about the issues, and the evidence needed to supplement the material submitted in writing, to enable useful decisions to be taken with regard to the structure of the hearing.

6.194 It is also essential that the parties should have comprehensive advance knowledge of the matters to be discussed at a pre-hearing conference; they need to consider the questions to be discussed, and possibly to discuss them with each other before meeting the arbitral tribunal.

6.195 Pre-hearing conferences have been used to considerable effect by the Iran–US Claims Tribunal. The relevant provision appears as part of the Tribunal Rules which provide:

> … The arbitral tribunal may make an order directing the arbitrating parties to appear for a pre-hearing conference. The pre-hearing conference will normally be *page "416"* held only after the Statement of Defense in the case has been received. The order will state the matters to be considered at the pre-hearing conference.(119)

iii. Revised ICSID Arbitration Rules

6.196 The potential value of pre-hearing conferences has been accepted by ICSID, which formulated a rule to provide for them:

> 1. At the request of the Secretary-General or at the discretion of the President of the Tribunal, a pre-hearing conference between the Tribunal and the parties may be held to arrange for an exchange of information and the stipulation of uncontested

facts in order to expedite the proceeding.

2. At the request of the parties, a pre-hearing conference between the Tribunal and the parties, duly represented by their authorised representatives, may be held to consider the issues in dispute with a view to reaching an amicable settlement.(120)

The first part of this rule envisages a conventional role for the pre-hearing conference, namely that of helping to ensure that time is saved at the hearing itself. The second part of the rule is less conventional. It seeks to take advantage of the fact that the claims and counterclaims of the opposing parties tend to change shape under the hammer of contested proceedings, as each side begins to understand its opponent's case better; and it envisages that, at the request of the parties, a pre-hearing conference may be held with a view to arriving at an amicable settlement of the dispute.

6.197 The practice of holding pre-hearing conferences was discussed at the ground-breaking International Council for Commercial Arbitration (ICCA) Congress in New York in 1986. Interestingly, in a number of countries—notably the Soviet Union, Japan, and in general the Arab countries—the practice was at that time virtually unknown.(121) The rules of the major international arbitral institutions are generally silent on the question of pre-hearing conferences—although it is clear that an arbitral tribunal has power to convene one (or more) such events, in the exercise of its discretion. One arbitral institution that does provide for such conferences is WIPO, whose rules provide:

> … The Tribunal may, in general following the submission of the Statement of Defense, conduct a preparatory conference with the parties for the purpose of organizing and scheduling the subsequent proceedings.(122)

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c. Procedure at hearings

6.198 Individual arbitral tribunals approach the determination of the procedure to be followed at the hearing in different ways. Most have the common aim of keeping the duration of the hearing to a minimum so far as practicable, in order to assist the busy schedules of the arbitrators and parties, and in order to reduce expense.

6.199 However, ideas as to what is a reasonable length of time for a hearing differ widely. Formerly,(123) in English court practice, hearings could last for many weeks, causing great inconvenience and expense to all concerned.(124) By contrast, arbitrators from the civil law countries tend to regard any hearing that takes more than three days as a long one. Indeed, many arbitrators from civil law jurisdictions would be unwilling to allocate more than three (or at the most five) days consecutively to the hearing of any particular case.

6.200 This means that the hearing will have to be adjourned if it

cannot be completed during the time allocated. The Iran–US Claims Tribunal held hearings exceeding two days in only the most complex cases. The trend in international arbitration is toward shorter hearings with greater reliance upon documentary evidence. This is a necessary step in the interests of economy of time and costs in cases that often involve arbitrators, lawyers, experts, company executives, and other arbitrators, operating away from their home bases.

i. International practice

6.201 There is also a trend in international arbitrations for the tribunal to take a role that is more typical of proceedings in the civil law inquisitorial tradition than the common law adversarial approach. In the view of an experienced arbitrator:

> … in most cases it is wise for an arbitral tribunal to take an active role in augmenting the parties' presentation of the facts. This can be done by conducting pre-hearing conferences with the parties and, in appropriate cases, by issuing orders requiring parties to submit specifically described evidence. Arbitration is more effective and efficient when the arbitrators actively seek to elucidate the facts, rather than merely evaluating what the parties choose to present. This active approach is particularly useful in international cases, which typically bring together parties and arbitrators who have different legal backgrounds and approaches to presenting evidence. *page "418"* In such circumstances parties can greatly benefit from the arbitral tribunal's guidance concerning what it expects.(125)

This trend is confirmed by the UNCITRAL Notes on Organizing Arbitral Proceedings, which state as follows:

> 81. Arbitration rules and national laws on arbitral procedure typically give broad latitude to the arbitral tribunal to determine the order of presentations at the hearings. Procedural patterns differ, for example, as to whether opening or closing statements are heard and their level of detail; the sequence in which the claimant and the defendant are to present their opening statements, arguments, witnesses and other evidence; and whether the defendant or the claimant should have the last word. In view of such differences, it may foster efficiency of the proceedings if the arbitral tribunal clarifies to the parties, in advance of the hearings, the manner of conducting oral hearings, at least in broad lines.

ii. Opening statements

6.202 The usual practice in international arbitration, given the strict time limits allocated, is to permit each side only a brief opening statement, in which the advocates assume that the

arbitrators have a full knowledge of the documents that have been submitted. This is followed by the oral testimony of the witnesses for each party, the claimant's witnesses being heard first. There is usually no examination-in-chief ('direct' examination) as the witness testimony will have been submitted in writing. However, it is usual for a witness to be given the opportunity to elaborate on the witness statement, or add any new points, so long as this is done briefly.

6.203 A leading English international arbitrator put it thus:

> … Finally, since the arbitrators are likely to be busy professional people and often from different countries, oral hearings will usually be remarkably short by English standards. Their main purpose is to hear the cross-examination of the witnesses, bracketed by short opening and closing remarks from both sides, which are often supplemented by written post-hearing submissions …[(126)]

iii. Pre-hearing briefs

6.204 In modern international arbitrations written pre-hearing briefs usually replace the traditional oral opening statements. However, it is also usual for the lead counsel from each side to make a short opening presentation in order to emphasise the principal points on which they wish the arbitrators to focus during the witness testimony, and to provide the arbitral tribunal with a 'road map' as to how their cases will be presented.

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6.205 However, it is not usual for counsel to summarise the evidence that will be given by the witnesses, and it is certainly not acceptable for counsel to read entire documents aloud during an opening statement. With the permission of the tribunal it is possible to read critical provisions of the underlying contract documents.

iv. Examination of witnesses

6.206 The examination of witnesses is dictated mainly by the arbitral tribunal itself. Individual arbitrators usually restrict their questions to those that they regard as essential to clarify or expand the information they need to reach their determination. It would be unusual for arbitrators to adopt a long line of questioning with the objective of attacking the credibility of a witness. However, there may be cases where specific questions are designed to test credibility when a case turns on whether or not the testimony of a witness is reliable.

6.207 In many civil law jurisdictions, cross-examination of witnesses by the parties is not permitted. However, in proceedings before international arbitral tribunals, an opportunity for cross-examination is almost always given if a party requests it.

6.208 US and English advocates nearly always want to cross-examine witnesses who attend the oral hearing, and in many instances wish to attack their credibility or the quality of their recollections. However, arbitrators from civil law countries are not accustomed to this procedure. They regard it as embarrassing

(even barbaric) for a witness to be subjected to attack at an arbitration hearing. Advocates brought up in the common law tradition do well to bear this in mind in deciding whether to cross-examine any particular witness, and, if so, how this examination should be conducted. To cross-examine witnesses at great length before arbitral tribunals composed primarily of arbitrators from civil law jurisdictions is often counterproductive.

6.209 The role of counsel should be to assist witnesses in developing the confidence and clarity of thought required to testify truthfully and effectively based upon their own knowledge or recollection of the facts. It should be borne in mind that being examined in the 'witness box' is, for most witnesses, an unfamiliar and intimidating experience.(127) The interests of justice are not well served by the transcripts of the interrogation of frightened witnesses by skilled and manipulative cross-examiners. Fortunately, experience indicates that experienced arbitrators tend to discount severe or bullying cross-examinations on the basis that it demonstrates  *page "420"* no more than the cleverness of the cross-examiner rather than the lack of credibility of the witness.(128)

6.210 Witnesses are sometimes excluded until they have given their testimony, although this practice is often dispensed with by agreement of the parties, out of deference to witnesses who may have to wait in hotel rooms until their turn comes. Much depends on whether or not a party is likely to gain an unfair advantage by having a particular witness present while the corresponding witness presented by the opposing party gives evidence.

6.211 Fact witnesses are almost always not allowed to discuss the case with any member of the 'team', whether lawyers or other witnesses presented by the same party during overnight or refreshment breaks. This is an obvious way of ensuring that the witness is not 'coached' on how to answer questions during re-examination ('re-direct'). Sometimes they are permitted to eat meals, or take coffee, with them on the understanding that the case will not be discussed in his presence.

6.212 If a transcript is taken, the parties may often agree that the witness should be given an opportunity to correct the record, either in consultation with representatives from each party or in discussion with the administrative secretary of the arbitral tribunal. However, the transcript should only be corrected to reflect what the witness actually said (for example, by reference to an audio recording made by the transcribers), not what the witness intended to say.

6.213 Article 8 of the IBA Rules confirms the current international standard previously adopted by many international arbitral tribunals. It provides as follows:

> 8.1. The Arbitral Tribunal shall at all times have complete control over the Evidentiary Hearing. The Arbitral Tribunal may limit or exclude any question to, answer by or appearance of a witness (which term includes, for the purposes of this Article, witnesses of fact and any Experts), if it considers such question, answer or appearance to be irrelevant, immaterial, burdensome, duplicative or covered by a reason

for objection set forth in Article 9.2. Questions to a witness during direct and redirect testimony may not be unreasonably leading.

8.2. The Claimant shall ordinarily first present the testimony of its witnesses, followed by the Respondent presenting testimony of its witnesses, and then by the presentation by Claimant of rebuttal witnesses, if any. Following direct testimony, any other Party may question such witness, in an order to be determined by the Arbitral Tribunal. The Party who initially presented the witness shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties' questioning. The Arbitral Tribunal, upon request of a Party or on its own motion, may vary this order of proceeding, including the arrangement of testimony by particular issues or in such a manner that page "421" witnesses presented by different Parties be questioned at the same time and in confrontation with each other. The Arbitral Tribunal may ask questions to a witness at any time.

8.3. Any witness providing testimony shall first affirm, in a manner determined appropriate by the Arbitral Tribunal, that he or she is telling the truth. If the witness has submitted a Witness Statement or an Expert Report, the witness shall confirm it. The Parties may agree or the Arbitral Tribunal may order that the Witness Statement or Expert Report shall serve as that witness's direct testimony.

8.4. Subject to the provisions of Article 9.2, the Arbitral Tribunal may request any person to give oral or written evidence on any issue that the Arbitral Tribunal considers to be relevant and material. Any witness called and questioned by the Arbitral Tribunal may also be questioned by the Parties.

6.214 In the courts of common law countries, elaborate rules of evidence are still deployed even though they were designed for use in jury trials which (other than in the USA) are largely used only in criminal cases. Such rules of evidence are not necessary in the courts of civil law countries because, in general, fact-finding is the responsibility of the judge based on his own enquiries and collection of the evidence. In any event, the civil procedure rules applicable in national courts do not apply to international arbitrations unless the parties agree otherwise, or the local law at the seat of arbitration provides that it does apply to international arbitrations held in the country that is the juridical seat.

6.215 Fact witnesses are usually ‘examined’, first, by counsel for the party presenting that witness; then ‘cross-examined’ by counsel for the other party; then ‘re-examined’ by the first counsel, if necessary; additional cross-examination may be introduced, with permission of the arbitral tribunal, where the witness has given new ‘direct’ testimony during the re-examination.

6.216 Arbitral tribunals usually overrule objections to questions

based on characterising them as ‘leading’ or ‘closed’ (that is, questions which prompt the answer that the examining counsel wishes to obtain). This is not because there is a rule against putting such questions in international arbitration, but because the value of a witness's testimony is reduced if it is given pursuant to a question that has suggested the answer. Arbitral tribunals sometimes warn examining counsel that the value of direct testimony that has been given pursuant to a ‘leading’ question is less than if it is given pursuant to an ‘open’ question. This practice does not apply to cross-examining counsel, who may ask any type of question so long as it is fair and relevant to the issues in dispute.

v. ‘Witness conferencing’

6.217 ‘Fact witnesses conferencing’ (or, in an unfortunate description, ‘confrontation’) techniques had not gained the status of a common practice, or even a trend, by the early years of the twenty-first century. It is a somewhat adventurous path for an *page "422"* arbitral tribunal to take, and should not, in general, be used as an *alternative* to cross-examination of individual witnesses by the parties' counsel. However, it sometimes provides an effective way of identifying areas of dispute between witnesses, and areas of agreement. It also offers the opportunity to make an immediate and direct comparison between the testimony they have given earlier, both in writing and orally at the hearing.(129)

6.218 Some trial lawyers do not like to lose control over the way in which their client's case is presented. They say that deprivation of the supposed right to present their case as they see fit could amount to lack of due process. Nevertheless, used with caution in relation to specified areas of disputed fact, witness conferencing may be regarded as a potentially useful way for an arbitral tribunal to assess the truth as between two conflicting versions of factual events.

6.219 In the conduct of the hearings generally, it is important for the arbitral tribunal to bear in mind the two principles that are likely to give rise to problems when enforcement of the award is sought. These are, first, that each party should have a fair opportunity to present its case, and, secondly, that the parties must be treated equally. It is sometimes difficult to operate these principles in a manner consistent with minimising the duration of the hearing. However, an experienced presiding arbitrator can normally find a way of combining firmness with fairness.

vi. ‘Expert conferencing’

6.220 Unlike the position in relation to fact witnesses,(130) ‘expert conferencing’ can be a very effective means of informing the arbitral tribunal about complex technical issues in dispute. Where a bridge has collapsed into a river, for example, a fact witness will testify as to what he saw and in what way the bridge fell. The expert witness will testify as to what, in his opinion, caused the bridge to collapse. Was it defective design, or defective workmanship or materials? Where the parties' respective experts disagree, after submitting lengthy and persuasive expert reports, how is the arbitral tribunal to decide which explanation is more persuasive?

6.221 The role of experts in this context is to assist, educate, and advise the arbitral tribunal, in a fair and impartial manner, in specialist fields (eg technical, forensic accountancy, legal, etc) in which the arbitrators (or some of them) do not themselves have relevant expertise in specific issues in dispute between the parties.

6.222 Historically, the practices of arbitrators and advocates in relation to the use of experts, from both common law and civil law countries, have tended to mirror the procedures and techniques adopted by the national court systems into which they page "423" were originally educated as litigation practitioners. In many cases where the issues to be decided involve complex technical considerations, this is neither necessary nor appropriate.

6.223 The result is that arbitral tribunals find themselves faced with deciding between the opinions of opposing experts who have provided diametrically opposite opinions to questions such as, for example, 'Why did the bridge fall down?',(131) with little or no unbiased expert advice to guide them.

6.224 In an effort to find a practical solution, a number of experienced international arbitrators(132) developed 'expert conferencing' techniques, usually limited to circumstances in which the parties and their counsel agree to participate in this format. In this kind of procedure the parties first present their written expert reports, as under the IBA Rules; then the experts are required to meet in advance of the hearing to draw up lists of (a) matters on which they agree, and (b) matters on which they do not agree.

6.225 Based on list (b), the arbitral tribunal prepares an agenda designed to encompass the matters on which the experts are not agreed, and presents it to the parties and their advocates in advance of the hearing.(133) Then, after all the fact witnesses from both sides have been heard, the independent experts retained by the opposing parties come before the arbitral tribunal seated alongside each other at the witness table.

6.226 The chairman of the arbitral tribunal(134) then takes the experts through the agenda, item by item. The experts are requested to explain in their own words the basis for reaching the opinions set out in their written reports, and to answer each other's main points. They may also be encouraged to debate these points directly with each other if the arbitral tribunal considers that this would be useful. Experience indicates that the transcript of such a debate is more helpful to the arbitral tribunal than the transcript of a traditional 'sparring match' cross-examination between one side's expert and the other side's cross-examining advocate.

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6.227 Arbitral tribunals do not usually adopt an expert conferencing procedure unless the parties (through their advocates) agree to it. Further, the parties' advocates are usually permitted, if they wish, to conduct a traditional cross-examination after the expert conferencing session has been completed. This is both reasonable and appropriate. There may be matters that the arbitral tribunal has not raised, such as apparent inconsistencies between an expert's prior published works and his or her opinion in the current case.

vii. Closing statements

6.228 As with opening statements, it is relatively rare in modern international arbitration for lengthy oral statements to be made after the witness testimony has been heard. There are two reasons for this. The first relates to time and cost. It has been stated elsewhere in this book that the most expensive phase of an international arbitration is the time that is spent with all the players in a city that will be foreign to most of them. The accommodation costs are high, but these are dwarfed by the 'time cost' of the parties—three arbitrators, the parties' representatives, their counsel, and the witnesses. The second is that a closing argument before the transcripts of the witness testimony is available and capable of being evaluated by the parties' counsel. Even though virtually instantaneous transcripts can be ordered in the major cities of Europe and the USA, it is asking too much of the parties' counsel to craft a closing statement that will deal adequately with the tribunal's concerns.

6.229 It is more usual in modern international arbitrations for the closing submissions to be in writing, in the form of post-hearing briefs, delivered after the transcripts are available, within a time to be agreed between the parties or fixed by the arbitral tribunal. These documents will contain footnote references to the transcripts of the evidence.

6.230 However, this does not exclude the possibility of counsel being permitted to present some form of oral closing statement after the witness testimony has been heard, if they wish, or to answer questions from the arbitral tribunal.

viii. Who has the last word?

6.231 In common law practice, the claimant (or 'plaintiff' in some jurisdictions) in a national court, on the basis that the claimant has the burden of proof. This means that the claimant has two opportunities to make oral submissions, while the respondent (or 'defendant' in some jurisdictions) has only one. In international arbitrations, wherever held, this practice is not widely followed, since arbitrators tend to feel, instinctively, that due process is generally served only if the parties are permitted an equal number of opportunities to make oral submissions. Furthermore, the 'burden of proof' point is not wholly valid, because in most international arbitrations the burden falls on each party to prove the facts on which it relies.

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d. Ex parte hearings

6.232 An arbitral tribunal may, and indeed should, proceed *ex parte* if one of the parties (almost invariably the respondent) refuses or fails to appear. In such cases, the arbitral tribunal should proceed with the hearing and issue its award, making sure that the precise circumstances in which the proceedings have taken place are specified in the award itself.(135)

6.233 This is necessary because there is a presumption that a party who boycotts an international commercial arbitration intends to resist enforcement of any award ultimately rendered. Since it is

a legitimate ground for refusal of recognition or enforcement of an award, whether under the New York Convention or otherwise, that a party has not had a full opportunity to present its case, it is desirable that the award should itself show, on its face, the circumstances in which the respondent did not participate. Two main problems commonly arise in relation to *ex parte* hearings. The first is what constitutes a 'refusal' to participate; the second is how the arbitral tribunal should proceed in such circumstances.

i. Refusal to participate

6.234 In some circumstances the situation is clear. This was so in the three Libyan oil nationalisation cases(136) in which the Libyan Government stated at the beginning that it refused to take any part in the proceedings on the grounds that the arbitral tribunals, in each case, had no jurisdiction. It will also be clear if a respondent expressly refuses to reply to correspondence from the arbitral tribunal, or to comply with any procedural directions as to the submission of written pleadings and so forth.

6.235 There are two other circumstances in which an arbitral tribunal should proceed *ex parte*, but these are more difficult to identify. The first is where a party does not notify its unwillingness to participate, but creates a delay so unreasonable that the arbitral tribunal (on the application of the other party) would be justified in treating the party in default as having abandoned its right to present its case. It is impossible to specify precisely when this point arises in any given proceedings, and an arbitral tribunal must use its best judgment, balancing the various factors involved. However, the arbitral tribunal should bear in mind that it may not be doing the claimant any favours if it accedes too early to an application to proceed *page "426"* *ex parte*, because the award may become the subject of a successful challenge when the claimant seeks to enforce it.(137)

6.236 The second situation, which has been referred to above,(138) is where a party so disrupts the hearing that it becomes impossible to conduct it in an orderly manner. Experience of such a situation is hard to find, but theoretically it could happen; the arbitral tribunal would then need to treat the defaulting party's conduct as being equivalent to a refusal to participate.

ii. Procedure in ex parte hearings

6.237 Unlike a court, an arbitral tribunal has no authority to issue an award akin to a default judgment. Its task is to make a determination of the disputes submitted to it. Accordingly, even if a party fails to present its case, the arbitral tribunal must consider the merits and make a determination of the substance of the dispute. Where it is clear from the beginning that a party (usually the respondent) does not propose to take part, the arbitral tribunal usually ensures that all the participating party's submissions and evidence are placed before it in written form. Then it will be justified in holding only a brief hearing, on an *ex parte* basis, to review the claims and raise any questions.

6.238 A reliable guideline as to how such a proceeding should take place is that the party who is taking part must prove its case to the satisfaction of the arbitral tribunal. The arbitral tribunal has

no duty to act as advocate for a party who has elected not to appear, but it must examine the merits of the arguments of law and fact put to it by the participating party, so as to satisfy itself that these are well founded. It must then make a reasoned determination of the issues.

6.239 The practice of arbitral tribunals varies as regards hearings in such situations. Much will depend on the form in which the written stages of the arbitration have taken place. If the written stages have been comprehensive, the arbitral tribunal may feel justified in holding a brief and purely formal hearing prior to issuing its award. If, on the other hand, the written pleadings have been simple, formal documents in which only the issues have been defined, and no documentary or witness evidence has been submitted in writing, the arbitral tribunal would probably consider it necessary to hear oral evidence before being satisfied that the participating party has discharged the burden of proof in relation to its claims (or defences).

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6.240 The Model Law contains a provision empowering the arbitral tribunal to continue the proceedings and to make an award where a party fails to comply with the requirements of the procedure agreed by the parties or established by the arbitral tribunal;(139) and similar provisions are to be found in modern laws of arbitration, even if they are not directly based on the Model Law.

6.241 Where a respondent fails to defend the case, and in particular where it fails to communicate a statement of defence in accordance with Article 23 of the Model Law, the arbitral tribunal may continue the proceedings, but without treating any such failure as an admission of the claimant's allegations. Accordingly, the arbitral tribunal is not given equivalent powers to that of the court to issue a ‘default’ judgment in favour of a claimant. It must make determinations on the claims presented in the arbitration, and incorporate those determinations into the award. The ICSID Arbitration Rules set out default procedures in useful detail.

F. Proceedings After the Hearing

a. Introduction

6.242 In theory, the hearing should conclude the participation of the parties in the arbitration. Indeed, it is good practice for the arbitral tribunal to declare the evidentiary record closed.(140) This will not prevent the parties, if so agreed by the tribunal, from submitting post-hearing briefs, but it will prevent them from submitting new unsolicited material after the hearing, which will require further procedural orders to enable the other party to reply.

b. Post-hearing briefs

6.243 It is increasingly frequent for the parties to submit post-hearing briefs, sometimes of limited length, summarising the main points that have emerged in evidence and argument; and the emergence of such a practice may be seen as a direct corollary of the practice of limiting the length of the hearing—and, indeed, of

imposing time constraints on the parties at the hearing.

6.244 It sometimes happens that the time allocated for the hearing does not permit the parties to have the full opportunity of presenting their cases that they believe to be necessary. This may happen either where the hearing has simply taken longer than anticipated, or where new material has been produced during the course of the hearing by one party, and the opposing party, justifiably, requires an opportunity to respond and cannot reasonably do so within the time frame imposed by the page "428" duration of the hearing. In these circumstances, the arbitral tribunal may either adjourn the hearing to a future date convenient to all parties, or permit a further submission in writing by the party seeking to respond to the fresh material.

6.245 Thus, the most frequently adopted form of proceedings after the closure of the hearings is an exchange of post-hearing briefs. These are commonplace in US litigation, and it is one of the elements of US litigation practice that European arbitrators have found useful to import from across the Atlantic. They are usually ordered when the parties' representatives have not had time to prepare or deliver oral closing statements. This happens typically where a verbatim transcript of the oral testimony is being taken, and the parties want to have time to study the record before making their final submissions.

6.246 Post-hearing briefs are also sometimes permitted where the arbitral tribunal has raised questions during the closing arguments and the parties' counsel wish to have time to undertake research before giving their answers. One of the authors experienced such a situation at a hearing in 1998, when the question of whether or not the Vienna Sales Convention applied to the transaction in question was raised during the closing arguments. This was not a matter upon which the parties' counsel could reasonably be expected to respond ‘off-the-cuff’; and, accordingly, the parties were directed to submit post-hearing memoranda on the question.(141)

c. Introduction of new evidence

6.247 The post-hearing briefs may not always be the end of the proceedings. First, fresh evidence may come to light after the hearing, but before the arbitral tribunal has issued its award. In these circumstances the arbitral tribunal has discretion to reopen the proceedings at the request of the party wishing to present the new evidence. Clearly it should refuse to do so where the fresh evidence is not needed for the deliberations, or if the new material appears to be a spurious attempt to delay the proceedings. But, in general, arbitral tribunals prefer to determine a dispute with the benefit of all the relevant evidence in their possession. If the fresh evidence turns out to be valueless, or without merit, the opposing party may be compensated by the arbitral tribunal in relation to the additional costs incurred, and by an award of interest where this is appropriate.

6.248 The course that should be adopted by the arbitral tribunal depends on the circumstances of each case and the nature of the material to which a response must be made. However, arbitral tribunals normally (and rightly) try to ensure that adjourned hearings do not take place unless they are really necessary; they

generally page "429" permit one party to put in further written evidence and submissions if the other has presented fresh material at the hearing. The other party will sometimes object, but this objection is not justifiable if that party has created the situation himself by producing new materials at a late stage. Any further written submissions, or evidence, should be seen by the opposing party, as well as by the arbitral tribunal; and the arbitral tribunal must decide when to call a halt in terms of further replies, rejoinders, and rebuttals.

G. Other Matters

a. Expedited procedures

6.249 Expedited dispute resolution processes are not a recent development. Short procedures were, for instance, known in Venice between the twelfth and sixteenth centuries, where decisions were rendered within very short time limits.(142)

6.250 Nevertheless, by the turn of the twentieth and twenty-first centuries there was a growing sense of frustration among businessmen involved in international commerce, because of the delays involved between the start of an international arbitration and the eventual delivery of the arbitral tribunal's award. A system of justice devised by merchants, which was simple, informal, and close to mediation and conciliation, but leading to an enforceable outcome, became a legalistic process backed by national laws and international treaties. What was once the domain of merchants and traders became the business of lawyers.

6.251 Cash flow considerations, always important to entrepreneurs, become critical during periods of financial constraints. Furthermore, trading partners were not content to have disputes outstanding between them for long periods of time. International arbitration, particularly where the arbitral tribunal is composed of three busy arbitrators from different countries, has never been a speedy form of dispute resolution, except by comparison with litigation in some national court systems.

6.252 Being aware of criticism from the international business community, which constitutes the ultimate users of the service, various solutions to the twin problems of delay and costs have been advocated. Those that have been developed include the following.(143)

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i. ICC 'Pre-arbitral Referee'

6.253 The Pre-arbitral Referee Procedure was first introduced in 1990.(144) This provides a procedure under which urgent action is required before the arbitral tribunal is established.

6.254 The Rules may be used only where there is a written agreement between the parties to adopt them, whether the agreement is part of the transaction agreement or made later. The use of the Pre-arbitral Reference Procedure is purely on an 'interim' basis. It does not issue decisions that limit in any way the powers or jurisdiction of an arbitral tribunal or national court that

may ultimately be mandated to determine the merits of the dispute.

6.255 An ICC referee is appointed either by agreement of the parties or by the Chairman of the ICC Court, following a request by one of the parties for the appointment of a referee (under Article 4.1).

6.256 Article 2 gives the referee power to:

- order conservatory measures or restoration measures that are urgently necessary to prevent either immediate damage or irreparable loss and so to safeguard any of the rights or property of one of the parties;
- order payment by one party to any other party or to another person any payment which ought to be made;
- order a party to take any step which ought to be taken according to the contract between the parties, including the signing or delivery of any document or the procuring by a party of the signature or delivery of a document;
- order any measures necessary to preserve or establish evidence.

An ICC referee does not have power to make any order other than that requested by the requesting party in its Request, or by the respondent in its Answer to the Request.(145) However, the powers of the referee may be altered by express written agreement between the parties.(146)

6.257 The referee must make the order within 30 days from the date on which the file was received.(147) The referee's orders are binding and remain in force unless and until the referee or the competent body (either a court or an arbitral tribunal) decides otherwise.(148) It is therefore clear that the orders of the referee are not intended to be permanent.

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6.258 The Pre-arbitral Referee Procedure has been described as ‘an excellent idea which thus far has not worked’.(149) It was designed as a remedy that could provide urgent measures necessary to preserve evidence or other provisional measures to avoid irreparable harm. However, at the time of writing, there is little evidence that this initiative has proved to be more useful than the old-fashioned remedy of applying directly to a national court with power to order appropriate interim measures of protection in jurisdictions where the respondent has assets, or at least a jurisdictional presence.

ii. Expedited formation of the arbitral tribunal

6.259 A sensible, if less adventurous, solution is provided by the LCIA Rules.(150) In cases of exceptional urgency a party may apply to the LCIA Court for the expedited formation of an arbitral tribunal. The application must be made in writing to the LCIA Court, with copies to all other parties to the arbitration, and must set out the specific grounds for the exceptional urgency in the formation of the arbitral tribunal. In practice, it is usually the claimant that requests expedited formation.

6.260 The LCIA Court has discretion to shorten the time limits for the formation of the arbitral tribunal. There have been a few cases where the time limit has been 'significantly abridged', and one case in which a sole arbitrator was appointed within 48 hours of receipt of the Request for Arbitration.(151)

6.261 Amongst more recent entrants into the field the Dubai International Arbitration Centre (DIAC) has adopted a similar approach to expedited formation of the arbitral tribunal.(152)

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6.262 In these solutions, which are usually used where urgent interim measures are sought by one of the parties, the arbitration will proceed normally under the relevant rules after the arbitral tribunal has been established and has dealt with the interim measures sought.

iii. Simplified procedures

6.263 Another approach is to establish a special procedure for such cases. Several important arbitral institutions have developed rules for the faster resolution of disputes by means of a simplified procedure. These include the AAA, CIETAC, WIPO, the SCC, and the Swiss Chambers' Court of Arbitration. The relevant rules of these institutions are available on their websites.(153) As might be expected, they differ from one institution to another, but the Swiss Rules serve as a good example of how the procedure is intended to work. Under these Rules:

- a single arbitrator is appointed;
- written pleadings are limited to a statement of case, a defence, and (if applicable) a counterclaim and reply;
- unless the parties agree to a documents-only arbitration, a single hearing is held for the examination of witnesses and experts, and for oral argument;
- the award is made within six months, which states the arbitrator's reasons in summary form (does not give reasons at all if the parties so agree).

It is worth noting that, while this procedure is mandatory for cases in which the total amount in dispute is less than one million Swiss francs,(154) it is available for disputes of a greater amount if the parties so wish. This perhaps points the way to the future for parties who want a dispute resolution process that leads to a binding award, but who wish to avoid the delay and cost involved in a traditional international arbitration process.

b. Fast-track arbitration

6.264 Fast-track arbitration can be an effective way to speed up the dispute resolution process, reduce the costs, and encourage settlement. Such procedures are more likely to be conducted in an expedited manner if submitted to institutional page "433" arbitration, rather than to *ad hoc* arbitration, unless the parties have provided in their arbitration clause for all contingencies regarding the organisation of the various procedural (155)

steps, or have a common interest in a speedy resolution which, surprisingly, seems to be relatively rare.

6.265 There are different approaches to the concept of fast-track arbitration. Under some institutional rules, notably those of the ICC and the LCIA, the arbitration is conducted under the same rules as those that govern a normal arbitration, but the arbitral tribunal is appointed expeditiously and on the basis that it is prepared to conduct the proceedings with the required urgency, to which end the usual time limits will be shortened dramatically.

i. The Formula One case

6.266 A notable example of a fast-track arbitration using existing rules involved Formula One (F1) racing cars.(156) At the relevant time the first race of the season was traditionally held in Melbourne, Australia, in March of each year. It was necessary for the cars to be shipped from Europe around mid-February. At the end of one season, in the mid-1990s, one F1 team fell into dispute with the Formula One Association (F1A), which runs and regulates the F1 championship in accordance with a comprehensive set of rules. The team in question, which was sponsored by a tobacco company, wished to paint one of its cars in the colours and style of one of its brands of cigarettes, and the other in the livery of another of its brands. The F1A objected, on the grounds that the championship is a team event, and insisted that each of the two cars that make up a team must be painted in identical livery. The constitution of the F1A, to which every team must sign up when entering the championship, contained an ICC arbitration clause.

6.267 By Christmas Eve in the year in question, it became apparent that a resolution of the dispute would not be achieved by negotiation. The team and the F1A agreed that they would submit to a 'fast-track' ICC arbitration with a view to obtaining a final decision by the end of January, so that the cars could be painted and shipped in time to reach Australia by the end of February.

6.268 The F1 team filed a Request for Arbitration with the ICC between Christmas Day and New Year's Eve. A three-member arbitral tribunal was appointed on New Year's Day. This tribunal circulated draft Terms of Reference on the same day, and they were signed by all concerned within a couple more days. A sequential exchange of 'Memoranda', to which the parties attached the documents on which they relied, then took place at seven-day intervals, followed by a simultaneous exchange *page "434"* of written witness statements within a few more days. A couple of disputed document requests were resolved by prompt procedural orders from the tribunal, and an eight-hour witness hearing took place on the last Saturday of January. The tribunal deliberated on the Sunday, and sent its Final Award to the ICC Court for scrutiny by fax and courier at lunchtime the next day (Monday), together with separate signed but undated signature pages.

6.269 The award was approved at an emergency session of the ICC Court the same afternoon, and the decision was notified to the parties by fax and overnight courier on the same day. The parties received the fully reasoned award on the last day of January, one month precisely from the day on which the tribunal was appointed, and the cars were painted and shipped to Australia in due time for the first Grand Prix race of the season.(157) This case is one of a

very few classic example of a successful 'fast-track' arbitration; and demonstrates with considerable clarity the proposition advanced earlier that the success or failure of expedited international arbitrations depends not on the rules to be applied, but on the willingness and ability of the parties and the arbitral tribunal to 'make it happen'.

ii. Summary

6.270 Fast-track arbitration can be effective if the world's major arbitration institutions work to make it so, and if international arbitrators and international arbitration practitioners join the drive to provide the cohesive and commonsense system which the ultimate users have clearly expressed that they want. However, at the time of writing there are countervailing forces. Some prospective disputing parties perceive their (short-term) interests to be obfuscation and delay, and it is not difficult for them to find lawyers who are willing to go along with these objectives. However, if the ultimate consumers consider that their disputes require swift resolution; if procedural tools tailored to the specific characteristics of their disputes are available; and if parties and arbitral tribunals are ready to cooperate in achieving accelerated timetables, it should be possible to make a fast-track arbitration system work effectively.

c. Small claims

6.271 As discussed earlier, some international arbitration institutions have made provision for arbitrations where the parties wish specifically to resolve their disputes speedily regardless of the amount in dispute. There is also another category of *page "435"* disputes that arise in international trade, where the amount in dispute does not even justify the involvement of an international arbitral institution.

6.272 For such cases there should perhaps be a system that would guide parties down a sensible path through a process where the costs involved in resolving their dispute would be proportionate to the disputed sum. Such a process would cater for cases where only a few thousand US dollars or euros are at stake.

6.273 These cases would require an 'ultra-simplified' procedure, which would not involve lawyers, rather like some of the commodity association arbitration schemes in London, which would be based on a simple printed form, making provision for a process along the following lines:

- a sole arbitrator should be appointed, by agreement or by an appointing authority;
- the arbitrator should encourage the parties to seek a mediated solution;
- a speedy method of communications should be adopted (preferably email);
- the arbitrator should identify the issues to be determined as soon as possible after his appointment, in appropriate cases by telephone conference with the parties;
- written statements should be subject to a page limit, and in appropriate cases statements should be dispensed with altogether;

- time limits for exchange of written statements (if any) should be short;
- the arbitrator should determine, in consultation with the parties, the scope of witness testimony (if any), and the way in which it will be presented;
- the parties should be required to deliver a single joint set of exhibits at least a week before any hearing;
- the arbitrator should fix an abbreviated procedure for any hearing, which would not exceed one day;
- the award should not contain extensive reasons, but merely list the considerations that weighed with the arbitrator so that the parties may understand the basis of his decision;
- all mechanisms for appeals (other than recourse for lack of due process or excess of jurisdiction) should be excluded.

d. Avoiding delay and disruption

6.274 In the last two decades of the twentieth century delay and disruption became important issues in international commercial arbitration, and were discussed extensively by working groups at ICCA Congresses during the 1980s and 1990s.(158) *page "436"* The debate has continued unabated through the first decade of the twenty-first century.

6.275 Domestic (national) arbitration relies on speed and cost-effectiveness for its survival, by comparison with litigation in national courts. In that context, very often what is quick is cost-effective. This has been recognised by legislators and institutions alike.(159) The position is different in international arbitration, where the paramount objective of the claimant (or counterclaimant) is to obtain an award that is enforceable across national boundaries. However, it is important that the proceedings should be conducted by arbitral tribunals, with cooperation from the parties' counsel, in accordance with international standards. If the arbitral tribunal fails to do this, the eventual award may be refused recognition and/or enforcement under the applicable international conventions.

i. Balancing speed and fairness

6.276 A balance must be struck between speed and fairness. This balance varies from case to case and no absolute time limits can be prescribed. The parties have their own role to play. Procedures that are adopted in an arbitral proceeding should depend on the nature of the dispute,(160) and the arbitral tribunal should be free to design the procedure according to its requirements; detailed procedures agreed by the parties needlessly tie the hands of the arbitral tribunal. Delay may be avoided more easily by wise choice of the composition of the arbitral tribunal rather than by inserting detailed procedural rules into the arbitration agreement.(161) *page "437"*

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[1] An award may be set aside under the Model Law if 'the arbitral

procedure was not in accordance with the agreement of the parties'; and this is also a ground for refusal of recognition or enforcement: Model Law, Arts 34(2)(a)(iv)and 36(1)(a)(iv), and New York Convention, Art V(1)(d).

[2] See the provisions of the Model Law and the New York Convention, above, n 1; and see Ch 2.

[3] See Ch 3, para 3.60.

[4] See Ch 1, paras 1.238–1.240.

[5] See Veeder, 'Whose arbitration is it anyway: the parties or the arbitration tribunal—an interesting question?' in *The Leading Arbitrators' Guide to International Arbitration* (Juris Publishing, 2004), 351.

[6] See, eg, UN Doc A/CN.9/207, para 17: '… probably the most important principle on which the Model Law should be based is the freedom of the parties in order to facilitate the proper functioning of international commercial arbitrations according to their expectations.'

[7] Model Law, Art 19(1).

[8] 1923 Geneva Protocol, Art 2.

[9] New York Convention, Art V(1)(d).

[10] ICC Rules, Art 15(1).

[11] LCIA Rules, Art 14(1).

[12] ICSID Arbitration Rules 20(1) and (2)(a).

[13] New York Convention, Art V(1)(b): 'Recognition and enforcement of the award may be refused … if … the party against whom the award was made was … unable to present his case.'

[14] Model Law, Art 18.

[15] UNCITRAL Rules, Art 15.1.

[16] See, eg, WIPO Arbitration Rules, Art 38(a); the corresponding provisions of the ICC Rules, Art 15(2), ICSID Rules, r 42 and the LCIA Rules Art 14.1(i) do not expressly mention 'equality', but the phrase 'fairly and impartially' must encompass it.

[17] UN Doc A/CN.9/207, para 21.

[18] eg the administration of oaths by arbitrators in a country where the law only allows oaths to be administered by judicial officers.

[19] In the US, eg, the Federal Arbitration Act, s 7, allows an arbitrator to issue a summons to order the attendance of a third party as a witness at the arbitral proceedings; but court assistance is necessary to enforce the summons if the third party refuses to obey it. The US courts have also developed jurisprudence based on the Federal Arbitration Act.

[20] See Ch 7, paras 7.33 and 7.37 *et seq.*

[21] See Ch 4, para 4.160.

[22] 'A Request' (in the US sometimes described as a 'Demand for Arbitration') is delivered to the institution in an institutional arbitration; a 'Notice' is delivered to the opposing party in *ad hoc* arbitrations, eg under the UNCITRAL Rules.

[23] See Ch 4, paras 4.04 and 4.29*et seq*.

[24] See Ch 9.

[25] See *Comparative Arbitration Practice*, ICCA Congress Series No 3 (1987), 64–65, where the discussion did not clarify this point adequately.

[26] It is necessary to distinguish between a preliminary meeting (or preliminary hearing) and a pre-hearing conference. A preliminary

meeting takes place as early as possible in the proceedings, and certainly before the written stage. A pre-hearing conference takes place after the written stage and has as its primary objective the organisation and order of proceedings at the hearing.

[27] As in the *Aminoil* arbitration; see (1982) 21 ILM 976, at 983.

[28] By the 21st century this had become rare. See Ch 3, paras 3.09 *et seq*and 3.49 *et seq*.

[29] See Ch 9, paras 9.182 *et seq*.

[30] See Ch 5.

[31] See also the discussion of partial and interim awards in relation to the separation of *liability* and *quantum* in Ch 9, paras 9.27–9.28.

[32] See *Aminoil* arbitration, above, para 6.42.

[33] See Hunter and Sinclair, 'Aminoil Revisited: Reflections on a Story of Changing Circumstances' in TJ Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May, 2005).

[34] See para 6.04.

[35] Model Law, Art 23.

[36] It is often said that arbitral tribunals should not permit 'trials by ambush'.

[37] UNCITRAL Rules, Arts 18and 19.

[38] Ibid, Art 23.

[39] ICC Rules, Arts 4and 5.

[40] LCIA Rules, Art 15.

[41] LCIA Rules, Art 15.6.

[42] ICDR Rules, Art 2.

[43] Ibid, Art 17.1.

[44] ICSID Arbitration Rules, Art 31(1) and (2).

[45] Ibid, Art 31(3).

[46] Ibid.

[47] As in the *Aminoil* arbitration where, although Aminoil was the natural claimant in relation to the primary issues, the Government had claims against Aminoil and did not concede that its participation in the arbitration should be in the role of defendant. In this case, the terms 'claimant' and 'respondent' were not used at all. Memorials and counter-memorials were exchanged simultaneously, containing respectively 'Aminoil's claims' and 'The Government's claims'; and at the main hearing, an agenda of issues was drawn up so that Aminoil's representatives would speak first when one of its claims was being debated, and the Government's representatives would speak first on issues where it was the claimant.

[48] The practice developed under the UNCITRAL Rules by the Iran–US Claims Tribunal is summarised, with case citations, in Holtzmann, 'Fact-Finding by the Iran-United States Claims Tribunal', in Lillich, *Fact-Finding Before International Tribunals* (11th Sokol Colloquium, 1992), at 101. In deciding upon the admissibility of late-filed submissions, the tribunal considered, in the light of the circumstances of each case, the needs for equality and fairness, the possibility of prejudice to the other party, and the requirements for orderly conduct of the proceeding.

[49] ICC Rules, Art 19.

[50] The Iran–US Claims Tribunal considered 'the reasons for the

delay, the prejudice to the other party, and the effect of admitting the late-filed counterclaim on the orderly progress of the case'; Holtzmann, *Some Lessons of the Iran–United States Claims Tribunal Private Investors Abroad* 17 Inv Arb 1987 16–21.

[51] English civil procedure was changed radically in 1998, converting the judge into a 'case manager'.

[52] See the discussion of comparative arbitration practices in ICCA Congress Series No 3 (1987), 98. The extent to which the Iran–US Claims Tribunal took an active role in requiring evidence is described by Holtzmann in *Fact-Finding*, n 48 above, Sec II-A, para 6–10.

[53] Reymond in (1989) 8 Arbitration, 159. See also Sandifer, *Evidence Before International Tribunals* (revised edn, University Press of Virginia, 1975), 2–3.

[54] Holtzmann, *Fact-finding*, n 48 above, Sec III-B. See also Holtzmann, 'Streamlining Arbitral Proceedings: Some Techniques of the Iran-United States Claims Tribunal' (1995) 11 Arb Intl, 1, 39–50, and Strauss, 'The Practice of the Iran–United States Claims Tribunal in Receiving Evidence from Parties and from Experts' (1986) 3 J Intl Arb 57.

[55] UNCITRAL Rules, Art 24.

[56] In *Parker* (1926) 4 Rep Intl Arb Awards 39, the Mexican–US Claims Commission held that: 'When the claimant has established a prima facie case and the respondent has offered no evidence in rebuttal the latter may not insist that the former pile up evidence to establish its allegations beyond a reasonable doubt without pointing out some reason for doubting.' See also Reiner, 'The Standards and Burden of Proof in International Arbitration' (1994) 10 Arb Intl 3, 321 and Pietrowski, 'Evidence in International Arbitration' (2006) 22 Arb Intl 3, 373–410.

[57] Sometimes actually rehearsed with the aid of video cameras.

[58] In two cases before the Iran–US Claims Tribunal, fact-finding on jurisdictional issues was based entirely on documentary evidence consisting of official documents, corporate documents prepared in the ordinary course of business, publications of which the Tribunal took judicial notice, certificates by independent certified public accountants, and affidavits of corporate officers: see Holtzmann, *Fact-finding*, n 48 above, Sec II-B, para 6–10.

[59] See Sandifer, n 53 above, 202. See also Pietrowski, 'Evidence in International Arbitration' (2006) 22 Arb Intl 3, 373–410.

[60] See the discussion of proof of authenticity of documents in *Comparative Arbitration Practice*, ICCA Congress Series No 3 (Kluwer, 1987), 79. See also Pietrowski n 59 above, 373–410.

[61] LCIA Rules, Art 15.6; the provision is non-mandatory, so the parties may agree on a different procedure.

[62] UNCITRAL Rules, Art 18 (emphasis added).

[63] See Ch 3, paras 3.07 *et seq*.

[64] Some commentators take the view that such an agreement may be implied from the conduct of the parties (or, more accurately) their legal representatives; but this proposition is of doubtful validity, and the authors are not aware of any convincing international authority on the point.

[65] The word/expression 'discovery' is a term of art used in the US and some other common law countries (not England, where the term was abolished by the 1996 Civil Procedure Rules) to describe a process whereby the parties (and their lawyers) are legally obliged to produce documents that are 'relevant to the pleaded

issues', even if they are prejudicial to that parties' case. Subject to any mandatory rules of the *lex arbitri*, or agreement of the parties, the process known as 'discovery' has no place in international arbitration.

[66] Other than where the applicable arbitration rules expressly permit such an order.

[67] At the time of writing, the IBA was in the process of conducting a 'ten year review' of whether any changes were necessary or desirable.

[68] Art 9.2 states:

> 2. The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any document, statement, oral testimony or inspection for any of the following reasons:
>
> (a) lack of sufficient relevance or materiality;
>
> (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;
>
> (c) unreasonable burden to produce the requested evidence;
>
> (d) loss or destruction of the document that has been reasonably shown to have occurred;
>
> (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;
>
> (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or
>
> (g) considerations of fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.

[69] Crothers, 'SBAND's Introduction To E-Discovery', North Dakota Supreme Court, 2007–08.

[70] See para 6.84.

[71] *Sedona Principles: Best Practices for Electronic Document Retention & Production*, named after The Sedona Conference (at the Sedona Hilton in the US). These principles clearly inspired the conclusions reached by the Cresswell Committee in England, whose Report in turn led to a Practice Direction to Part 31 of the English Civil Procedure Rules and, later, to an amendment of the US Federal Rules of Civil Procedure. See also Judge R Hedges, 'Litigation lessons?: US Federal Rules of Civil Procedure The Sedona Principles, and Part 31 of the English Civil Procedure Rules', in Howell (ed), *Electronic Disclosure in International Arbitration*, (Juris Publishing, 2008).

[72] See para 6.02.

[73] Which would generally be inappropriate unless both parties come from the seat of the arbitration, in which case the arbitration would not in fact be an *international* arbitration.

[74] IBA Rules, Art 1.

[75] IBA Rules, Art 3.3.

[76] See CIArb Protocol for E-disclosure in Arbitration, see also ICDR Guidelines for Arbitrators concerning Exchanges of Information.

[77] See Smit and Robinson, 'E-Disclosure in International Arbitration' (2008) 24 Arb Intl 1.

[78] English Arbitration Act 1996, s 43.

[79] US Federal Arbitration Act 1925, s 7.

[80] See Jennings Strouss PLC, 'Recent Developments In U.S. Discovery For Use In Foreign Tribunals Under § 1782 U.S.C.', 2007, <http://www.jsslaw.com/article_details.aspx?id=10>; Gibbons PLC, Myers and Rastaetter, 'U.S. Discovery For Use in Foreign Tribunals, 2008, <http://www.gibbonslaw.com/news_publications/articl...>; Handler and Tennyson, 'International Discovery Requests Under 28 U.S.C. § 1782', Pretrial Practice & Discovery Litigation Newsletter of the Section of Litigation's Pretrial Practice & Discovery Litigation Committee, Vol 16, No 2, Winter 2008, American Bar Association; *Intel Corp v Advanced Micro Devices Inc*, 124 S Ct (2004); and White & Case LLP, '§ 1782 Discovery In Aid Of International Arbitral Proceedings', *International Disputes Quarterly*, Fall 2007.

[81] The Iran–US Claims Tribunal drew adverse inferences from the silence of a party in the face of alleged breach or non-performance of the contract when some complaint would have been expected and from failure of a party to mention a point in a contract or in contemporaneous correspondence consistent with their position in the arbitration. Holtzmann, *Fact-finding*, n 48 above, Sec III-E.

[82] See, eg, LCIA Rules, Art 20.

[83] LCIA Rules, Art 20.6.

[84] IBA Rules, Art 4(3).

[85] Germany is a significant example, followed by countries where the code of civil procedure broadly follows the German tradition, such as Austria and the Czech Republic.

[86] IBA Rules, Art 4(2).

[87] The practice of the Iran–US Claims Tribunal concerning the weight to be given to affidavits is discussed by Holtzmann, *Fact-finding*, n 48 above, Sec II-B(5).

[88] UNCITRAL Rules, Art 25.6.

[89] eg Austria and Germany.

[90] See para 6.202 below.

[91] See the 3rd edn of this book, 322–323.

[92] Signed on 18 March 1970.

[93] See the 3rd edn of this book, 322–323.

[94] Model Law, Art 27

[95] See the 3rd edn of this book, 322–323.

[96] See Ch 4, paras 4.53 *et seq*.

[97] See *Starrett Housing Corp v The Government of the Islamic Republic of Iran* (1987) 16 Iran–US CTR 112, Award No 314-21-1, para 264 (14 August 1987), quoting (at 196) the ICJ in the *Corfu Channel* case.

[98] eg the Iran–US Claims Tribunal in *Starrett Housing*, above, made an initial decision that the claimant's property had been taken by Iran, before appointing an expert to assist the tribunal on issues of valuation.

[99] See, eg, UNCITRAL Rules, Art 27; ICC Rules, Art 20(4); and LCIA Rules, Art 21.

[100] It is unusual for the applicable law to contain an express power, although the English Arbitration Act 1996, s 37 contains such a provision.

[101] This principle was expressed by the Iran–US Claims Tribunal in *Starrett Housing* (above, para 6.155): 'No matter how well qualified an expert may be, however, it is fundamental that an arbitral tribunal cannot delegate to him the duty of deciding the case' (197, para 266). In applying this principle the Tribunal cited earlier international tribunals and stated at 199, para 273: '… the Tribunal adopts as its own the conclusions of the Expert within his area of expertise when it is satisfied that sufficient reasons have not been shown that the Expert's view is contrary to the evidence, the governing law, or common sense.' See also comment and cases cited at paras 270–272.

[102] For a statement to this effect (admittedly in the context of disputes between States) see White, *Use of Experts by International Tribunals* (1965), 73: 'Such practice as does exist, however, would seem to point to the recognition of an implied power to order an expert inquiry or to call independent expert witnesses in appropriate cases. This implied power is a concomitant of the principle that the function of the international judge is to resolve the dispute before him on the basis of all the relevant factual data, and that he has a duty to satisfy himself that he is in possession of this evidence and that he is equipped to understand its legal significance.' Where reliance has to be placed upon an implied power, it is advisable first to check the provisions of the law governing the arbitration.

[103] See *Starrett Housing* case, para 6, pp 117–118, para 6.155.

[104] Judge Learned Hand, 'Historical and Practical Considerations Regarding Expert Testimony' (1901) 15 Harv L Rev 40 at 54.

[105] IBA Rules, Art 5.10.

[106] Herzog, *Civil Procedure in France* (Nijhoff, 1967), 355–356.

[107] In fact, the dispute was settled before this was done.

[108] UNCITRAL Rules, Art 27.2.

[109] LCIA Rules, Art 21.

[110] AAA Commercial Arbitration Rules, Art 33.

[111] WIPO Arbitration Rules, Art 50.

[112] ICSID Arbitration Rules 34(2)(3) and (4).

[113] For further discussion of administrative arrangements of an arbitral tribunal see Ch 4, paras 4.165 *et seq.*

[114] The Model Law as adopted in the Province of British Columbia was amended to provide that: 'Unless otherwise agreed by the parties, all oral hearings and meetings in arbitral proceedings are to be held *in camera*', International Commercial Arbitration Act of British Columbia, s 24(5). The UNCITRAL Rules also provide that 'Hearings shall be held *in camera* unless the parties agree otherwise …'UNCITRAL Rules, Art 25.4.

[115] Both the UNCITRAL Rules (Art 4) and the LCIA Rules (Art 18) make it clear that parties are entitled to be represented by non-lawyers.

[116] *Birbrower, Montabano, Condon Frank v The Superior Court of Santa Clara County*, 1998 Cal Lexis 2; 1998 WL 1346 (Cal 1/5/98).

[117] ie that only a member of the local bar should be entitled to represent a party in a judicial or quasi-judicial proceeding.

[118] English Arbitration Act 1996, s 36. This reaffirms the previous common law position.

[119] Final Tribunal Rules of Procedure, 3 May 1983, n 4 to Art 15.

[120] This Rule was added as r 21, displacing the former r 21 (Procedural Languages), which became r 22. This renumbering continues until former r 37 (Minutes) is reached. This Rule was dropped; thus, from r 38 onwards the Rules bear the same numbers as before.

[121] 'Comparative Arbitration Practice', ICCA Congress Series No 3 (1987), 64–7; the rapporteurs appear to confuse preliminary meetings with pre-hearing conferences.

[122] WIPO Arbitration Rules, Art 47.

[123] Under the English Civil Procedure Rules 1998, however, the length of the hearing is restricted according to the value or complexity of the case.

[124] The oral tradition in England owes its origin to the 'man who is no longer there'; that is to say, the juror. Jury trials lead to two inescapable procedural features. First, once started, the oral proceedings had to be completed because, once assembled, there was no real practical possibility of reconvening the same jury many weeks, or even months, later. Secondly, although jurors had to be property owners, there was no guarantee that they were literate; hence the need for all the documents to be read aloud at the hearing.

[125] Holtzmann, *Fact-finding*, n 48 above, Sec IV.

[126] Kerr, 'Concord and Conflict in International Arbitration' (1997) 13 Arb Intl 121, at 126–127; see also para 1.247.

[127] Roney, 'Effective Witness Preparation for International Commercial Arbitration: A Practical Guide for Counsel' (2003) 20 J Intl Arb 429, which provides a useful practical six-step guide for the preparation of witnesses.

[128] Veeder, 'The Lawyer's Duty to Arbitrate in Good Faith', 2001 Goff Lecture (2002) 18 Arb Intl 445.

[129] See, eg, Peter, 'Witness Conferencing' (2002) 18 Arb Intl 1, 47–58.

[130] See para 6.102.

[131] One side's expert says, with great conviction, 'faulty design of the bridge'. Equally convincingly, the other side's expert says 'defective materials used in construction of the bridge'. Cross-examination of experts by counsel is considered by many international arbitrators as an inadequate tool to assist them in making a determination between the opposing views of such experts.

[132] Notably, Peter, n 129 above.

[133] For the sake of efficiency, this may be done at an early stage of the hearing after the experts have arrived at the hearing location, and during the period in which the fact witnesses for each side are giving their oral testimony.

[134] Or one of the other arbitrators designated by the others, on the basis of his or her understanding of the technical issues, or simply because that arbitrator designed the agenda on the basis of the experts' (a) and (b) lists.

[135] For a discussion of practice under various arbitration rules and national laws, see van den Berg, *Preventing Delay and Disruption of Arbitration*, ICCA Congress Series No 5 (Stockholm, 1990).

[136] The *Texaco*, *BP*, and *Liamco* arbitrations; see Ch 3, paras 3.145 *et seq.*

[137] It is rare, but not unknown, for the respondent to want the

proceedings to go ahead, when the claimant has failed to take them forward, in order to obtain an award that will put an end to the claim. In such a case, similar considerations will apply: the respondent will require a solid award, capable of being *recognised* by the courts, if this becomes necessary.

138 See above, para 6.235.

139 Model Law, Art 25.

140 Some sets of institutional rules require it, eg, ICC Rules, Art 22; DIAC Rules, Art 34.

141 AAA Case No 13T1810031097.

142 Marrella and Mozzato, *Alle origini dell'arbitrato commerciale internazionale. L'arbitrato a venezia tra medio evo ed eta moderna* (2001).

143 The debate that followed also gave birth to the notion of 'fast-track' arbitration. The aim of such processes is to accelerate all the steps, thereby achieving a binding result as quickly as possible, reducing overall costs and encouraging settlements.

144 See Gaillard, 'ICC Pre-Arbitral Referee: A Procedure Into Its Stride', NYLJ, 5 October 2006. See also Model Clause at <http://www.iccwbo.org/court/arbitration/id5095/ind...>.

145 Art 2.2.

146 Art 2.1.1.

147 Art 6.2.

148 Art 6.3.

149 Craig, Park and Paulsson, *International Chamber of Commerce Arbitration* (3rd edn, Oceana Publications, 2000), 706. It is understood that the procedure has been used on only a handful of occasions since the Rules were introduced in 1990.

150 LCIA Rules, Art 9 provides:

> 9.1 In exceptional urgency, on or after the commencement of the arbitration, any party may apply to the LCIA Court for the expedited formation of the Arbitral Tribunal, including the appointment of any replacement arbitrator under Articles 10 and 11 of these Rules.
>
> 9.2 Such an application shall be made in writing to the LCIA Court, copied to all other parties to the arbitration; and it shall set out the specific grounds for exceptional urgency in the formation of the Arbitral Tribunal.
>
> 9.3 The LCIA Court may, in its complete discretion, abridge or curtail any time limit under these Rules for the formation of the Arbitral Tribunal, including service of the Response and of any matters or documents adjudged to be missing from the Request. The LCIA Court shall not be entitled to abridge or curtail any other time limit.

151 Information provided by the LCIA's Registrar.

152 The DIAC Arbitration Rules, Art 12 Expedited Formation provides:

> 12.1 On or after the commencement of the arbitration, any party may apply to the Centre for the expedited formation of the Tribunal,

including the appointment of any replacement arbitrator where appropriate.

12.2 Any such application shall be made to the Centre in writing, copied to all other parties to the arbitration and shall set out the specific grounds for exceptional urgency in establishing the Tribunal.

12.3 The Centre may, in its complete discretion, adjust any time-limit under these Rules for formation of the Tribunal, including service of the Answer and of any matters or documents adjudged to be missing from the Request.

153 <http://www.adr.org/> (AAA); <http://www.cietac.org.cn/index_english.asp> (CIETAC); <http://www.wipo.int/amc/en/index.html> (WIPO); <http://www.chamber.se/Arbitration> (SCC); <https://www.sccam.org/sa/en/> (SCCAM).

154 Art 6(4) of the Swiss Rules of International Arbitration (Swiss Rules).

155 Ibid.

156 ICC Case No 10211. None of the material published in this book is confidential, because the proceedings and the procedure were fully reported in various motor racing journals.

157 As a postscript, one of the present authors, who was a member of the tribunal (which unanimously upheld the F1A's position), recalls one of the other arbitrators during the deliberation making the observation: 'Of course, you know what they [the F1 team] will do … they'll paint each car the same, one side in the livery of one brand and the other car in the livery of the other brand'. His instinct served him well. This is precisely what the F1 team did.

158 In Stockholm (1988); Vienna (1994); and Paris (1998). See ICCA Congress Series Nos 5, 7 and 9.

159 English Arbitration Act 1996, s 1(a); German Arbitration Law 1998, ss 1028, 1046, and 1048. See also ICC Rules, Art 20(1) and LCIA Rules, Art 14(1)(ii).

160 The same could be said about laws and rules; see Marriott, 'Pros and Cons of More Detailed Arbitration Laws and Rules', in *Planning Efficient Arbitration Proceedings, The Law Applicable in International Arbitration*, ICCA Congress Series No 7 (1996).

161 See Karrer, 'Pros and Cons of Terms of Reference and Specific Procedural Agreements in Arbitration Clauses: Storm into a Calm Sea', in ibid.

IBA Rules on the Taking of Evidence in International Arbitration

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International Bar Association

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the legal profession®

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About the Arbitration Committee

Established as the Committee in the International Bar Association's Legal Practice Division which focuses on the laws, practice and procedures relating to the arbitration of transnational disputes, the Arbitration Committee currently has over 2,300 members from over 90 countries, and membership is increasing steadily.

Through its publications and conferences, the Committee seeks to share information about international arbitration, promote its use and improve its effectiveness. The Committee maintains standing subcommittees and, as appropriate, establishes Task Forces to address specific issues. At the time of issuance of these revised Rules, the Committee has four subcommittees, namely the Rules of Evidence Subcommittee, the Investment Treaty Arbitration Subcommittee, the Conflicts of Interest Subcommittee, and the Recognition and Enforcement of Arbitral Awards Subcommittee; and two task forces: the Task Force on Attorney Ethics in Arbitration and the Task Force on Arbitration Agreements.

Foreword

These IBA Rules on the Taking of Evidence in International Arbitration ('IBA Rules of Evidence') are a revised version of the IBA Rules on the Taking of Evidence in International Commercial Arbitration, prepared by a Working Party of the Arbitration Committee whose members are listed on pages i and ii.

The IBA issued these Rules as a resource to parties and to arbitrators to provide an efficient, economical and fair process for the taking of evidence in international arbitration. The Rules provide mechanisms for the presentation of documents, witnesses of fact and expert witnesses, inspections, as well as the conduct of evidentiary hearings. The Rules are designed to be used in conjunction with, and adopted together with, institutional, ad hoc or other rules or procedures governing international arbitrations. The IBA Rules of Evidence reflect procedures in use in many different legal systems, and they may be particularly useful when the parties come from different legal cultures.

Since their issuance in 1999, the IBA Rules on the Taking of Evidence in International Commercial Arbitration have gained wide acceptance within the international arbitral community. In 2008, a review process was initiated at the instance of Sally Harpole and Pierre Bienvenu, the then Co-Chairs of the Arbitration Committee. The revised version of the IBA Rules of Evidence was developed by the members of the IBA Rules of Evidence Review Subcommittee, assisted by members of the 1999 Working Party. These revised Rules replace the IBA Rules on the Taking of Evidence in International Commercial Arbitration, which themselves replaced the IBA Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration, issued in 1983.

If parties wish to adopt the IBA Rules of Evidence in their arbitration clause, it is recommended that they add the following language to the clause, selecting one of the alternatives therein provided:

'[In addition to the institutional, ad hoc or other rules chosen by the parties,] [t]he parties agree that the arbitration shall be conducted according to the IBA Rules of Evidence as current on the date of [this agreement/the commencement of the arbitration].'

In addition, parties and Arbitral Tribunals may adopt the IBA Rules of Evidence, in whole or in part, at the commencement of the arbitration, or at any time thereafter. They may also vary them or use them as guidelines in developing their own procedures.

The IBA Rules of Evidence were adopted by resolution of the IBA Council on 29 May 2010. The IBA Rules of Evidence are available in English, and translations in other languages are planned. Copies of the IBA Rules of Evidence may be ordered from the IBA, and the Rules are available to download at **http://tinyurl.com/iba-Arbitration-Guidelines.**

Guido S Tawil
Judith Gill, QC
Co-Chairs, Arbitration Committee
29 May 2010

The Rules

Preamble

1. These IBA Rules on the Taking of Evidence in International Arbitration are intended to provide an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those between Parties from different legal traditions. They are designed to supplement the legal provisions and the institutional, ad hoc or other rules that apply to the conduct of the arbitration.
2. Parties and Arbitral Tribunals may adopt the IBA Rules of Evidence, in whole or in part, to govern arbitration proceedings, or they may vary them or use them as guidelines in developing their own procedures. The Rules are not intended to limit the flexibility that is inherent in, and an advantage of, international arbitration, and Parties and Arbitral Tribunals are free to adapt them to the particular circumstances of each arbitration.
3. The taking of evidence shall be conducted on the principles that each Party shall act in good faith and be entitled to know, reasonably in advance of any Evidentiary Hearing or any fact or merits determination, the evidence on which the other Parties rely.

Definitions

In the IBA Rules of Evidence:

'Arbitral Tribunal' means a sole arbitrator or a panel of arbitrators;

'Claimant' means the Party or Parties who commenced the arbitration and any Party who, through joinder or otherwise, becomes aligned with such Party or Parties;

'Document' means a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means;

'Evidentiary Hearing' means any hearing, whether or not held on consecutive days, at which the Arbitral Tribunal, whether in person, by teleconference, videoconference or other method, receives oral or other evidence;

'Expert Report' means a written statement by a Tribunal-Appointed Expert or a Party-Appointed Expert;

'General Rules' mean the institutional, ad hoc or other rules that apply to the conduct of the arbitration;

'IBA Rules of Evidence' or *'Rules'* means these IBA Rules on the Taking of Evidence in International Arbitration, as they may be revised or amended from time to time;

'Party' means a party to the arbitration;

'Party-Appointed Expert' means a person or organisation appointed by a Party in order to report on specific issues determined by the Party;

'Request to Produce' means a written request by a Party that another Party produce Documents;

'Respondent' means the Party or Parties against whom the Claimant made its claim, and any Party who, through joinder or otherwise, becomes aligned with such Party or Parties, and includes a Respondent making a counter-claim;

'Tribunal-Appointed Expert' means a person or organisation appointed by the Arbitral Tribunal in order to report to it on specific issues determined by the Arbitral Tribunal; and

'Witness Statement' means a written statement of testimony by a witness of fact.

Article 1 Scope of Application

1. Whenever the Parties have agreed or the Arbitral Tribunal has determined to apply the IBA Rules of Evidence, the Rules shall govern the taking of evidence, except to the extent that any specific provision of them may be found to be in conflict with any mandatory provision of law determined to be applicable to the case by the Parties or by the Arbitral Tribunal.
2. Where the Parties have agreed to apply the IBA Rules of Evidence, they shall be deemed to have agreed, in the absence of a contrary indication, to the version as current on the date of such agreement.
3. In case of conflict between any provisions of the IBA Rules of Evidence and the General Rules, the Arbitral Tribunal shall apply the IBA Rules of

Evidence in the manner that it determines best in order to accomplish the purposes of both the General Rules and the IBA Rules of Evidence, unless the Parties agree to the contrary.

4. In the event of any dispute regarding the meaning of the IBA Rules of Evidence, the Arbitral Tribunal shall interpret them according to their purpose and in the manner most appropriate for the particular arbitration.
5. Insofar as the IBA Rules of Evidence and the General Rules are silent on any matter concerning the taking of evidence and the Parties have not agreed otherwise, the Arbitral Tribunal shall conduct the taking of evidence as it deems appropriate, in accordance with the general principles of the IBA Rules of Evidence.

Article 2 Consultation on Evidentiary Issues

1. The Arbitral Tribunal shall consult the Parties at the earliest appropriate time in the proceedings and invite them to consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence.
2. The consultation on evidentiary issues may address the scope, timing and manner of the taking of evidence, including:
   (a) the preparation and submission of Witness Statements and Expert Reports;
   (b) the taking of oral testimony at any Evidentiary Hearing;
   (c) the requirements, procedure and format applicable to the production of Documents;
   (d) the level of confidentiality protection to be afforded to evidence in the arbitration; and
   (e) the promotion of efficiency, economy and conservation of resources in connection with the taking of evidence.
3. The Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues:
   (a) that the Arbitral Tribunal may regard as relevant to the case and material to its outcome; and/or
   (b) for which a preliminary determination may be appropriate.

Article 3 Documents

1. Within the time ordered by the Arbitral Tribunal, each Party shall submit to the Arbitral Tribunal and to the other Parties all Documents available to it on which it relies, including public Documents and those in the public domain, except for any Documents that have already been submitted by another Party.
2. Within the time ordered by the Arbitral Tribunal, any Party may submit to the Arbitral Tribunal and to the other Parties a Request to Produce.
3. A Request to Produce shall contain:
   (a) *(i)* a description of each requested Document sufficient to identify it, or
   (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner;
   (b) a statement as to how the Documents requested are relevant to the case and material to its outcome; and
   (c) *(i)* a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents, and
   (ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party.
4. Within the time ordered by the Arbitral Tribunal, the Party to whom the Request to Produce is addressed shall produce to the other Parties and, if the Arbitral Tribunal so orders, to it, all the Documents requested in its possession, custody or control as to which it makes no objection.
5. If the Party to whom the Request to Produce is addressed has an objection to some or all of the

Documents requested, it shall state the objection in writing to the Arbitral Tribunal and the other Parties within the time ordered by the Arbitral Tribunal. The reasons for such objection shall be any of those set forth in Article 9.2 or a failure to satisfy any of the requirements of Article 3.3.

6. Upon receipt of any such objection, the Arbitral Tribunal may invite the relevant Parties to consult with each other with a view to resolving the objection.
7. Either Party may, within the time ordered by the Arbitral Tribunal, request the Arbitral Tribunal to rule on the objection. The Arbitral Tribunal shall then, in consultation with the Parties and in timely fashion, consider the Request to Produce and the objection. The Arbitral Tribunal may order the Party to whom such Request is addressed to produce any requested Document in its possession, custody or control as to which the Arbitral Tribunal determines that *(i)* the issues that the requesting Party wishes to prove are relevant to the case and material to its outcome; *(ii)* none of the reasons for objection set forth in Article 9.2 applies; and *(iii)* the requirements of Article 3.3 have been satisfied. Any such Document shall be produced to the other Parties and, if the Arbitral Tribunal so orders, to it.
8. In exceptional circumstances, if the propriety of an objection can be determined only by review of the Document, the Arbitral Tribunal may determine that it should not review the Document. In that event, the Arbitral Tribunal may, after consultation with the Parties, appoint an independent and impartial expert, bound to confidentiality, to review any such Document and to report on the objection. To the extent that the objection is upheld by the Arbitral Tribunal, the expert shall not disclose to the Arbitral Tribunal and to the other Parties the contents of the Document reviewed.
9. If a Party wishes to obtain the production of Documents from a person or organisation who is not a Party to the arbitration and from whom the Party cannot obtain the Documents on its own, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the requested Documents, or seek leave from the Arbitral Tribunal to take such

steps itself. The Party shall submit such request to the Arbitral Tribunal and to the other Parties in writing, and the request shall contain the particulars set forth in Article 3.3, as applicable. The Arbitral Tribunal shall decide on this request and shall take, authorize the requesting Party to take, or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate if, in its discretion, it determines that *(i)* the Documents would be relevant to the case and material to its outcome, *(ii)* the requirements of Article 3.3, as applicable, have been satisfied and *(iii)* none of the reasons for objection set forth in Article 9.2 applies.

10. At any time before the arbitration is concluded, the Arbitral Tribunal may *(i)* request any Party to produce Documents, *(ii)* request any Party to use its best efforts to take or *(iii)* itself take, any step that it considers appropriate to obtain Documents from any person or organisation. A Party to whom such a request for Documents is addressed may object to the request for any of the reasons set forth in Article 9.2. In such cases, Article 3.4 to Article 3.8 shall apply correspondingly.
11. Within the time ordered by the Arbitral Tribunal, the Parties may submit to the Arbitral Tribunal and to the other Parties any additional Documents on which they intend to rely or which they believe have become relevant to the case and material to its outcome as a consequence of the issues raised in Documents, Witness Statements or Expert Reports submitted or produced, or in other submissions of the Parties.
12. With respect to the form of submission or production of Documents:
    (a) copies of Documents shall conform to the originals and, at the request of the Arbitral Tribunal, any original shall be presented for inspection;
    (b) Documents that a Party maintains in electronic form shall be submitted or produced in the form most convenient or economical to it that is reasonably usable by the recipients, unless the Parties agree otherwise or, in the absence of such agreement, the Arbitral Tribunal decides otherwise;

(c) a Party is not obligated to produce multiple copies of Documents which are essentially identical unless the Arbitral Tribunal decides otherwise; and

(d) translations of Documents shall be submitted together with the originals and marked as translations with the original language identified.

13. Any Document submitted or produced by a Party or non-Party in the arbitration and not otherwise in the public domain shall be kept confidential by the Arbitral Tribunal and the other Parties, and shall be used only in connection with the arbitration. This requirement shall apply except and to the extent that disclosure may be required of a Party to fulfil a legal duty, protect or pursue a legal right, or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority. The Arbitral Tribunal may issue orders to set forth the terms of this confidentiality. This requirement shall be without prejudice to all other obligations of confidentiality in the arbitration.

14. If the arbitration is organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability or damages), the Arbitral Tribunal may, after consultation with the Parties, schedule the submission of Documents and Requests to Produce separately for each issue or phase.

Article 4 Witnesses of Fact

1. Within the time ordered by the Arbitral Tribunal, each Party shall identify the witnesses on whose testimony it intends to rely and the subject matter of that testimony.

2. Any person may present evidence as a witness, including a Party or a Party's officer, employee or other representative.

3. It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them.

4. The Arbitral Tribunal may order each Party to submit within a specified time to the Arbitral Tribunal and to the other Parties Witness Statements by each witness on whose testimony it intends to rely, except for

those witnesses whose testimony is sought pursuant to Articles 4.9 or 4.10. If Evidentiary Hearings are organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability or damages), the Arbitral Tribunal or the Parties by agreement may schedule the submission of Witness Statements separately for each issue or phase.

5. Each Witness Statement shall contain:
   (a) the full name and address of the witness, a statement regarding his or her present and past relationship (if any) with any of the Parties, and a description of his or her background, qualifications, training and experience, if such a description may be
   relevant to the dispute or to the contents of the statement;
   (b) a full and detailed description of the facts, and the source of the witness's information as to those facts, sufficient to serve as that witness's evidence in the matter in dispute. Documents on which the witness relies that have not already been submitted shall be provided;
   (c) a statement as to the language in which the Witness Statement was originally prepared and the language in which the witness anticipates giving testimony at the Evidentiary Hearing;
   (d) an affirmation of the truth of the Witness Statement; and
   (e) the signature of the witness and its date and place.
6. If Witness Statements are submitted, any Party may, within the time ordered by the Arbitral Tribunal, submit to the Arbitral Tribunal and to the other Parties revised or additional Witness Statements, including statements from persons not previously named as witnesses, so long as any such revisions or additions respond only to matters contained in another Party's Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration.
7. If a witness whose appearance has been requested pursuant to Article 8.1 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.

8. If the appearance of a witness has not been requested pursuant to Article 8.1, none of the other Parties shall be deemed to have agreed to the correctness of the content of the Witness Statement.
9. If a Party wishes to present evidence from a person who will not appear voluntarily at its request, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the testimony of that person, or seek leave from the Arbitral Tribunal to take such steps itself. In the case of a request to the Arbitral Tribunal, the Party shall identify the intended witness, shall describe the subjects on which the witness's testimony is sought and shall state why such subjects are relevant to the case and material to its outcome. The Arbitral Tribunal shall decide on this request and shall take, authorize the requesting Party to take or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate if, in its discretion, it determines that the testimony of that witness would be relevant to the case and material to its outcome.
10. At any time before the arbitration is concluded, the Arbitral Tribunal may order any Party to provide for, or to use its best efforts to provide for, the appearance for testimony at an Evidentiary Hearing of any person, including one whose testimony has not yet been offered. A Party to whom such a request is addressed may object for any of the reasons set forth in Article 9.2.

Article 5 Party-Appointed Experts

1. A Party may rely on a Party-Appointed Expert as a means of evidence on specific issues. Within the time ordered by the Arbitral Tribunal, (i) each Party shall identify any Party-Appointed Expert on whose testimony it intends to rely and the subject-matter of such testimony; and (ii) the Party-Appointed Expert shall submit an Expert Report.
2. The Expert Report shall contain:
   (a) the full name and address of the Party-Appointed Expert, a statement regarding his or her present and past relationship (if any) with

any of the Parties, their legal advisors and the Arbitral Tribunal, and a description of his or her background, qualifications, training and experience;

(b) a description of the instructions pursuant to which he or she is providing his or her opinions and conclusions;

(c) a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal;

(d) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;

(e) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions. Documents on which the Party-Appointed Expert relies that have not already been submitted shall be provided;

(f) if the Expert Report has been translated, a statement as to the language in which it was originally prepared, and the language in which the Party-Appointed Expert anticipates giving testimony at the Evidentiary Hearing;

(g) an affirmation of his or her genuine belief in the opinions expressed in the Expert Report;

(h) the signature of the Party-Appointed Expert and its date and place; and

(i) if the Expert Report has been signed by more than one person, an attribution of the entirety or specific parts of the Expert Report to each author.

3. If Expert Reports are submitted, any Party may, within the time ordered by the Arbitral Tribunal, submit to the Arbitral Tribunal and to the other Parties revised or additional Expert Reports, including reports or statements from persons not previously identified as Party-Appointed Experts, so long as any such revisions or additions respond only to matters contained in another Party's Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration.

4. The Arbitral Tribunal in its discretion may order that any Party-Appointed Experts who will submit or who have submitted Expert Reports on the same or

related issues meet and confer on such issues. At such meeting, the Party-Appointed Experts shall attempt to reach agreement on the issues within the scope of their Expert Reports, and they shall record in writing any such issues on which they reach agreement, any remaining areas of disagreement and the reasons therefore.

5. If a Party-Appointed Expert whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Expert Report by that Party-Appointed Expert related to that Evidentiary Hearing unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise.
6. If the appearance of a Party-Appointed Expert has not been requested pursuant to Article 8.1, none of the other Parties shall be deemed to have agreed to the correctness of the content of the Expert Report.

Article 6 Tribunal-Appointed Experts

1. The Arbitral Tribunal, after consulting with the Parties, may appoint one or more independent Tribunal-Appointed Experts to report to it on specific issues designated by the Arbitral Tribunal. The Arbitral Tribunal shall establish the terms of reference for any Tribunal-Appointed Expert Report after consulting with the Parties. A copy of the final terms of reference shall be sent by the Arbitral Tribunal to the Parties.
2. The Tribunal-Appointed Expert shall, before accepting appointment, submit to the Arbitral Tribunal and to the Parties a description of his or her qualifications and a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal. Within the time ordered by the Arbitral Tribunal, the Parties shall inform the Arbitral Tribunal whether they have any objections as to the Tribunal-Appointed Expert's qualifications and independence. The Arbitral Tribunal shall decide promptly whether to accept any such objection. After the appointment of a Tribunal-Appointed Expert, a Party may object to the expert's qualifications or independence only if the objection is for reasons of which the Party becomes aware

after the appointment has been made. The Arbitral Tribunal shall decide promptly what, if any, action to take.

3. Subject to the provisions of Article 9.2, the Tribunal-Appointed Expert may request a Party to provide any information or to provide access to any Documents, goods, samples, property, machinery, systems, processes or site for inspection, to the extent relevant to the case and material to its outcome. The authority of a Tribunal-Appointed Expert to request such information or access shall be the same as the authority of the Arbitral Tribunal. The Parties and their representatives shall have the right to receive any such information and to attend any such inspection. Any disagreement between a Tribunal-Appointed Expert and a Party as to the relevance, materiality or appropriateness of such a request shall be decided by the Arbitral Tribunal, in the manner provided in Articles 3.5 through 3.8. The Tribunal-Appointed Expert shall record in the Expert Report any non-compliance by a Party with an appropriate request or decision by the Arbitral Tribunal and shall describe its effects on the determination of the specific issue.
4. The Tribunal-Appointed Expert shall report in writing to the Arbitral Tribunal in an Expert Report. The Expert Report shall contain:
   (a) the full name and address of the Tribunal-Appointed Expert, and a description of his or her background, qualifications, training and experience;
   (b) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;
   (c) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions. Documents on which the Tribunal-Appointed Expert relies that have not already been submitted shall be provided;
   (d) if the Expert Report has been translated, a statement as to the language in which it was originally prepared, and the language in which the Tribunal-Appointed Expert anticipates giving testimony at the Evidentiary Hearing;

(e) an affirmation of his or her genuine belief in the opinions expressed in the Expert Report;
(f) the signature of the Tribunal-Appointed Expert and its date and place; and
(g) if the Expert Report has been signed by more than one person, an attribution of the entirety or specific parts of the Expert Report to each author.

5. The Arbitral Tribunal shall send a copy of such Expert Report to the Parties. The Parties may examine any information, Documents, goods, samples, property, machinery, systems, processes or site for inspection that the Tribunal-Appointed Expert has examined and any correspondence between the Arbitral Tribunal and the Tribunal-Appointed Expert. Within the time ordered by the Arbitral Tribunal, any Party shall have the opportunity to respond to the Expert Report in a submission by the Party or through a Witness Statement or an Expert Report by a Party-Appointed Expert. The Arbitral Tribunal shall send the submission, Witness Statement or Expert Report to the Tribunal-Appointed Expert and to the other Parties.
6. At the request of a Party or of the Arbitral Tribunal, the Tribunal-Appointed Expert shall be present at an Evidentiary Hearing. The Arbitral Tribunal may question the Tribunal-Appointed Expert, and he or she may be questioned by the Parties or by any Party-Appointed Expert on issues raised in his or her Expert Report, the Parties' submissions or Witness Statement or the Expert Reports made by the Party-Appointed Experts pursuant to Article 6.5.
7. Any Expert Report made by a Tribunal-Appointed Expert and its conclusions shall be assessed by the Arbitral Tribunal with due regard to all circumstances of the case.
8. The fees and expenses of a Tribunal-Appointed Expert, to be funded in a manner determined by the Arbitral Tribunal, shall form part of the costs of the arbitration.

Article 7 Inspection

Subject to the provisions of Article 9.2, the Arbitral Tribunal may, at the request of a Party or on its own motion, inspect or require the inspection by a Tribunal-

Appointed Expert or a Party-Appointed Expert of any site, property, machinery or any other goods, samples, systems, processes or Documents, as it deems appropriate. The Arbitral Tribunal shall, in consultation with the Parties, determine the timing and arrangement for the inspection. The Parties and their representatives shall have the right to attend any such inspection.

Article 8 Evidentiary Hearing

1. Within the time ordered by the Arbitral Tribunal, each Party shall inform the Arbitral Tribunal and the other Parties of the witnesses whose appearance it requests. Each witness (which term includes, for the purposes of this Article, witnesses of fact and any experts) shall, subject to Article 8.2, appear for testimony at the Evidentiary Hearing if such person's appearance has been requested by any Party or by the Arbitral Tribunal. Each witness shall appear in person unless the Arbitral Tribunal allows the use of videoconference or similar technology with respect to a particular witness.
2. The Arbitral Tribunal shall at all times have complete control over the Evidentiary Hearing. The Arbitral Tribunal may limit or exclude any question to, answer by or appearance of a witness, if it considers such question, answer or appearance to be irrelevant, immaterial, unreasonably burdensome, duplicative or otherwise covered by a reason for objection set forth in Article 9.2. Questions to a witness during direct and re-direct testimony may not be unreasonably leading.
3. With respect to oral testimony at an Evidentiary Hearing:
   (a) the Claimant shall ordinarily first present the testimony of its witnesses, followed by the Respondent presenting the testimony of its witnesses;
   (b) following direct testimony, any other Party may question such witness, in an order to be determined by the Arbitral Tribunal. The Party who initially presented the witness shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties' questioning;
   (c) thereafter, the Claimant shall ordinarily first

present the testimony of its Party-Appointed Experts, followed by the Respondent presenting the testimony of its Party-Appointed Experts. The Party who initially presented the Party-Appointed Expert shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties' questioning;

(d) the Arbitral Tribunal may question a Tribunal-Appointed Expert, and he or she may be questioned by the Parties or by any Party-Appointed Expert, on issues raised in the Tribunal-Appointed Expert Report, in the Parties' submissions or in the Expert Reports made by the Party-Appointed Experts;

(e) if the arbitration is organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability and damages), the Parties may agree or the Arbitral Tribunal may order the scheduling of testimony separately for each issue or phase;

(f) the Arbitral Tribunal, upon request of a Party or on its own motion, may vary this order of proceeding, including the arrangement of testimony by particular issues or in such a manner that witnesses be questioned at the same time and in confrontation with each other (witness conferencing);

(g) the Arbitral Tribunal may ask questions to a witness at any time.

4. A witness of fact providing testimony shall first affirm, in a manner determined appropriate by the Arbitral Tribunal, that he or she commits to tell the truth or, in the case of an expert witness, his or her genuine belief in the opinions to be expressed at the Evidentiary Hearing. If the witness has submitted a Witness Statement or an Expert Report, the witness shall confirm it. The Parties may agree or the Arbitral Tribunal may order that the Witness Statement or Expert Report shall serve as that witness's direct testimony.

5. Subject to the provisions of Article 9.2, the Arbitral Tribunal may request any person to give oral or written evidence on any issue that the Arbitral Tribunal considers to be relevant to the case and material to its outcome. Any witness called and

questioned by the Arbitral Tribunal may also be questioned by the Parties.

Article 9 Admissibility and Assessment of Evidence

1. The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.
2. The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons:
   (a) lack of sufficient relevance to the case or materiality to its outcome;
   (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;
   (c) unreasonable burden to produce the requested evidence;
   (d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred;
   (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;
   (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or
   (g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.
3. In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account:
   (a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice;
   (b) any need to protect the confidentiality of a Document created or statement or oral

communication made in connection with and for the purpose of settlement negotiations;

(c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen;

(d) any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise; and

(e) the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules.

4. The Arbitral Tribunal may, where appropriate, make necessary arrangements to permit evidence to be presented or considered subject to suitable confidentiality protection.

5. If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.

6. If a Party fails without satisfactory explanation to make available any other relevant evidence, including testimony, sought by one Party to which the Party to whom the request was addressed has not objected in due time or fails to make available any evidence, including testimony, ordered by the Arbitral Tribunal to be produced, the Arbitral Tribunal may infer that such evidence would be adverse to the interests of that Party.

7. If the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence.

Part II: The Process of an Arbitration, Chapter 12: General Witness and Expert Evidence

Key words

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12.1. Introduction

The previous chapter considered the value of contemporaneous documents to legal fact finding. Section 10.2 above looked at the supposed tendencies of different legal families to prefer either contemporaneous documents or oral testimony. As has been suggested throughout, there are advantages and disadvantages to each. The advantage of oral evidence is that questions can be asked and themes explored at the request of opposing counsel or the adjudicator. Disadvantages include the expense, given that all parties sit and listen to examination and cross-examination; individuals who are better educated and more eloquent might have their testimony preferred even though they are not more truthful; different people have different ability to withstand the tricks of cross-examination techniques; and the evidence may be less probative given that it is presented after the dispute is known and at times by those with a vested interest in the proceeding's outcome. Despite these concerns, in many instances, oral evidence will be the key to resolving contentious factual questions. In other cases oral evidence will be needed to explain the background, nature and even interpretation of key documents. As a result, most arbitrations will typically involve oral evidence.

Lévy and Reed point to various benefits oral testimony may provide over and above written statements. The authors note that this will obviously depend on the circumstances. The questions to be considered in terms of utility are the extent of the credibility of each witness; whether witnesses may clarify and elaborate on facts in the statements or other relevant facts; whether they will assist in authenticating or interpreting documents, normally those in the record but at times other documents; and whether examination of witnesses will help the counsel identify page "885" the key issues for arbitrators, which includes helping them properly direct their attention to the important matters.(1)

There are two broad categories of oral evidence, general witnesses and experts. In the common law tradition, experts are party appointed and are simply a specialised form of witness. In the civilian tradition, experts are tribunal appointed and are not witnesses in the normal sense. A number of policy and procedural questions arise in relation to each category of testimony. The first is who may give such testimony. The second is the use of written statements and expert reports as well as, or in lieu of oral evidence. A related question is how much assistance is it proper for counsel to give in the preparation of statements? Where oral evidence is concerned, will evidence in chief be given or will a written statement stand in its place? Is there entitlement to cross-examination and by whom? Will the tribunal ask questions or leave it for counsel? What assistance may counsel give in preparing witnesses for questioning? In what language is testimony presented and what role will there be for interpreters? Will there be a right of reexamination and yet another opportunity for a second round of cross-examination? What evidentiary record is to be made of oral testimony? Once again, the answers to these and other questions depend upon an amalgam of party choice, mandatory norms, arbitral statutes and rules and policy factors that should guide the application of discretions held by the tribunal.

12.2. Arbitral Statutes and Rules and the Right to be Heard

Superimposed on any specific statutory provisions or arbitral rules is the mandatory right to have an adequate opportunity to present the case, which includes the right to be heard. It does not seem that the right to be heard on its own includes an implied right to have oral hearings and examination and cross-examination of witnesses, absent agreement to the contrary. Nevertheless, the emerging norm expressed in arbitral statutes and rules is to expressly allow for oral hearings when one party so requests and to allow witnesses to present orally as well as in writing and to be questioned by counsel

and the tribunal.[2] Typically they will also indicate that each witness who has submitted a witness statement shall appear for testimony if the opposing party or the tribunal so requests.[3] If a witness refuses to submit for testimony without the agreement of the parties, the tribunal is generally directed to disregard the statement, unless due to exceptional page "886" circumstances, the tribunal determines otherwise.[4] Some national laws allow arbitral tribunals to designate one member to examine witnesses.[5] This is not the preferred view in international arbitration.[6] In most instances, such a delegation would run the risk of contradicting the tribunal's mandate.

The next question is how a tribunal should approach the exercise of a discretion where there is no unilateral right of a party to call for a hearing and the parties are in disagreement. National systems vary on the issue, but the better view is that there is no automatic right.[7] The English Court of Appeal has rejected an argument that a refusal to hear oral evidence was contrary to natural justice.[8] The Swiss Federal Supreme Court considered that the right to be heard does not afford a guaranteed right to have witnesses attend and be questioned.[9] A contrary view might seek to rely on the jurisprudence applying Article 6 of the European Convention on Human Rights where relevant.[10]

If the parties agree on a documents-only arbitration, then the tribunal will normally accept this unless the facts in dispute cannot be adequately resolved in this manner.[11] Even party agreement may not always resolve the issue, as parties cannot generally waive mandatory due process rights. A number of factual permutations can be envisaged where discretions and potential challenges must both be considered. Least likely is an agreement by the parties to have oral hearings where the tribunal believes that a documents-only arbitration would be far more efficient. In such circumstances, most arbitrators would allow a hearing but might severely limit its length. The more likely scenario where a tribunal's discretionary determination may be challenged is where parties are not in agreement as to whether there should be an oral hearing. If the tribunal thinks that an oral hearing is appropriate, there is little difficulty. The tribunal is following its mandate to come to the most appropriate conclusion which it has determined requires oral testimony. If the tribunal decides against a hearing, a challenge may be more likely but should not succeed in most instances.

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12.3. Discretionary Control over Witness Testimony

The previous section looked at the general right of parties to have witnesses give evidence. This section looks at the discretionary control over witness testimony by the tribunal where witnesses are to be involved. The discussion covers both general witnesses and experts as witnesses. A tribunal has a duty to promote fairness and efficiency and cannot allow parties to have an open-ended right to have as many witnesses as possible over an extended hearing period. However, a tribunal will need to be careful to ensure that legitimate due process challenges are not encouraged. These might be made on the grounds of failure to allow an adequate presentation of case and/or unequal treatment. Judgment will be needed on a case-by-case basis. The judgment needs to be made in the context of some uncertainty. At the early procedural stages where procedural directions are made about the length of hearings and number of witnesses, the tribunal may not have a full picture as to the key issues and certainly cannot have a firm view about the preponderance of non-witness evidence.

12.3.1. Choice of Witnesses

The first principle is that the parties can designate the witnesses that they wish to rely upon. It would not be the norm for a tribunal to allow a preliminary debate about whether a particular witness may be called although this is entirely possible under proactive arbitration as a means to exclude superfluous and irrelevant witnesses. Böckstiegel suggests, however, that every witness and expert proposed should be invited to be heard unless the tribunal is sure that the testimony is irrelevant to the outcome of the case.[12]

While parties generally have the right to select their own witnesses, in exceptional circumstances a tribunal might require a particular witness that was not proposed to be called.[13] While few arbitral statutes expressly provide a tribunal with a power to summon witnesses,[14] the better view is that general discretionary powers are broad enough to justify this.[15] Furthermore, the intent behind

the reference to 'other evidence' in the initial version of Article 24.3 of the UNCITRAL Rules was intended to include witness testimony.[16] The powers would page "888" typically be limited to the parties, their officers and employees and perhaps other persons under their clear control. Where such persons are concerned, a tribunal might warn that failure to present a particular witness may lead to adverse inferences. While a tribunal has a power to call for the attendance of a particular witness, it may choose not to do so, relying instead on the application of burden and standards of proof to the material presented. It has been suggested that if a tribunal does direct that a witness be heard and the witness does not appear, this might cause problems as to the way the tribunal will then proceed,[17] although there seems no reason why this should be different to any other non-attending key person.

12.3.2. Timing and Number of Witnesses

A tribunal might also separate oral hearings into different stages. It may hear a first round of witnesses and then determine what further evidence is needed in later rounds. This may be particularly important when a gateway factual finding on one issue will significantly impact upon the utility of follow up evidence. In some cases a tribunal might invite the parties to consider presenting further evidence in support of areas of uncertainty.

It is also perfectly acceptable for a tribunal to impose reasonable limits if an excessive number of witnesses are proposed. Yet even then it will need to decide whether it wishes to limit the number of witnesses or the total time frame for oral testimony or both and if so, to what degree. Obviously the tribunal should not make procedural rulings that impact upon the ultimate conclusion as to which party has the preponderance of evidence. Proper preparation and caution should be the norm. In such circumstances it may be desirable for the tribunal to indicate its belief as to the key issues. For example, the tribunal can indicate that it wishes to know about a certain matter and may ask the parties whether one witness could establish the relevant facts. If so, the tribunal can let the parties choose who would be the best witness. If the issue instead is the weight of opinion, there is a need to determine how many witnesses would be necessary to attest to a widespread belief. A common view among experts can still be shown by a select number of witnesses supported by an appropriate search of scholarly literature. Furthermore, if a written witness statement suggests to the tribunal that the witness would be irrelevant to the outcome, a question might be raised as to the reason for the witness being called.

There are also policy challenges if there are no limits on number but instead, overall time limits imposed for efficiency reasons. One influential approach is chess-clock arbitration, giving the parties a total amount of time to use as they see fit. This is discussed further in section 9.6. Such approaches raise unique page "889" challenges where witness testimony is concerned. First, a decision needs to be made by the tribunal as to whether time taken in cross-examination counts against the party for whom the cross-examination is being conducted or counts against the party who called the witness being cross-examined. There would be a problem in the latter event as counsel could cross-examine at length to take away available time from the opposing party. It also goes against the substantive policy basis of a time limit for presenting one's case if factors beyond counsel's control are used against it. Hence, the norm is to count cross-examination time against the party conducting the cross-examination.

There are still other difficulties with cross-examination under chess-clock arbitration even on this approach. Counsel is forced to choose between time taken to primarily present a case and time taken to challenge the opponent's case. Time allocated to oral evidence in chief with a view to settling the witness, giving an indication of veracity and keeping a busy tribunal alert to the issues, also comes at the expense of other activities. Problems also arise because the opposing party's witness has the ability to affect the allocated time. Expansive answers that take up time can simply frustrate cross-examining counsel. A proactive tribunal will have to consider whether to intervene and demand more succinct answers. In some cases the allotted time might run out with an earlier witness and an application might then be made to extend the time of the hearing to allow other witnesses to be called. There will then be challenges facing a tribunal asked to revise its chess-clock demands in view of the behaviour of earlier witnesses. For this reason, a tribunal should confirm at the outset that chess-clock times may need to be altered as the need arises.

It has also been observed that the method of payment of arbitrators can impact upon the amount of time made available for oral testimony. An arbitrator on a lump sum or subject to a more modest

ad valorem institutional scale might be disinclined to a lengthy oral hearing,[18] although this should not be a determining factor.[19]

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Finally, should a witness be permitted to give evidence if they have not submitted a written statement within the time period as required? The general presumption would be no, but no blanket rule can be suggested in terms of the exercise of a tribunal's discretion even where rules raise a presumption of exclusion. The tribunal would need to look at the circumstances as to why a written statement was not presented and what implications allowance would have for the due process rights of the other party.

These are just some examples. The overriding point is to ensure that efficiency-based decisions do not pre-empt due process rights and are taken at a stage when the tribunal has a sufficient grasp of the key issues. These matters should all be dealt with at a pre-hearing conference. Such a procedural discussion can be a useful way 'to win over parties' counsel as partners in a joint venture with the tribunal'.[20] Such a discussion ought to cover a range of issues, from contentious aspects such as cross-examination and time limits, to practicalities of availability and translation. Considering logistical issues as to witness presentation also helps to minimise the disruption to the witnesses themselves, where the tribunal can make it clear which witnesses must be on standby, depending on the time of conclusion of previous testimony.

12.3.3. Pre-hearing Protocols for Witness Evidence

Lévy and Reed recommend such a special procedural pre-hearing conference with counsel in appropriate cases, to be conducted shortly before the evidentiary hearing. They also suggest that efficiency would be maximised if the tribunal sent an advance list of questions to counsel. They provide an example draft as follows:

> Proposed draft: 'Notes on Organising Fact Testimony in Advance of Evidentiary Hearing in International Commercial Arbitration'.

A. IBA Rules.

   Do you agree with the basic principles in Art 8 of the IBA Rules (arbitrator control, normal order of witnesses and questions, affirmation, scope of tribunal questions)? If so, scope of conference can be abbreviated. (Note: This focuses counsel new to international arbitration on the IBA Rules.)

B. Why? Underlying purposes for fact witnesses. page "891"
   1. What is your perception as to the main purpose of fact testimony? To test the credibility of witness statements? Or to maximise fact finding? Or both?
   2. Would you welcome the tribunal indicating in advance what fact testimony it most wants to hear? If so, by witness or by issue? If not, why not?

C. Who? Details as to the witnesses.
   1. Subject to the time allowed (see below), what witnesses do you intend to present?
   2. Are there witness statements filed for all? Critical amendments to be made?
   3. Order of priority? Comfortable that they are not duplicative?
   4. Are there witnesses from the other side you require?
   5. Do you have witnesses you wish to call even if the other side indicates it does not want to cross-examine them?
   6. Does any witness require a formal order or subpoena?
   7. Do you anticipate bringing witnesses for possible rebuttal? If so, why do you anticipate a need for rebuttal?

D. When? Scheduling and order issues.
   1. In what order do you intend to present the witnesses? All of claimant's witnesses followed by all of respondent's? Or claimant-respondent by issue? Or a combination?
   2. Are all your witnesses available?
   3. Any special scheduling requests?
   4. Do you have an estimate, however rough, of how much time each witness should take?

E. How and what? Method and scope of testimony.

1. Do you agree that the tribunal, specifically the chairman, shall be the umpire for all questioning?
2. Any special requirements/expectations for affirmation/oaths? Any Islamic witnesses?
3. Witness preparation: What are your expectations/intentions in relation to preparing your witnesses to testify? How much time do you intend to spend in cross-examination exploring the scope of preparation? How much preparation is likely to lead you to lodge an objection?
4. Sequestration of witnesses? Both before and after testimony? Special rules for parties' representatives?
5. Progression: Do you anticipate each witness going through direct, cross, redirect? Re-cross?
6. Progression: Do you anticipate limiting opening direct to 30 minutes, to affirm the witness statement and 'relax' the witness?
7. Timing: Do you prefer the tribunal to use the 'chess clock' or 'guillotine' timing system?

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8. Timing: Does time spent on cross come out of the time 'account' of the sponsoring side or the crossing side? How about time spent on tribunal questions (asking and answering)?
9. Style: Do you anticipate using leading questions on direct as well as cross?
10. Style: On cross, do you intend to use a relatively aggressive US approach or a more conversational approach (subject to the chairman's control?
11. Scope: Do you intend to limit direct and cross-questions to subjects covered in the witness statement? To object if the other side goes beyond those subjects? What are your expectations as to the scope of the arbitrator's questions?
12. Privilege: What are your expectations as to privilege/confidentiality for witness testimony?
13. Objection: Do you anticipate making objections on relevance? Hearsay? Privilege/confidentiality? Repetitiveness? Delaying tactics?
14. Objections: How do you envisage making objections? How do you envision the tribunal should respond and rule on objections?
15. Use of documents: When you question a witness about a document, do you intend to refer him/her to an agreed hearing bundle or will you use loose copies (with copies for all)? Do you anticipate spending substantial witness time on documents, to focus the tribunal on the record?
16. Visual aids: Do you intend to use new charts/maps/etc with witnesses? If so, have copies available, as no surprises will be allowed.
17. Are you open to witness conferencing? If so, for which issues or witnesses?(21)

The authors suggest this only as a starting point, perhaps especially useful for new arbitrators and subject to modification by experienced arbitrators and on a case-by-case basis. Whether sent to counsel or not, the list is also an excellent and comprehensive guide to matters that should be thought about by a tribunal. The clear advantage of providing these questions prior to the hearing is that counsel is educated as to procedural matters that may arise, and is invited to think in advance of how to deal with certain situations in a more relaxed environment and time frame than the hearings and try and agree upon procedures. However, a list of potential areas of agreement can also be turned into potential areas of disagreement, which might encourage some of the problems to arise where they otherwise would not. Questions in advance can play into the hands of guerrilla tactics, with counsel taking particularly intransigent positions on a range of matters and threatening lack of due process rights if the tribunal makes determinations to the contrary. Counsel will tend to find it harder to take issue with oral directions of experienced arbitrators in the middle of a hearing than they might in their own time via documentary communications on such preliminary questions, although that page "893" would not be uniformly so. While such forms of abuse of sensible practical suggestions must always be a concern, these will often be issues facing a tribunal in any event. In the above example, a tribunal has to decide whether efficiency demands some indication of the issues of most concern to it. The time set down for the evidentiary hearing will rarely be long

enough to contemplate lengthy debates about procedural issues. Hence, it is always better to seek to resolve these in advance and the Lévy and Reed proposal is to be preferred.

A tribunal utilising such questions might also give consideration to the matters on which it is happy to defer to the parties' preferences and conversely, those matters that it believes must be presented in a particular way in the interests of fairness and efficiency. The latter are matters for early notice and not requests for party agreement. For example, if a tribunal is wholly against leading questions on direct examination, it would not wish a question list to lead to an agreement by counsel that this should be allowed. A more contentious example would be if a tribunal believes that expert conferencing is needed to help it understand and resolve technical issues. Some assert that this should only occur with consent of the parties in any event,[22] although this is not the view taken below.

12.3.4. Notification of Witnesses and Tribunal Directions

There needs to be advance notice as to which witnesses are intended to give evidence. Article 8.1 of the IBA Rules of Evidence 2010 requires notification within the time ordered of the witnesses whose appearance a party requests. This is important as a party may not wish to have every witness who has submitted a statement attend a hearing. Other rules seek to specify a time period before the hearing where such notice is required.[23] The UNCITRAL Notes also suggest that the notification indicates the language in which the witnesses intend to testify; the relationship with any of the parties; the qualification and experience of the witnesses and the means by which the witnesses learnt about the facts on which they intend to testify.

Hwang and Chin provide an example of a direction as to witness testimony commonly used by one of the authors:

(a) Parties are to prepare statements of evidence in chief *(in numbered paragraphs)* containing the *full evidence in chief of* all witnesses of fact upon whom they propose to rely. Photographs of the witnesses should be attached to their respective witness statements if possible. *All documents* intended to be referred to in the evidence in chief of the witnesses must be attached to the statements of evidence in chief and copies provided with the statements of evidence in chief if not previously provided to the Tribunal. Statements of evidence in chief are to be filed and exchanged by *page "894"* [insert date]. Parties are at liberty to file further statements of evidence in chief (either of the same witnesses or of new witnesses) *only in response to the original statements.* Responsive statements are to be exchanged by [insert date],

(b) All witnesses who are giving statements of evidence in chief are to attend for cross-examination, if requested by the other Party. If a witness so requested does not attend then, on good cause shown, the Tribunal may accept the statement and decide what weight, if any, to attach to it. Each Party is to give the other Party notice whether any of the other Party's witnesses are not required to appear for cross-examination not later than [insert date]. If any witness requested to attend cannot attend, notice of non-attendance must be given at the earliest possible opportunity to the other Party.[24]

More detailed guidance can be provided where experts are concerned in the form of a detailed brief. This is discussed in section 12.14.3 below.

12.4. General Witnesses

12.4.1. The Function of General Fact Witnesses

The following sections deal with general fact witnesses. Sections 12.10 to 12.14 below deal separately with the question of experts. Some issues discussed in this section, such as counsel's involvement in preparing witnesses, apply to both forms of oral testimony. Nevertheless, the bulk of the discussion in the following sections is focused on the treatment of general witnesses. The first issue is to properly understand the role of a general witness. A general witness is there to provide evidence of *facts.* It is not appropriate for a general witness to provide an opinion on a matter to be determined by the tribunal. As has been said by the International Court of Justice in the *Nicaragua* case:

> The Court has not treated as evidence any part of the testimony given which was not a statement of fact, but a mere expression of opinion as to the probability or

> otherwise of the existence of such facts, not directly known to the witness. Testimony of this kind, which may be highly subjective, cannot take the place of evidence. An opinion expressed by a witness is a mere personal and subjective evaluation a possibility, which has yet to be shown to correspond to a fact; it may, in conjunction with other material assist the court in determining a question of fact, that is not proof itself.[25]

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At times it will be appropriate for a fact witness to state an opinion if it shows why they acted in a particular way. For example, a buyer of faulty machinery might terminate a contract after the seller has attempted repairs on a number of occasions. The buyer might ultimately form an opinion that the seller's repair staff will never be able to adequately fix the machine in a reasonable period of time. If the opinion is reasonable, it supports a conclusion that the breach justifies termination under most applicable substantive laws.

The modern approach with witnesses of fact is to allow the opposing party to call for cross-examination of a witness if it is not prepared to allow the written statement to stand unchallenged. A witness who is called for cross-examination must be available. If they do not attend for cross-examination, the written statement will be disregarded unless there are exceptional circumstances that lead to the tribunal directing otherwise.[26] Excluding the evidence of witnesses who refuse to testify is considered common practice[27] unless the witness has a compelling excuse. Even then, if the statement is allowed, the lack of cross-examination may go to weight.

12.4.2. Parties as Witnesses

While some civilian systems do not allow parties to appear as witnesses,[28] no such limitations apply in international arbitration.[29] While arbitral rules are generally silent on this question, the norm in arbitration is to allow all parties to be witnesses. This is confirmed by the IBA Rules of Evidence 2010 where they apply.[30] It would page "896" be undesirable to exclude a party's testimony per se. They may be the only person in possession of information that is important and which in some cases will not even be contested by the opposing party. Preventing a party from being a witness would lead to other problems where the parties are in any event entitled to make submissions. It is better to allow the material and have it tested by the other side. A rule against parties as witnesses would also be difficult to apply in modern commercial environments with multiple inter-related companies where there could be gateway questions as to who in fact is a party.

While party testimony is habitually accepted, its credibility can of course be tested. Credibility can be affected by a range of factors. For example, at least one tribunal has noted the lack of perjury provisions which would be an inducement to veracity in certain domestic litigation.[31] At times the Iran-US Claims Tribunal distinguished between non-party witnesses and evidence provided by persons having an interest in the proceedings. The approach was to consider that witnesses gave ‘testimony’ while interested parties provided ‘information’.[32] The Tribunal treated the latter as ‘party representatives’ or ‘party witnesses’.[33] The information so provided was weighed against other evidence but parties needed to consider the ‘ingrained prejudice’ that some arbitrators might have against such evidence.[34] This approach was not applied uniformly.[35] If a person was treated as an interested party rather than a witness, this may also have impacted upon notice requirements as to witnesses who will testify, the application of an oath and ability to sit in on proceedings other than when providing comments to the tribunal.[36] Once again, this is not the better approach in modern international arbitration.

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12.5. Witness Statements

It is common for witnesses to provide written statements as to their testimony prior to the hearing, although this is not required as a matter of course and there are domestic trends against in some jurisdictions. They have become prevalent in international arbitration even though such statements are commonly disregarded as evidence in civil law systems.[37] The IBA Rules of Evidence 2010 allow a tribunal to call for witness statements to be submitted in writing prior to the hearing.[38] This is a matter for the tribunal's

discretion in consultation with the parties. There may also be revised or additional statements responding to matters in the other party's witness statements.(39)

There are a number of advantages and limitations to such statements. By providing witness statements at an early point in time, the other party can determine whether there is a need to cross-examine or whether it is possible to agree on certain facts. In this way the written statements, together with the written submissions themselves, will help narrow the points at issue that must ultimately be resolved by the tribunal. Written witness statements also allow the tribunal itself to determine whether it is necessary to hear witnesses orally. In some cases, oral testimony may not be necessary because the statements are irrelevant or unduly repetitious or the written statements from both sides show that certain facts are not in dispute. Even if the witness is to be heard orally, a well prepared tribunal can help direct the parties as to the more important matters or at least impose overall chess-clock constraints properly informed by the prior written statements. Having the written submissions in advance also helps opposing counsel properly prepare for cross-examination. It also allows the tribunal to prepare its own questions for the witnesses.(40) Written witness statements as well as written submissions also help ensure that preparation is undertaken early. Too often in domestic litigation in common law countries, attention is given to minimal pleadings with a last minute flurry in preparing the case. Such an approach will also commonly leave insufficient time for adequate settlement negotiations.

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12.5.1. Statements in Lieu of Oral Evidence

More contentious is the question whether witness statements should be accepted in lieu of oral testimony. There are likely to be significant cost savings with written witness statements as opposed to oral testimony. Preparing a statement in consultation with counsel involves only two people. Oral testimony in the presence of counsel and parties from both sides, a multi-member tribunal and transcribers, involves a significant number of people, together with travel and accommodation costs. Written witness statements can also be read at whatever speed is considered appropriate and in some circumstances at least, might lead to a better understanding of what is being said than oral testimony, although the availability of transcripts in the latter event will at times deal adequately with that issue. However, the concern as to whether a written statement was in fact drafted by a party, and the lack of an ability to assess the veracity and memory of the witness concerned, suggest that efficiency gains may come at the cost of reliability.(41) Written statements may also be unhelpful where a more nuanced dialogue with the tribunal will be necessary. Too often written statements make assertions that need to be explored orally in any event and hence can be of little probative value even if believed.

For this reason, and as noted above, most arbitral statutes and rules give each party a unilateral right to call for an oral hearing and an opportunity to challenge opposing witnesses. Each party should be entitled to call for oral presentation, for example if they want witnesses to comment on other testimony(42) or if witness conferencing is called for. Because of this entitlement, Lévy sees a witness statement as an offer to have a witness appear orally unless the other party or the tribunal waives this.(43) The tribunal might also want to hear the witnesses give oral evidence to determine veracity even if the parties do not call for this.(44) As noted, some rules also expressly indicate that if the witness is called for but does not give oral evidence, the statement can be disregarded as evidence.

Where the parties agree that a witness need not appear, this is not taken to be an admission of the correctness of the contents of the statement.(45) If that was the presumption, parties would simply call for oral evidence in all cases, undermining the efficiency value of written submissions. The witness statement could be page "899" challenged on the basis that it is dealing with opinion not fact, that it has insufficient particulars to meet the party's burden of proof, that it is irrelevant, that it has internal inconsistencies or that it is contradicted by other more probative evidence.(46) Nevertheless, counsel need to understand that such evidence, if material, needs to be refuted or outweighed one way or another, so a decision not to test it at a hearing needs to be based on a sensible case strategy. It should also be understood that the IBA Rules only express the position where both parties agree that the witness need not be called. In other circumstances, choosing not to call and challenge an opposing witness will inevitably have implications as to the weight of that evidence.(47) In ICC Case No. 9333,(48) a witness

became ill and unavailable for oral examination. The Tribunal collected questions from the other party and its own and sent a questionnaire to the witness and allowed a second witness statement.

12.5.2. Preparation of Witness Statements

Typically, general witness statements are drafted by counsel. If statements were only drafted by the witnesses themselves, they would often not be written with sufficient focus, order and depth to assist the tribunal with its assessment. Problems with witnesses drafting their own statements include conflicting language and style between different statements when drafted by inexperienced persons and the difficulty of having the witness understand and address each of the key issues. Laypersons are also less likely to understand the difference between attesting to facts on the one hand and rendering opinions or making submissions on the other. While assistance from counsel is thus understandable, the value of the statement will be significantly undermined if the tribunal has no confidence that it is actually the witness's testimony. At the extreme, if there is too much involvement of counsel the statement may stray too far from the witness' exact belief. That should not be the case where counsel is concerned to maintain ethical standards and only assist the witness in accurately and eloquently setting out their true testimony. This may not always be the case.(49) There are also no uniform ethical standards to apply to the page "900" behaviour of counsel from a myriad of countries when involved in international arbitration.(50)

12.5.3. The Ambit of Assistance of Counsel

An important ethical question is whether counsel is entitled to ask the witness to consider strengthening the language in a statement in support of the case strategy. Once again there is a difference between inviting a witness to consider whether he or she is able to assert a particular proposition, which ought to be acceptable and conversely, urging a witness to use stronger language than they were naturally disposed to use. This is discussed further in the context of witness preparation generally in the following section. It is often difficult to state a principle which clearly articulates the dividing line between acceptable and non-acceptable behaviour, although extreme versions of the latter will usually be readily characterised as such.

Another reason why counsel should ensure that a witness statement reflects the witness's own views and even modes of expression is that too much disparity between the written statement and oral testimony can undermine the persuasive value of the witness if the tribunal forms the view that the witness must have been happy to sign anything presented by counsel. Legalistic phrases in a statement from a lay person can raise doubt as to the true author of the statement.(51) Another problem with not using the witness's own words is that this can typically create uncertainty and embarrassment during cross-examination when opposing counsel confronts the witness with a phrase from the written statement that the witness may not understand or recollect.(52) A valuable recommendation is to ask the witness to prepare the first draft.(53) That is desirable although there may then be ethical issues if counsel wishes the witness to present things quite differently following the draft. There may also be privilege issues arising if there is a document production request as to the drafts.(54)

12.5.4. Contents of Statements

It is important to ensure that a witness as to fact limits the statement to facts alone and does not delve into submissions, which can too easily occur when drafted by page "901" inexperienced or overzealous counsel. The written witness statement should not be too long, should not be repetitive and should not replicate pleadings. The witness should not speculate and should identify the basis of knowledge.(55) If a witness statement is in fact mere opinion or pleading, it may be appropriate for the Tribunal to note this at the earliest opportunity.(56)

A comprehensive witness statement that also deals with the matters likely to be subject to cross-examination can help with the assessment of veracity. It can also prevent the feeling that the cross-examination has exposed a hidden position. It can even undermine the impact of the cross-examination itself. However, it should not always need to raise matters that the cross-examiner might be likely to overlook. Judgment must of course be exercised.

If a witness statement is not in the person's natural language, then the counsel will obviously help in ensuring that it is appropriately expressed. On the one hand, such assistance aids the tribunal in understanding the witness's actual evidence when oral presentation through an interpreter can sometimes be difficult to follow. Such oral testimony is also very dependent on the skills of the interpreter. On the other hand, a wish to alter the witness' natural expression mandates greater counsel involvement and raises questions as to the extent to which it is truly the witness's testimony. There will also be a difference between drafting a statement in the natural language and having it translated and conversely, giving instructions for direct articulation in the language of arbitration. Whichever approach is chosen, the ideal is to present the statement in a way which will help the tribunal but still keep the essential flavour of the witness' articulation in a way that will harmonise with the oral testimony.

There is no general form requirement for witness statements and no requirement that statements be presented on oath by way of affidavit, although this is utilised in some legal systems. It is more common that witness statements are merely signed by the witness. Lévy[57] suggests that a witness statement should:

1. include personal information
2. perhaps include a photograph
3. state that the witness knows the use to which the statement is to be put
4. contain an affirmation and provide knowledge of the consequences of a misrepresentation.

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The suggestion as to a photograph is that it would help busy arbitrators to recollect their impressions as to the veracity and quality of the testimony when deliberations only occur quite some time after the hearings. For similar reasons, it may even be desirable to video testimony in large cases where the expense would not be inappropriate.[58]

A tribunal might direct that a witness statement should contain an indication of the nature and extent of any assistance provided in preparation.[59] The IBA Rules of Evidence 2010 require the witness statement to contain, in addition to the above, a statement regarding present or past relationship if any with any of the parties; background qualification, training and experience if such a description may be relevant to the dispute or the contents of the statement; and a full and detailed description of the facts and the source of the witness' information as to those facts sufficient to serve as that witness' evidence in the matter in dispute. There is also to be a statement as to the language in which the statement was originally prepared and the language in which the witness anticipates giving testimony. Finally, the witness is to sign with a note as to the date and place of signature.[60]

A decision needs to be made whether to include documents as part of the witness statements or to separately produce documentary evidence. Note was taken of suggestions to require inclusion of such documents in the draft direction of Hwang and Chin.[61] While the norm would be to attach documents to a witness statement, this may be affected by procedural orders as to document production. If documents are attached to a witness statement and were not produced by a party, this raises questions as to how a Tribunal should treat this. Lévy suggests that attachment of documents should not be allowed to add new factual allegations or bypass discovery time limits,[62] although this may not always be practical and there are many cases where both parties are still tendering documents close to the hearing. Nevertheless, this is an important warning as the plain meaning of Article 4.5(b) of the IBA Rules of Evidence 2010 simply states that '(d)ocuments on which the witness relies that have not already been submitted shall be provided…'. This should not be problematic if the tribunal ensures that the timing page "903" of witness statements is in harmony with cut-off dates for document presentation and production.

Regardless of whether relevant documents are appended, key parts might also be extracted in the body of the statement so that the gist of the statement is easily understood by the reader. It will be less time-consuming for counsel to ensure an appropriate amount of referencing to documents rather than have three tribunal members sift through bundles of documents and collate these with the statements. If one witness statement is responding to another, appropriate cross-referencing to paragraphs will also assist the tribunal. This can also occur if a number of statements are being drawn by counsel for one party where they could cross-reference each other to support the testimony and save time for the

tribunal.[63] However, there will be problems if modern word processing leads to various witness statements using identical language even where they are attesting to the same matters, as this can also undermine the belief that it is the witness' real statement. In a very complex and lengthy statement, it may be useful to include an executive summary.[64] The danger in drafting such a summary would be to accurately encapsulate the more detailed testimony. There may be a danger of over-reliance on the summary as opposed to the detailed statement. If an executive summary was used, it would be useful to cross-reference it easily to the relevant paragraphs of the witness statement.

12.5.5. Witness Statement Checklist

Based on views of the eminent arbitrators referred to above and the suggestions in the IBA Rules, the following is a possible checklist for arbitrators in considering directions to general witnesses as to the content of their statements. It is not a recommended list as such but rather, a broad checklist of items that might be relevant in an instant case. Such a direction might include a requirement that a witness statement contain some or all of the following:

1. *Personal information.*
2. *Background qualification, training and experience where relevant to the dispute or the contents of the statement.*
3. *A statement regarding present, past or proposed relationship if any with any of the parties or with anyone closely connected with any of the parties.*
4. *A photograph (if considered desirable).*
5. *A statement that the witness knows the use to which the statement is to be put.* *page "904"*
6. *An affirmation as to truth and an indication of knowledge of the consequences of a misrepresentation.*
7. *Documents on which the statement is reliant and documents that will be alluded to in oral testimony.*
8. *A full outline of the factual evidence in chief.*
9. *A description of the source of the witness' information as to those facts.*
10. *An indication of the language in which the statement was originally prepared and the language in which the witness anticipates giving testimony. Translation pagination should follow the original.*
11. *An attestation that it is the witness' own factual evidence. The statement could confirm the extent of any assistance given in the preparation of the statement by counsel or other persons and confirm that the witness has not changed what it believes to be true at the request of a party, party's counsel or any other person acting on behalf of a party.*
12. *Date of signature.*
13. *If appropriate under the relevant rules, certain form requirements must be met, for example, whether the statement is presented by way of affidavit, although this would be rare.*
14. *A direction that paragraphs should be numbered and that references to documents and submissions should use a particular method of referencing as designated by the tribunal. Of particular value is prefixing the documents and submissions C and R respectively.*
15. *A direction as to an executive summary if required.*
16. *If the direction is as to a second round of statements, the direction may state that the second round may only pertain to information contained in the other party's previous statements.*

12.5.6. Simultaneous or Sequential Exchange of Witness Statements?

Similar issues arise in relation to the timing of witness statements as arise in relation to the timing of submissions themselves. The latter will typically predate the witness statements. Section 6.14.2 deals with the question of whether written submissions should be ordered sequentially or concurrently. There is often a strong argument for sequential ordering of submissions if one party's allegations need to be evaluated by the other before a response. The same logic does not necessarily apply to witness statements. Once all claims, defences and counterclaims are known, witness statements can simply deal with the evidence that each wishes to present on each issue. Hence, there is a stronger argument in favour of simultaneous exchange. This will reduce delay and promote equality. However, simultaneous exchanges may make it harder for the tribunal to integrate such material and the submissions may be

'ships that pass in the night'. Integration might be easier when one statement focuses directly on the points made in another, which requires sequential ordering. In some cases a tribunal might organise two rounds of page "905" simultaneous exchanges to optimise the above competing considerations.(65) In the latter event, the second round might be directed to only address information contained in the other party's statements, although this would be hard to enforce and most would not constrain counsel in this way.

If simultaneous lodging is ordered, there is a risk that one party may delay, receive the other statements and then amend accordingly. A tribunal can ask for statements to first be served on itself or an institution and only exchanged when both are available.

12.6. Witness Preparation

12.6.1. Introduction

Domestic legal systems vary greatly as to the degree to which counsel may interview and prepare witnesses. Some legal systems even stipulate that it is unethical for counsel or parties to contact witnesses prior to them giving evidence. This relates both to oral testimony and to written statements, although assistance with written statements is now fully accepted, subject to the cautions noted above as to the need for the statement to truly remain that of the witness. The issues addressed below apply equally to party-appointed expert witnesses as to general witnesses.

12.6.2. Interviews

It would be undesirable if counsel from differing legal families approached the question of witness preparation based on their domestic litigation experiences, without understanding that opposing counsel could at times be likely to take a different approach. Equal treatment suggests that the tribunal should make clear its attitude, either in the terms of reference, or in a pre-hearing conference.(66) Notwithstanding that parties may have different legal traditions, to treat them differently on this issue would offend against principles of equality of treatment.(67) The norm in international arbitration is to allow witnesses to be interviewed and prepared.(68) While interviews and preparation are allowed, the more a witness page "906" appears to be coached or the more it appears that the statement is not really theirs, the less weight will be given to their testimony.

The IBA Rules of Evidence 2010 expressly indicate that it is not improper for a party, its officers, employees, legal advisers or other representatives to interview its witnesses or potential witnesses.(69) The Rules expressly allow prospective testimony to be discussed. The drafters of the new IBA Rules chose not to provide further guidance on permissible interaction between witnesses and counsel.(70)

12.6.3. Interviewing Opposing Witnesses

There is no arbitral rule against counsel contacting the other party's witnesses although there is no express rule in favour either. A tribunal might retain discretion to prevent this if there was a valid reason for doing so, although there is no obvious sanction to apply if the tribunal is ignored. The first issue is whether counsel actually knows that a person is a witness for the other side. A second issue is whether the witness is also a party (or an employee or officer of the party). National bar codes could impact upon counsel's powers but will not be determinative from the tribunal's perspective.

It has been suggested that a proscription against approaching the other party 'behind its counsel's back' would, by analogy, apply to that counsel's witnesses.(71) This does not flow as a matter of plain meaning from rules and guides or necessary policy. Refraining from interfering with a person represented by another lawyer may simply be a protection of that lawyer/advisee relationship. This is not necessarily the prime consideration for an arbitrator dealing with broad powers under a *lex arbitri* and arbitral rules. Stated differently, preserving lawyer/advisee relationships does not necessarily trump arbitral rights. It has been suggested to the same end that Article 4.3 of the IBA Rules of Evidence 2010, indicating that it shall not be improper for a party and advisers to interview 'its' actual or potential witnesses, suggests *a contrario* that the other party's witnesses cannot be approached.(72) It can page "907" certainly be inferred that the Working Party did not wish to expressly sanction this, although they did not expressly proscribe it either. Another uncertainty is the breadth of the notion of a 'potential' witness and whether one party can have an exclusive entitlement to a central

witness simply by being the first to approach the person. This should not be the case and it will inevitably be a matter for tribunal control where there are disputes as to the entitlement to interview opposing or prospective witnesses.

The same principles should not apply to a party-appointed expert. Opposing experts should not be approached. They have entered into a contractual relationship as part of the opposing team, albeit with duties of independence. Denying opposing counsel access to such an expert prior to the hearing cannot be a denial of due process as might be arguable if access to a key factual witness was barred as each party can access other experts.

12.6.4. Preparing Witnesses for Oral Testimony

Those opposing witness preparation before oral hearings argue that lawyers cannot refrain from coaching witnesses to a point where the testimony is not really theirs. Those supporting preparation argue that the legal process is too unfamiliar to laypersons. The system should not allow a non-expert witness to come face-to-face with an expert cross-examiner without some legitimate guidance as to the reasons that they are being called, the key points to get across and the areas where they are likely to be challenged. As always, there are advantages and disadvantages with each position. Neither approach can inherently be seen to optimally promote truth with maximum efficiency.

Article 4.3 of the IBA Rules of Evidence 2010, in allowing witness interviews to 'discuss their prospective testimony', is broad enough to suggest the entitlement now seems settled. Nevertheless, witness preparation does pose added ethical challenges for counsel to ensure that they do not overstep the mark. Certain forms of witness preparation which merely aim to educate them about the process should be less problematic. For example, in preparing a witness for cross-examination, it is reasonable for counsel to explain to witnesses that they should carefully consider questions, seek clarifications when they are not understood, correct factual errors in questions, limit answers to the questions and maintain a calm demeanour. If an experienced witness understands how to clarify ambiguous questions, limit answers and the like, there seems no reason not to educate less experienced witnesses in this manner. There is obviously a significant difference between, on the one hand, explaining the issues to a witness, explaining the role that the witness will play in the proceedings, and warning them about the kinds of matters that may be raised by the tribunal or in cross-examination, all acceptable aspects of witness preparation, and on the other hand, detailed coaching as to a script drafted by counsel to be used in answers to key questions. The latter would be unethical on any view of that notion. It would also be grossly unethical to invite a witness to lie or encourage the witness to leave out references to adverse facts that page "908" are nonetheless central to their intended testimony. If a witness seems too rehearsed, their credibility is likely to be affected in any event. That might be even more so where the arbitrators are from a civilian law background and are less used to and more suspicious of witness preparation.

C Mark Baker has suggested that in preparing witnesses for cross-examination 'the attorney should inform the witness about the issues and the facts that he or she may be questioned about during the examination. Key documents and exhibits should be reviewed with the witness, and the witness should be prepared for the kinds of questions that opposing counsel may ask depending on the seat of arbitration and the background of the tribunal'.(73) It would also be appropriate for counsel to prepare expert witnesses for conferencing where that is used and where they have no experience with this technique. Lawrence W. Newman also suggests that the witness 'should be prepared for the kinds of questions he or she will be asked on cross. Care must be taken not to provide "canned" answers to such questions – much less coach the witness into providing devious or misleading answers to anticipated questions. But the witness can and should be permitted to think back on the facts underlying his or her testimony and recall the circumstances about which questions might be asked'.(74) It has also been suggested that witnesses should be taken through their witness statements on a large projector screen which better focuses their attention on their words and prepares them for cross-examination.(75)

The above suggestions outline some clear and reasonable distinctions between acceptable and non-acceptable practices. However, a more difficult question is whether counsel should be able to hold a practice session aiming to direct the witness to the kind of comments that would be more successful. There are a range of

other potentially challenging ethical dilemmas. There will always be ethical issues at the margin. For example, in addition to differentiating between introducing the witness and leading the witness, the more that counsel engages in thorough preparation of witnesses, the more counsel might identify inconsistencies between proposed testimony and prior statements. Ethical issues again naturally arise in such circumstances.(76)

A tribunal may wish to give guidance to civilian practitioners who may be less familiar with witness statements and who might have a natural reluctance to page "909" engage in witness preparation. A tribunal can spell out what it wishes to receive and what it feels is desirable for counsel.(77)

12.6.5. Codes of Conduct and Obligations of Counsel

National bar codes dealing with proscriptions against contact with prospective witnesses will commonly exclude arbitration. In some cases ethical standards may indicate that they apply to any proceedings within their geographical location. They may also expressly apply to arbitration. Even then, a professional code from private lawyers in one jurisdiction cannot necessarily be binding on the behaviour of lawyers in other fora and on international arbitrators conducting an arbitration in that Seat. The situation would be different if a comprehensive code of conduct is promulgated by the national government of the Seat, in which case its provisions must be integrated with those of the *lex arbitri.* The provisions may indeed be seen as part of the *lex arbitri.*

Another uncertainty with national codes of conduct is whether they seek to have extraterritorial effect and regulate the behaviour of counsel in foreign jurisdictions. There may be good reasons for professional bodies to wish to do so. However, it is not clear that this should apply to arbitration, so extraterritorial effect cannot be presumed where the rules are silent. In any event, if it is a mere professional code, it cannot apply as of right to constrain the control of a foreign arbitrator.(78) Where international arbitration is concerned, there is always the need to separately consider counsel's obligations and a tribunal's rights and obligations as the tribunal cannot be said to be bound to uphold differential national bar ethics rules over counsel who happen to have been selected to appear before it. Some have suggested that there ought to be rules of conduct applicable to arbitration, at least with similar status to the IBA Rules of Evidence and the IBA Guidelines on Conflicts of Interest to assist tribunals.(79) But regardless of the merits or otherwise of such a proposal, it is not likely to eventuate in the short term. There are as yet no general codes of conduct for counsel in arbitrations.

12.6.6. Tribunal Responses to Inappropriate Coaching

Before a tribunal needs to consider a response to inappropriate coaching, there needs to be enough evidence that this has occurred. Such issues can arise for page "910" determination by a tribunal if on cross-examination, the witness admits to a contentious degree of coaching and an application is thus made to reject the witness's testimony or even to bar opposing counsel on the basis of unethical behaviour, although this would be rare.

If the witness has been improperly coached, a tribunal is entitled to discount the weight of the evidence, but what if the only allegation is that counsel has approached the witness contrary to any legal entitlement to do so? A mere approach, without any presumption of influence, does not logically discount the veracity of the evidence, although countervailing arguments may need to be balanced on a case-by-case basis.

12.6.7. Witness Access to Key Documents

Another area of policy contention relates to whether witnesses ought to be given access to all relevant documents from all parties well before giving evidence. While the norm in arbitration is to ask parties to include copy documents on which they intend to rely at the earliest opportunity, the important question is what rights a party has to strategically use some documentation not previously notified. Must a document that will only be relied on to undermine an opposing witness be disclosed? Where cross-examination is concerned, the arguments in favour of full disclosure are that a truthful witness will, as a result, be best able to consider the documents carefully, think about what are often historical circumstances and be best able to efficiently and articulately present their testimony and respond to cross-examination. The contrary concern is that a dishonest or strategic witness is best

identified through the ability to challenge them with contemporaneous documents on the spot, without an opportunity for them to prepare strategic and untruthful responses. As with all complex policy questions, there is no obvious answer as the competing concerns are both real.

There is no norm on this issue and arbitrators may have opposing views, although the notion of providing documents on which one intends to rely seems broad enough to encompass documents which will be relied on in cross-examination. Furthermore, parties must respond fully to tribunal directions as to document production. Some arbitrators request that, at a specified time before cross-examination, each counsel is to provide documents upon which they intend to rely during cross-examination.[80] The approach a tribunal takes may also vary depending on whether the documents are in the public domain.[81]

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12.7. Depositions

Depositions by witnesses as used in the US are not common in international arbitration.[82] Nor are they expressly referred to in the Federal Arbitration Act (US). The ICDR Guidelines indicate that depositions, interrogatories and requests to admit as developed in American court procedures are generally not appropriate for international arbitration.[83] The IBA Rules of Evidence 2010 do not expressly refer to depositions. Conversely, the CPR Protocol allows for such an approach in the discretion of the tribunal. The parties are of course free to agree on any process even if not standard to arbitration. It is arguable that a tribunal's broad discretion would allow it to order depositions,[84] but it would be rare for this to occur. As a precaution with parties from differing legal systems it is prudent at the preliminary meeting to establish what the party expectations are.

Section 2(c) of the CPR Protocol explains the nature of depositions:

> Depositions are recorded sessions at which witnesses are questioned by the parties outside the presence of the tribunal, enabling the parties to obtain information from witnesses in advance of their testifying at the hearings. Depositions should be permitted only where the testimony is expected to be material to the outcome of the case and where one or more of the following exigent circumstances apply: witness statements are not being used, the parties agree to the taking of the deposition and/or the witness may not be available to testify, in person or by telecommunication, before the tribunal. The tribunal should impose strict limits on the number or length of any depositions allowed. Deposition transcripts may, as the tribunal determines, be used at hearings or otherwise be made part of the record before the tribunal.

A key disadvantage is the lack of control by the tribunal as it is not present during the process. When forced on parties against their will, it may contradict the spirit of arbitration. An advantage of depositions is reducing cost and allowing testimony from parties who would find it difficult to come to the place of arbitration. Another value in using depositions might be where there is no alternative means to preserve the testimony of an important witness.[85] In many cases, however, video or telephone evidence before the tribunal would be a far preferable alternative.

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12.8. Hearing Witnesses

12.8.1. Order of Examination

Typically, witnesses of fact are examined first by counsel for the party presenting the witness, then cross-examined by the other party, and then are re-examined by their party's counsel. In some cases a further round of cross-examination might be permitted in relation to discrete matters raised on re-examination. This order is not required, but is emerging practice. The Iran-US Claims Tribunal tended to follow the civil law inquisitorial approach to receiving oral testimony rather than allowing for direct and cross-examination.[86] There is also the possibility of witness conferencing, that is, hearing a group of witnesses together. This is discussed further in sections 12.13.11–14 below.

The IBA Rules of Evidence 2010 suggest what would ordinarily happen at an oral hearing. Article 8.3 indicates that claimant would ordinarily first present the testimony of its general witnesses followed by the respondent doing likewise. After that, any other party may question the witness in the order determined by the tribunal. The party initially presenting the witness shall subsequently have the opportunity to ask additional questions on the matters raised in the other party's questioning. After that the claimant would ordinarily present testimony of party-appointed experts followed by respondent. There is also an issue as to how the tribunal will integrate its own questions, if any, with those of counsel. The typical approach in modern arbitrations is to allow counsel to primarily direct evidence in chief and cross-examination, with the tribunal interjecting where appropriate and utilising follow-up questions as well.(87)

12.8.2. Examination in Chief

In many cases, the witness will begin by presenting the tribunal with their key personal details, name, address, occupation and expertise; acknowledge that any written witness statement is theirs and is true and correct, if necessary amend any errors which may have been found on reflection; and acknowledge, whether under oath, affirmation or otherwise, their understanding of the need for truth and confirm that the evidence that they intend to give will be truthful. Some of this may simply have been dealt with through a curriculum vitae attached to the witness statement and would not need to be repeated.

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Witnesses may be permitted access to their statements, documentary evidence and appropriate notes.(88) In some cases, such notes may need to be disclosed for examination.(89)

12.8.3. Matters to Cover

Direct testimony should normally be limited to the matters contained in the witness statement. Evidence in chief should also be allowed to deal with new developments since the time of the witness statements,(90) subject to tribunal approval, although there would be a concern if this allows for surprise elements to be introduced to the detriment of the opposing party. If the tribunal had previously warned that no new material can be presented other than in exceptional circumstances and only with the tribunal's approval, and that any such proposed new material be notified promptly, this may alleviate this concern.

12.8.4. Forgoing Oral Presentation

One method of reducing costs has been to develop a practice whereby examination in chief is not conducted orally. The witnesses' written statements suffice for that purpose and the hearing is limited to questions from the other party's counsel and from the tribunal and where appropriate re-examination to cover matters that were raised afresh during cross-examination.(91) One advantage is that written statements are a more efficient means of presenting evidence in chief than oral testimony. By cutting down the time for direct oral evidence, this frees up more time for cross-examination and submissions, particularly where chess-clock arbitration is employed. The advantage in reducing the length of oral presentation is to save time, cost and avoid duplication. The disadvantage of entirely removing any direct oral presentation of evidence is that an adjudicator forms a view about veracity and expertise based on the way a witness presents.(92) If an adjudicator is only listening to the more adversarial form of cross-examination, an unfairly negative view might be formed. This is particularly so where the witness is speaking in a second page "914" language and is at the mercy of highly skilled common law cross-examiners. There may also be psychological implications if witnesses are only subject to cross-examination, particularly where the parties or key officers of the parties are involved. A key witness will often wish to be able to express the story in an inter-personal way and not just in writing. Skilful cross-examination would not allow for such a narrative. Another problem in only hearing cross-examination rather than direct examination at the oral hearing is that it might be given more weight than the written statements.(93) There are added difficulties if the witness statement stands in lieu of evidence in chief and the cross-examination simply fails to test key issues. Should that witness' views thus be presumed correct? How will an accurate evaluation be made? Would this be unfair to counsel from civilian backgrounds?

Another problem with no evidence in chief is that some busy arbitrators might not have properly read the witness statements. A short oral outline can ensure they better understand the case being made. A tribunal will thus often benefit from hearing some of the key elements orally to allow the witness to relax before cross-examination, become used to the process, and provide an indication of veracity and expertise and the degree to which the witness statement is truly theirs. The way statements are drawn will also impact upon the need if any for direct testimony. If it is simply a brief summary of the testimony to be given, direct oral evidence will be required. The corollary is that if the statement is to stand in lieu of direct evidence, counsel will need to be very careful to ensure that it is comprehensive and sufficient.

If the parties have already agreed that no witness will give oral evidence in chief but will only be available for cross-examination, it seems unreasonable to allow a party to demand oral presentation when cross-examination is not called for.(94) Nevertheless, it is conceivable that in some cases that would be proper under a right to fully present one's case. This is particularly so when a claim is a difficult one and the veracity of the witness is crucial. Again this is a matter that can be dealt with at the outset. One party could still ask for its witnesses to present orally even if the tribunal has recommended that statements stand in lieu of evidence in chief. A challenge should not usually be successful if such a request is declined but a tribunal might still consider such a request favourably. While the tribunal has a duty to treat the parties equally, the same offer could be made to each, whether it is accepted or not. Tribunals still have control over total time and parties can be given flexibility within total time parameters.

Other problems arise in terms of the ideal approach to examination in chief if the witness statement is incomplete as alluded to above. This is worth further page "915" exploration in terms of a tribunal's duties and discretions. There is a significant policy difference between statements that deal with issues in an incoherent way and statements which fail to address a key issue. Each poses distinct problems. The latter raises a question as to whether a witness may deal with a new matter not properly notified beforehand. A tribunal would be entitled to reject such evidence in the event of an application made, although it may be accepted if there is no unfairness or if that can be addressed with costs orders and adjournment after considering submissions. Rejecting the evidence could also lead to due process challenges if events in the proceedings made the new evidence more material than previously thought. That is addressed further in section 10.22.3 dealing with new evidence generally.

As to the use of written statements in lieu of evidence in chief, it is the other situation mentioned above that is of concern, where the statement addresses a matter but in an ambiguous, unclear or incomplete manner. An example would be an allegation that a representation was made without identifying the person alleged to have done so. If the written witness statement is inadequate it certainly makes sense for this to be expanded upon in oral testimony. If it is the tribunal that sees the inadequacy, some direction might be given to ensure that the party has a full opportunity to present its case. However, too much guidance puts the arbitrator in the position of counsel, helping to develop the case. A tribunal thus has a difficult choice as to whether to give directions or not. The line is a fine one, particularly when the inadequacy in a witness statement could simply lead to the conclusion that the party relying on that witness has failed to meet its burden of proof on a key issue. Situations may vary from those where opposing counsel shows this to be the case through cross-examination or submissions and conversely, where the cross-examination or submissions fail to address possible inadequacies to any degree.

Use of PowerPoint by witnesses should be limited to situations where it will help a tribunal understand complex matters and not where the PowerPoint seeks to articulate most eloquently the witness's assertions. In the latter context, they are more akin to written witness statements which can have too much involvement of counsel.(95)

12.8.5. Cross-Examination

While some civil law jurisdictions do not allow cross-examination, this process is now the norm in international arbitration. A question may even arise as to whether a party has been denied a full opportunity to present a case if it has been refused the right to cross-examine or refused the right to cross-examine as extensively as it wishes.(96)

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While cross-examination is now common, the more aggressive approach to cross-examination, seeking to challenge the veracity and expertise of a witness, might be considered unseemly by some civilian arbitrators and hence be a questionable strategy.(97) Obviously as cross-examination becomes the norm in arbitration, that may be less of a concern. Extreme forms of cross-examination gamesmanship that are more about confusing the witness than eliciting the truth would be frowned on by competent arbitrators from any jurisdiction.(98) One aim of cross-examination is to distinguish between true recollection and mere speculation or submissions. It is not simply about differentiating between truth and lies.

Tribunals also need to consider when to intervene if counsel undertaking cross-examination is inexperienced in the process. A common fault is to fail to challenge a witness' answers with probing follow-up questions. A tribunal also has a difficulty if an experienced cross-examiner concentrates on less important material in the hope of undermining credibility on that aspect with a view to undermining the overall testimony. A tribunal also needs to think about whether it will interpose its own questions or allow counsel time and space for the cross-examination strategy to be developed. A tribunal may also need to carefully manage cross-examination where interpreters are being involved.(99)

12.8.6. Re-examination

A tribunal should ensure that re-examination only deals with matters raised in cross-examination and does not deal with other matters. Nor should it merely repeat evidence in chief. However, if the cross-examination has led to a distorted body of evidence, a sensible re-examination can restore coherence.

12.8.7. Order of Witnesses

As with much of arbitral procedure, the parties are generally able to agree on the order of witnesses. Even if all parties do not agree, it is also the norm that an *page "917"* individual party might naturally select the order of its own witnesses. This flows from their entitlement to have an adequate opportunity to present their case. It is for them to determine how to optimise the case. The corollary may be that it is for them to decide on the most effective order of witnesses. However, the tribunal is the ultimate determiner of facts. The tribunal also has a duty to promote fairness and efficiency and ensure that the procedures aid it in achieving that outcome. Hence, in some cases, a tribunal might prefer a different order to that of the parties collectively or individually and may direct the parties accordingly.(100) Pro-active guidance as to the matters of greatest importance can also help the parties select the most useful order.

One situation where a tribunal might wish to vary the preferences of the parties is if it wishes to have all witnesses on a particular issue, whether from claimant or respondent. The norm would be for claimant to provide all of its evidence after which respondent replies. In a complex matter, however, the tribunal might feel better able to understand and address the key issues if witnesses are grouped on a topic basis rather than on a party basis.

12.8.8. Recalling Witnesses

In some cases a party might apply to recall a witness previously heard to deal with a matter addressed in later testimony. This should be a matter for tribunal discretion under normal principles of fairness and efficiency. The more that the material being responded to is surprising, the more justification for allowing this, as the surprise material should have been notified earlier in any event.

12.8.9. Conferencing and Fact Witnesses

Witness conferencing involves hearing groups of witnesses together and allows for a dialogue between them, co-ordinated and controlled by the tribunal. Instead of the tribunal hearing conflicting evidence separately, a tribunal might feel better able to resolve conflicts if the witnesses have a controlled dialogue about their differences. While the advantages and disadvantages of witness conferencing apply both to fact and expert witnesses, the more detailed discussion is left to the latter in sections 12.14.11–13.

Raeschke-Kessler supports the use of witness conferencing for fact witnesses.(101) Similar views are presented by Wolfgang Peter and Clifford *page "918"* Hendel.(102) Nevertheless, tribunals do not generally utilise conferencing techniques for fact witnesses as opposed to experts, absent party agreement. Some counsel might

assert that this unduly deprives counsel of the ability to present the case as they see fit and hence is a denial of due process. That should not be so if counsel is given a separate and appropriate opportunity to raise matters from their own witnesses and challenge the evidence of opposing witnesses. There are a number of cases where conferencing of factual witnesses could be particularly beneficial. A not atypical example arises where there is a breakdown in some joint-venture or partnership arrangements, where the commercial documentation is inadequate or at best ambiguous, and where the key issues are the true intent of the parties to be discerned over a range of pre and post-contractual meetings. Having a number of personnel present evidence sequentially may be far less insightful than a discussion between the witnesses present at the meeting that attempts to reconstruct the discussions and discern the cause of differing perceptions under the careful control of the tribunal.

A problem with conferencing and factual witnesses is that the recollections of one may be influenced, even unintentionally, by hearing the evidence of other witnesses.(103) Another issue is that it is harder to keep each witness within the confines of their written statements if conferencing occurs. A further problem as compared to expert conferencing is that in theory if not in practice, party-appointed experts may eventually come to a point of agreement at least as to a methodology for further dispute resolution. Conversely, witnesses of fact, particularly when they are the parties or parties' employees, are likely to remain opposed and a conferencing process could, therefore, have an adversarial tendency that requires particularly sensitive management by the tribunal.

Importantly, all suggestions for dealing with some of the more difficult aspects of fact finding in international commercial arbitration need to be looked at alongside the alternatives. If there was one optimal model, all sophisticated legal systems would have adopted it. Instead, there are costs and benefits of each model, in terms of both fairness and efficiency. Importantly, many of the perceived problems of conferencing of fact witnesses are inherent problems in party-nominated witnesses who know that they are there to advance the interests of the appointing party. Redfern and Hunter suggest that, at the very least, it should generally not be used as an alternative to cross-examination.(104)

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12.8.10. Oaths, Affidavits and Affirmations

Some legal systems compel the use of oaths when witnesses testify. Some merely empower an arbitrator to do so and provide discretion whether to do so or not.(105) Some laws prevent an arbitrator from administering oaths(106) as some countries would find it improper for this to be undertaken by someone other than a judge or notary.(107) In some jurisdictions which prevent an arbitrator obtaining oaths, court assistance might be sought.(108) The lack of a uniform rule is partly cultural but also arises because the practical utility of oaths is thought to be greater where perjury under oath comes with significant criminal sanctions. Perjury statutes rarely apply to arbitration, other that in England, where the tribunal is expressly provided with power to administer any necessary oath or take any necessary affirmation.(109) Others may be more sanguine and believe that liars are undeterred by sanctions.

The ICSID Arbitration Rules provide for a specific declaration:

> I solemnly declare upon my honour and conscience that my statement will be in accordance with my sincere belief.(110)

The IBA Rules of Evidence simply call for a witness of fact to affirm that they commit to tell the truth.(111) Some arbitrators will follow this approach. Others may advise the witness of criminal sanctions for false testimony that may apply where the arbitration physically takes place. Care should be taken not to make legal assertions that may be debatable as to the application of such laws. Some will page "920" ask the witness whether they have any religious beliefs and seek to administer an oath if permitted where the answer is affirmative.

A failure to administer an oath where required may have different implications in differing jurisdictions. Poznanski suggests that such a failure would not allow for an award being set aside under the US Federal Arbitration Act but may do so under English law,(112) although this would be rare in more recent times.

12.8.11. Interpreters

Witnesses will generally be heard in their native language unless they are fluent in the language of the arbitration. If interpreters are required, a tribunal needs to control how these are to be selected. An interpreter should be both competent and independent, although the latter is not always possible. The parties are typically asked to confer and also indicate how the fees are to be paid and whether such fees are intended to come under an ultimate costs award.

It is desirable that both parties and ideally the tribunal each have at least one person who understands the foreign language to ensure that accurate interpretation is occurring. Less experienced interpreters often fail to understand that their role is merely to translate and not to engage in side discussions so as to explain questions to the witness. A tribunal may wish to think in advance as to the way it will respond if there are disputes about the quality and accuracy of the interpretation. There may be a need for a sentence-by-sentence analysis in extreme cases where the testimony is crucial.

12.8.12. Transcription

Transcripts of evidence are common in large matters although no rules require this as a matter of course. If post-hearing submissions are allowed, the parties would also typically wish to have transcripts sufficiently in advance so that final submissions can integrate all relevant references. An alternative in smaller cases would be to simply record the proceedings and only refer to the recording where necessary. Legal costs of listening to tapes need to be compared to transcript fees. The civilian court approach of having the adjudicator draft summaries of testimony(113) is not the preferred mode in international arbitration. Transcripts were not common before the Iran-US Claims Tribunal.(114) If transcripts are utilised, parties might agree that page "921" witnesses be given an opportunity to check the accuracy. The tribunal might itself direct that transcripts are provided to the parties who are entitled to correct errors. A witness may only correct an inaccurate transcription and must not aim to recast the testimony.(115)

If the parties cannot agree to a transcript and the tribunal does not order one, circumstances may arise where one party alone provides a transcript. There may be problems with the evidentiary value of such a document.(116) It would be appropriate to direct that such transcripts and their source tapes be provided to all for comment.(117)

12.8.13. Video Evidence

Modern technology means that in many cases, it ought to be appropriate to hear evidence of a witness who is not physically present, as long as the audio and visual link is good enough to allow the arbitrator to fully understand and evaluate the veracity and expertise of the witness. A related question is whether a party should have a right to present its evidence in this way in order to reduce costs, or whether the other side has an automatic right to demand physical presence for the purposes of cross-examination. While there are no strict rules in that regard, most arbitrators would expect physical presence in such circumstances, but practices may change as technology improves.(118)

The IBA Rules of Evidence 2010 provide that a personal appearance shall be the presumption unless the tribunal allows the use of video conference or similar technology.(119) The Commentary indicates that an application for permission to do so should indicate the reasons why the person is unable to appear and should propose a protocol. The tribunal should seek to ensure fairness and equality and have the technology 'approximate live testimony'. The tribunal should ensure that the technology is of sufficient quality and include a fallback plan in case technological problems arise, typically a teleconference. Consideration will also need to be given as to how exhibits would be shared. There would also be a need to ensure that the person is giving evidence under the same conditions as they would be if present, for example having no better access to preparatory notes or advisers in the background.(120) It is not uncommon for one or both parties to have a solicitor or a page "922" local representative at the witness location of the video conference. The provision of an attendee of both parties avoids any suspicion of the witness being assisted or prompted out of sight of the video cameras.(121)

It is certainly the case that many witnesses in complex matters are not really needed in person. One of the difficulties in organising this

in advance is that this is often not known until one sees the degree to which the opposing side seeks to cross-examine the witness. In an appropriate case, an arbitrator might invite each party to indicate which witnesses it wishes to have present for significant cross-examination and then use cost orders if that right has been abused without just cause.

12.8.14. Challenges to Questions Put to Witnesses

A tribunal will need to determine whether it will allow questions subject to objections from the other side or will itself seek to disallow questions it thinks are inappropriate. Tribunals should give consideration to this issue before a hearing, particularly when there may be differences in view amongst a multi-person tribunal and/or counsel who come from differing legal traditions. It is particularly problematic to try and make on the run evidentiary rulings on questions by counsel in such circumstances.(122) It is particularly important to understand the problems with questions and memory on a general level. It is important to understand that the way we question, impacts upon an answer. For example, some people seek to oblige when answering questions. It is also important to understand that memory has three stages, perception, storage and retrieval, which can significantly impact upon testimony.

12.8.15. Style and Content of Questions

In domestic litigation, counsel can often object to the way questions are put to witnesses. In common law systems, it is not permitted to lead one's own witness. A leading question is one which hints at the answer that is being sought. In extreme circumstances, a party's own witness can be declared to be hostile and be treated in a more interventionist manner. It is also not usual to permit counsel to follow up questions as answered by one's own witnesses to force an incompetent witness to complete the intended testimony. There are no similar proscriptions on cross-examining counsel as the latter will typically lead the witness to a proposition that they are disposed to disagree with in any event. Without being able to lead and follow up, cross-examining counsel would be unable to hone in on and probe the key parts of the testimony that need exploration.

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It is necessary to consider what principles an international arbitrator should apply in controlling questions to witnesses. There is no *lex mercatoria* of international arbitration evidence in that regard. Nor do the IBA Rules of Evidence 2010 say much on this issue. Article 8.2 of the Rules states:

> The Arbitral Tribunal may limit or exclude any question to, answer by or appearance of a witness, if it considers such question, answer or appearance to be irrelevant, immaterial, burdensome, duplicative or otherwise covered by a reason for objection set forth in Article 9.2.

A witness should thus be entitled to refuse to answer questions in situations where Article 9.2 of the IBA Rules of Evidence or similar principles apply. Questions can also be challenged on the basis of lack of relevance. Cross-examination can be challenged on the basis of being unduly rigorous. Challenges can also be made as to the admissibility of the evidence provided. Bühler and Webster,(123) suggest that it is generally not possible to object against leading questions. This view is rightly criticised by Born,(124) and is contradicted by the IBA Rules of Evidence 2010 Article 8.2, although the Rules do not set up a blanket proscription. Instead they state that 'questions to a witness during direct and re-direct testimony may not be unreasonably leading'. Tribunals will generally bar such questions or at least warn counsel that they may reduce the probative value of the answers.

12.8.16. Questions Eliciting Material beyond the Witness Statements

The idea behind requiring written statements in advance is to allow the other side to appropriately prepare. Only then can the party be afforded its full due process rights to adequately present its case. This is the notion of an adversarial hearing and the right of contradiction as utilised in civilian systems. The corollary is that if counsel believes that new matters need to be addressed after reviewing opposing witness statements, leave should be sought from the tribunal to submit supplementary witness statements prior to the hearing. To fail to do so and try and introduce new evidence at the hearing could violate due process norms. A proper test of whether

the material is problematic is whether the opposing party might legitimately have wished to make investigations, conduct research and/or bring contrary evidence. In addition, there will be problems if opposing counsel would legitimately require extra time to prepare for cross-examination,[125] although that should ordinarily not require too much extra time.

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One practical question where challenges arise is whether it is truly new material. Too often, witness statements make broad allegations and leave it to the hearing for elaboration of particulars. That might even be done for undesirable tactical reasons, to minimise the effectiveness of cross-examination or even prevent it entirely if the material is reintroduced on re-examination.[126] Hwang and Chin suggest that a witness should only be allowed to add to the matters contained in the witness statement in the following four situations:

(a) where they wish to correct an error or ambiguity;

(b) where they wish to elaborate on a relatively small detail;

(c) where the witness wishes to respond to matters raised in opposing party's witness statements not seen before preparing their own statement;

(d) where the witness wishes to give evidence about facts which have occurred since the date of the statement.[127]

One problem with any limitations is that they might lead to an inequality between what the witness can present as evidence in chief and what a cross-examiner might deal with or what a tribunal might legitimately question. An example referred to above is a claim based on a misrepresentation inducing a contract where the witness statement alleges this but does not particularise the person or conversation involved. How is the tribunal to treat this? Will it naturally allow the material to be expanded upon in chief? Will it ask for this to occur and ask its own questions? What if the cross-examiner does not ask any questions, either for tactical reasons or inadvertence? How will the tribunal apply burden and standard of proof in such circumstances? These questions suggest that it will be difficult to establish hard and fast rules that could apply optimally in all factual permutations.

Lévy argues that it is permissible to cross-examine beyond the witness statement at least so as to invalidate the statement. The distinction is justifiable. Invalidating a statement made is in that sense, still dealing with the statement. Supplanting it with positive evidence is varying its essential nature.[128] It was also noted above that the proscription against dealing with matters outside the statement becomes more problematic with witness conferencing where a relevant dialogue moves back and forth and does not limit itself to individual statements, although the tribunal can manage the scope of the conference session.

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12.8.17. Questions by the Tribunal

The UNCITRAL Notes invite the tribunal to indicate how witnesses will be heard and in what order questions will be posed. One approach is for the tribunal to first question the witness, after which the parties themselves can pose questions.[129] A second alternative is for the parties to engage in questioning, with the tribunal interrupting where it thinks appropriate. A third alternative is for the tribunal to wait until the parties have completed questions, including cross-examination, and then ask any remaining questions of the witnesses. Some continental European arbitrators may still wish to have questions directed through the tribunal, although this would be rare. The tribunal might also consider posing questions to witnesses to be answered in written form where that would be appropriate. As noted, in ICC Case No. 9333,[130] a witness became ill and unavailable for oral examination. The Tribunal collected questions from the other party and drafted its own and sent a questionnaire to the witness and allowed a second witness statement.

While party priority for oral questions is the most common, some arbitrators will tend to allow cross-examination to be completed before they ask their own questions. This is not a preference for common law over civilian systems but instead a concern not to be seen to unduly interfere with the party's own strategic choices as to how to best present its case. That is particularly so where the tribunal has imposed strict time limits for the hearing with an invitation for the parties to present the material as they see fit. If a tribunal was too invasive under such a procedure, a party might legitimately be able to argue that its rights were unduly interfered

with. Even here it is important to consider other factors and not be overly concerned with form over substance. A failure to draw a witness' attention to the key aspects as soon as they are of concern to an arbitrator may in reality be a more meaningful interference with their ability to win the case.

The tribunal's right to question the witness would of course encompass the right to deal with matters contained in the written submissions. While tribunals will typically seek clarification of information provided, not all arbitrators would use questioning to test the credibility of a witness in the way that cross-examining counsel might employ. Nevertheless, in some cases this may be appropriate.(131) A tribunal might wish to do so when the respondent is not represented, on the basis that only the tribunal can test the quality of the claimant's evidence. In an appropriate case a tribunal might also provide written questions to the parties and their witnesses for formal written response. This could be particularly useful in a page "926" documents-only arbitration or where deliberations show some key gap in the testimony.

12.8.18. Witnesses Present during Other Testimony

A tribunal will need to determine whether one witness is entitled to be present during the testimony of another. This is otherwise described as 'sequestration'.(132) This usually only applies to witnesses of fact, although where experts give both factual and opinion evidence, similar principles might apply. The parties could agree to allow or bar access of witnesses to the hearing. In other cases the tribunal will have to make a determination. As always there are arguments for and against. The benefit of having other witnesses present is that they hear the conflicting testimony, they better understand the issues in contention and can more directly address the matters of most significance to the tribunal. A person can indicate exactly what they agree or disagree with rather than having this filtered by lawyers. Hearing the witness might also jog the memory to allow more accurate and pertinent evidence.

The detriment is that witnesses who are unwilling to be fully honest or at least who wish to be strategic, are given too much advance warning of the challenges facing their testimony and can be better able to inappropriately tailor their comments accordingly. There is a particular disadvantage to the witness going first as the other witness can be too rehearsed and prepared. Furthermore, psychological studies show that if people express an opinion openly, a person with a dissenting view hearing a range of views to the contrary is more reluctant to present their true thoughts. Where it is the same side's witness, a disadvantage would be the ability to tailor testimony to maximise consistency where that would otherwise not have occurred. If one person is in a position of influence over the other, the one in the weaker position may feel intimidated and pressured to concur with the more senior person. Conversely, the presence of such a senior person might induce someone to be more honest when that otherwise would not be the case.(133) The conflicting hypotheses are also not mutually exclusive. Hence, every legal system inevitably undertakes a trade-off, although unfortunately most tend to come to a particular view from a single issue concern.

Historically, the norm in arbitration was to exclude witnesses until the time that they gave their own evidence.(134) The IBA Rules of Evidence 2010 do not take a position either way on this issue. Tribunals will often allow witnesses who have testified to be present during subsequent parts of the hearing. Some take a contrary view, arguing that witnesses should have open access at all times. The argument in page "927" part is that counsel can present prospective witnesses with transcripts in any event, hence the benefits of exclusion are outweighed by the detriments.

A special situation is where the witness is a party in person or is a key corporate officer of a corporate party. As a general rule, it is felt that parties must be given an opportunity to be present throughout the proceedings, otherwise they might legitimately argue that they have not had a full opportunity to continually monitor, and hence present their case. It is only when they can consider all aspects of the proceedings that they know how best to address issues of concern to the tribunal and issues raised by opposing witnesses and direct counsel as to case strategy modifications. Fouchard, Gaillard and Goldman present a contrary view as to the entitlement of such witnesses to attend hearings.(135) The authors raise a concern that other witnesses might need to be treated similarly. In some cases, even though a witness is technically a corporate officer of a party, the person need not be present for the above-mentioned strategic reasons as they are not the person with such authority. If tribunals accept the argument that only party witnesses are entitled

to be present throughout, they might at least schedule them to testify first to minimise their tactical advantage.(136)

12.8.19. Contact with Witnesses during Hearings

It is generally accepted that once a witness has begun his or her testimony, they should not be approached by counsel, parties or other witnesses during any breaks. They have already been properly prepared within the boundaries of what is acceptable and any discussion of the case during their testimony would be more naturally presumed to be improper coaching. The caution is more pertinent where cross-examination is concerned. A tribunal might allow social or work related contact on the express understanding that the case is not to be discussed.

12.9. Subpoenas, Compulsion and Dealing with Difficult Witnesses or Those Who Refuse to Testify on Matters

12.9.1. Compulsion

An arbitral tribunal has no direct power over third parties. Arbitral jurisdiction and power emanates from consent as supported by arbitral statutes. Consent of the parties to arbitration can never empower a tribunal to exercise coercive powers over third parties who have not consented.

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The national legislature that promulgates an arbitral statute may seek to grant such coercive powers, either directly to the tribunal or to a supervisory court within the jurisdiction of the seat. Even if a legislature purports to grant such a power, this does not necessarily mean that it will be effective, particularly in relation to foreign persons, which will naturally be the case with a neutral Seat. Some *lex arbitri* indicate that local courts can be approached to assist in obtaining the appearance of witnesses who are not willing to come voluntarily.(137) In some cases the tribunal might choose to hold hearings where it or a party might apply to a court for a subpoena over a witness.(138) The IBA Rules of Evidence 2010 allow a party to ask the tribunal to take whatever steps are legally available to ensure the testimony of the particular person.(139) A party might also look to a national court that may have jurisdiction.

It would be wrong to presume that compulsion is always concerned with reluctant witnesses. In some circumstances a witness may be personally willing to appear but may be concerned to do so lest an employer or other related party takes an adverse view of it doing so. For such prospective witnesses, a valid albeit unenforceable compulsion order by a tribunal or supervisory court can aid them in doing what they would wish to do in any event.(140) In some cases a tribunal may assist witnesses by merely issuing a letter inviting attendance. This might also help in getting permission from an employer or in getting a requisite visa.

12.9.2. Refusals to Answer and Evasive Witnesses

Tribunals will sometimes be faced with witnesses who are uncooperative or evasive when giving evidence. The proper approach to take in response depends in large part on the duties of witnesses and powers of compulsion of arbitrators. Because arbitration is consent based, parties who are witnesses have at least impliedly consented to arbitral power and discretion, absent evidence to the contrary via party agreement or exclusionary rules selected. The corollary of the consent base is that third-party witnesses are generally not obliged to give evidence, answer questions or indeed continue in attendance at the tribunal's pleasure. It also means that a bilingual witness cannot be compelled to give testimony in their non-preferred language. Any powers to the contrary in *lex arbitri* would be subject to territorial limitations in an enforcement sense at least. The key response to evasive witnesses is in relation to the potential to draw adverse inferences discussed in the following section.

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A witness should normally be allowed to refuse to answer a question for the reasons articulated in Article 9.2 of the IBA Rules of Evidence, which were discussed in section 11.7 above. It may be difficult for a tribunal to decide whether the objection is validly taken without knowing the nature of the withheld testimony although in most cases a general discretion should allow a tribunal to make an informed ruling.

12.9.3. Adverse Inferences

In all cases a tribunal will be able to consider the impact of a witness' failure to attend or answer, in terms of an analysis of the preponderance of evidence. For a party with the burden of proof, a failure to respond by a key witness will mean they might fail for that reason alone. Where the situation is not so clear cut, the next question is as to adverse inferences against either party and when these may legitimately be drawn. This was discussed more generally in section 10.4.8.2. Where witnesses are concerned, the issue is in part circular. An adverse inference is generally to the effect that the evidence would be against interest, but it needs to be based on a logical presumption to be valid. If the refusal is because of a legitimate right not to attend or answer, the adverse inference is not appropriate.

If subpoenas have been utilised and a witness does not attend, a tribunal may need to consider the validity of the subpoena and whether service has been appropriate before considering whether adverse inferences may be drawn.

12.9.4. Perjury

Another question is whether statutes which provide criminal sanctions for perjury apply before arbitral tribunals. That would depend upon the language and intent of the relevant statute; whether they intend to apply to arbitration and also to foreign persons or to nationals giving evidence in foreign places. Even then, there is a question as to which countries' perjury statutes are intended to apply. A tribunal may also need to consider whether it is entitled to notify the relevant authorities or whether confidentiality norms preclude this. Jurisdictions vary as to whether false testimony will lead to criminal sanctions, which may depend on whether it is sworn or unsworn testimony.

It is normally for the tribunal to determine whether testimony is truthful or not. A complex situation arises where testimony relied upon is subsequently found to be false which is then a basis for attacking the award. While a challenge is conceivable where it can be shown that the false testimony was induced by some procedural error of the tribunal,[141] this is highly unlikely to be the case. Deliberate false page "930" testimony by a party or at a party's behest might form grounds for overturning an award on public policy grounds.

12.10. Expert Witnesses and Expert Assistance

12.10.1. Introduction

A tribunal will often need the input of experts in order to resolve complex factual disputes. For example, some expertise will typically be required if the issue is whether a construction had a faulty design, an engineering calculation was inaccurate or whether the construction itself was negligent. Experts are also sometimes used for mathematical calculations, such as claims for measured work in construction disputes, company valuations, present value or projected profit. Lawyers may give expert evidence as to the content of national systems of law that are applicable. Forensic scientists may give evidence as to authenticity of documents where this is challenged. An expert may also assist the tribunal in considering document production requests where the tribunal does not wish to be the one assessing grounds for refusal that might compromise it, such as confidentiality claims, although this is a unique category as there is a debate as to the status of such persons.[142] In some cases an expert witness or assistant may be unnecessary as the arbitration clause will lead to an appropriate expert as arbitrator. An example would be an appointment by the president of an engineering association in a construction dispute. The very use of expert witnesses can be questioned in international arbitration, whose flexibility allows the parties to select experts as arbitrators.[143] Even then the parties may wish to present conflicting views.

While non-expert witnesses are only heard on issues of fact, and not in order to express opinions, the same is not true with expert witnesses. Experts often do not simply provide evidence in the strict sense but instead provide opinions and reasoning underlying the opinions in relation to evidence otherwise before the tribunal.[144] In other cases their testimony is as to the status of specialist facts and theories.

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In each case there would be questions as to who is an expert; methods of appointment; suitable qualifications; who can challenge any selection, the ethical responsibilities of experts including whether and how they can be paid; the form of presentation of expert witness testimony, including whether they are entitled to listen to each other's testimony; and the means by which tribunals can reconcile conflicting expert opinions, including whether they give evidence individually or whether they are involved in a collective exercise such as witness conferencing.

12.11. Advantages and Disadvantages of Tribunal Versus Party Experts

In civilian State courts, experts are typically appointed by the adjudicator and work for that person's benefit. In common law jurisdictions, they are typically selected by the parties, appear as formal witnesses and their evidence is subject to cross-examination.(145) Some modern common law rules seek a hybrid position and also make it clear that an expert is there to help the court and not to be an advocate for a party's strategic position.(146) Historical differences in view about party versus tribunal-appointed experts stem in part at least from cultural differences about adversarial and inquisitorial processes. From an adversarial perspective, if counsel's job is to present the best possible argument including the best possible evidence, control over one's experts is important. Conversely, from an inquisitorial perspective, if expert assistance is only there to help the adjudicator, then avoiding a battle between party-appointed experts is the logical corollary. Because there are advantages and disadvantages of each model, not only are there debates as to which should be preferred but there are also design issues in optimising the use of whichever is to be utilised. Where party-appointed experts are concerned, domestic models in common law countries vary from the English tradition which has sought to articulate obligations to primarily assist the court, to the US approach which relies on a preliminary determination as to the standards of proposed scientific expert testimony.(147) The US system can be argued to be complex and expensive, while the English system is seen by some as having a misguided belief in the ability to constrain 'hired guns'.(148)

The trend in international arbitration is to rely on party-appointed experts rather than tribunal ones,(149) although there have been important suggestions and page "932" possibly more recent trends to the contrary. The uncertainty is because of significant practical problems either way, in addition to differing historical views between legal families. It is also rarely clear what the marginal cost implications are of appointing experts as this will depend on the assistance they give to the tribunal, any reduction in tribunal analysis time where tribunals are remunerated on an hourly or daily basis and any promotion of efficiency at the fact finding stage. As always, there is a need to consider any option in contradistinction to alternatives. For example, Mark Kantor aptly observes that if parties are denied their own appointed experts, sophisticated counsel can find witnesses of fact with sufficient expertise to testify on the key issues.(150) It is also the case that where legal experts are concerned, the relevant person could simply be used as a co-counsel as opposed to an expert witness.(151)

The key problem with party-appointed experts is thought to be lack of impartiality. It has been observed that expert testimony can be abused when it becomes 'no more than paid advocacy of a party's cause' .(152) They may typically be too long and complex,(153) although that may depend on instructions given by the tribunal. Use of party-appointed experts may also produce obtuse reports that contain extreme and divergent conclusions and which fail to prioritise matters of most concern to the tribunal. In addition, by following independent methodologies and modes of expression, they often make it difficult to be read alongside other written reports of opposing experts.(154) There is also uncertainty as to whether party-appointed experts may withhold adverse information or may refrain from identifying problems with any assumptions that their brief was required to utilise, although this should not be the preferred view. There is also the added cost of a larger number of experts. Even if the parties were able to agree on a single expert, this may not necessarily reduce costs if they utilise 'shadow experts' to help in submissions.(155) A particular difficulty with party-appointed experts is that if they are each truly expert and honest but conflict in their views, how is a non-expert adjudicator to make a choice? The problems are added to when experts cannot provide compelling proof of their conclusions, but instead, merely state page "933" conclusions based on their professional experiences. Examples could include the belief that certain causes were most likely for any damage in a construction dispute or that certain values are most

appropriate in an expropriation claim. A further problem with conflicting party-appointed experts is where they are likely to divide on theoretical lines. For example, accounting experts may have fundamentally different views as to the best way to value a company or an ongoing business. A tribunal has a judgment problem in deciding which theoretical view to accept if both theories are well respected in the relevant professional circles. The challenge will not be diminished simply because one member of the tribunal is from that expert field, as that person, like other experts, might well have a preordained view of the theoretical issue. Furthermore, in a multi-person tribunal, the other members must each form a view and cannot too readily defer to their expert colleague. In some circumstances a tribunal may resolve the matter by determining whether the party with the burden of proof has met the required standard.

There is even a law and economics argument against the use of party-appointed experts. This is on the basis that the financial incentives to favour the appointing party, and the difficulty an adjudicator has in assessing where this occurs, could lead to market failure in the supply of experts by providing greater incentives for partiality.(156) It has also been observed that the skill-set needed to best educate a tribunal about matters beyond their expertise is also a skill-set that would allow partisan experts to engage in advocacy in the guise of objectivity.(157) However, there are a number of techniques, including proper briefing, express ethical standards and witness conferencing, which ought to help minimise any such tendencies.

Tribunal-appointed experts are presumed to be more independent and will be subject to cost control by the tribunal or by an institution where involved. As noted, single experts might still add to costs if parties appoint shadow experts.(158) Concerns with tribunal-appointed experts include lack of control by the parties, problems with the flow of information from the parties to the tribunal-appointed expert, difficulties in identifying the key assumptions upon which certain opinions must rely and a concern that too much of the effective decision-making is in fact undertaken by the expert.(159) The latter would occur where the expert is invited to analyse evidence and express an opinion as to the probative value of conflicting documents that will not be carefully analysed by the tribunal. Problems again arise with tribunal-appointed experts where experts are likely to divide on theoretical lines. Here a tribunal has a prejudgment problem in deciding which theoretical page "934" camp to select an expert from. Where the key issue is which theoretical camp prevails, selection of the tribunal-appointed expert will go a long way to deciding the final dispute. Where access to information is concerned, party-appointed experts will obviously be granted access to the information they request otherwise they will simply refuse to present an opinion. Where tribunal-appointed experts are concerned, there may be problems of selectivity and an inability to ensure compliance without the assistance of the tribunal. Issues of length and complexity can similarly be a problem with the reports of tribunal-appointed experts, which can again be impacted upon by useful directions by the tribunal. This is discussed further in section 12.14.3 below.

While there is obviously a distinction between tribunal-appointed and party-appointed experts, where the latter are concerned, if the tribunal exercises sufficient control and guidance, this can be made to work harmoniously for the clear benefit of the tribunal. It may even be that the parties could be asked to agree to changing their status to tribunal-appointed to overcome an impasse.(160)

Because there are no easy solutions to these problems, leading arbitrators have experimented with hybrid solutions or other processes to maximise the fairness and utility of expert input. In some cases, this also mirrors domestic developments. Because it is relatively easy to find experts that might disagree on contentious matters, modern case management in common law systems has led to some encouragement of court-appointed or jointly appointed neutral experts as has been the tradition in civilian jurisdictions. Even where expert testimony is still subject to party selection, as noted above, ethical codes sometimes indicate that an expert must nevertheless see their role as being to assist the adjudicator.(161) These issues and options are addressed separately in the sections that follow. It is also important to understand that the two forms of experts are not mutually exclusive in any particular arbitration. A particular case might use a tribunal-appointed expert to help the tribunal deal with the conflicting opinions of party-appointed experts. Here there are again organisational questions and challenges which flow.

12.11.1. Power of Parties to Appoint

Some arbitral statutes expressly allow parties to appoint their own experts.[162] Nevertheless, even where the laws only expressly deal with tribunal experts, as page "935" is the case with Article 26 of the UNCITRAL Model Law, the better view is that the right to submit evidence, for example pursuant to s 23(1) of the Model Law allows for evidence by means of party-appointed experts.[163] Some rules expressly allow for party-appointed experts without tribunal permission. Article 25(3) of the ICC Rules 2012 requires tribunal permission although this would invariably be granted. It would be difficult for an arbitrator to deny such a right given due process concerns. The CIArb Protocol Article 3 also indicates that permission must be sought before adducing expert evidence. Article 5.1 of the IBA Rules of Evidence 2010 indicates that a party may rely on a party-appointed expert. Notification shall be within the time ordered by the tribunal. Many other rules are silent but the norm is to allow party appointment as of right. Even without express reference, parties should be able to designate their witnesses, including experts. Each party's right to appoint their own expert could be considered a fundamental right in the context of being heard. Given that a right to representation is sacrosanct, there is nothing in theory to distinguish an expert presenting an opinion by way of submissions and a lawyer doing so instead.

While the tribunal has overall control over the number of witnesses and duration of evidentiary hearings, the mandatory right to present one's case would mean that restrictions on experts must only be imposed where this right is not affected. Poudret and Besson suggest a limitation by proposing that there is no right to an expert opinion flowing from the right to be heard unless it 'is necessary and capable of establishing facts which are relevant to the outcome of the dispute'. The qualification seems broad enough to apply in virtually all circumstances.[164]

A problem may still arise if there is a difference in view between the parties as to the value of expert evidence for dealing with a key issue where there is no express right to appoint. In such cases the tribunal might require the parties to make submissions in that regard so that appropriate procedural orders could be made,[165] but the overriding discretion should still remain.

12.11.2. Joint Appointment and Instructions

One possible solution to many of the problems of party-appointed experts is to jointly agree on a single expert. There are a number of procedural hurdles that would need to be carefully considered with such a proposal. There may well be resistance by a claimant who has had to engage an expert to formulate and crystallise its claim. Not only would there be a need for a clearly expressed joint appointment but also a joint brief to the expert. The tribunal would inevitably page "936" control that document, seeking agreement of the parties. Problems would arise if a joint expert was first appointed but the parties could not then agree on the instructions. There would also need to be provisions covering situations where only one party was forthcoming with instructions or materials, late submission of information by one of the parties, methodology of instructing and providing access to materials, and conferring and payment of fees. If a single expert was appointed, it would make sense to allow for cross-examination by both parties.[166]

12.11.3. Power of Tribunal to Appoint

Arbitral statutes typically make greater reference to tribunal-appointed experts than party ones,[167] although some key laws are silent on the issue. Nevertheless, general procedural powers are seen as being broad enough to cover the entitlement to tribunal appointment.[168] Arbitral rules will also tend to expressly allow for tribunal appointment of experts.[169] Subject to any express duty to call for an expert, if a tribunal thinks it has sufficient information and refuses to order an appointment, this does not violate due process rights.[170]

12.11.4. The Right to Appoint

Redfern and Hunter suggest that tribunals will rarely appoint experts unless expressly empowered to do so,[171] although Born suggests that such a request is not a prerequisite to appointment.[172] The IBA Rules of Evidence require a tribunal to consult the parties before appointing an expert.[173] Born also suggests that a page "937" tribunal is not required to appoint an expert where the parties so request.[174] This will depend on the particular jurisdiction. The Swiss Federal Supreme Court has considered that in some cases, it

is possible for an individual party to call for a tribunal-appointed expert under mandatory due process norms. This would be so where there is a specific request in a proper and timely manner, where the party is prepared to advance the costs if required by the tribunal and where the expert evidence would be required to adequately resolve the issue.(175) Redfern and Hunter pose the question as to whether a power to appoint can be implied under general principles of the *lex arbitri* and argue strongly that an appointment power can be implied.(176) This should be the preferred position under general procedural powers in cases where the parties express no preference. Nevertheless, there are good practical reasons to seek party approval wherever possible. Appointment by a tribunal raises an important policy question as to the proactive nature of tribunal behaviour, given that absent such an appointment a determination will be made on the basis of the evidence presented by each of the parties, including their own appointed experts. A related observation is that wherever a tribunal appoints its own experts as well as allowing party-appointed experts, costs may increase significantly. This might only be appropriate in matters of sufficient significance.(177) Because of the cost involved both directly and indirectly through the impact upon party witnesses, a tribunal should seek the parties' views when it is considering appointing an expert, provide reasons and give fair and reasonable consideration to the parties' responses.(178)

The situation will be more complex where the parties express a common contrary view or disagree strongly as will often occur. It would seem natural that tribunals should not appoint experts if the parties do not wish this to occur. Derains and Schwarz suggest that the general powers in the ICC Rules should not be interpreted to give a tribunal a right to appoint an expert contrary to the wishes of the parties as a tribunal ought not to be able to impose such an expense without their consent.(179) The reasoning may be problematic at least in the sense that it could be used against many discretionary determinations of tribunals on a range of issues. This issue may also be affected by questions of timing. If the tribunal was already page "938" expressly empowered to do so but the parties subsequently agreed to the contrary, in extreme cases the tribunal might consider that its entitlement to do justice is being unfairly reduced by the parties. For example, it has been suggested that international judges in inter-State disputes have an inherent right to call for experts because of a duty to resolve the dispute on all relevant data and be in possession of and understand all relevant evidence.(180) Because commercial arbitration is private and consent-based and is not seeking to generally establish principles of international law with broader implications, that logic is not readily transferable, particularly as it traverses the debate about an arbitrator's duty to be proactive or whether the arbitrator should merely reconcile the material as presented by the parties.

12.11.5. The Process of Appointment of a Tribunal Expert

Because differing experts can vary in their views, a tribunal concerned to allow all parties a full opportunity to present their case has to be very careful on how it goes about making an appointment of a tribunal expert. The parties might be invited to comment on selection and certainly must be given an opportunity to comment on any report. Poudret and Besson suggest that the right to be heard would imply entitlement to be consulted as to the choice of expert and the terms of reference.(181) If there are residual concerns, a tribunal might need to allow the parties to appoint their own expert and then appoint a third to assist the tribunal, although the added expense might not be appropriate in all cases. An example might be an accounting expert asked to synthesise the costings in a construction dispute. There might be little need to allow each party to present their own calculations as opposed to allowing them to merely cross examine or make submissions on the report of the tribunal-appointed accountant. Experts as to foreign law may not be necessary given that the parties are likely to have at least one counsel expert in the applicable law.

Where a tribunal wishes to appoint experts, it may seek to appoint its own experts from its own knowledge, or conversely, ask the parties to submit lists of appropriate names in order to identify a commonly agreed person or persons. If that approach does not display common names, the lists can be exchanged, parties given an opportunity to object to a defined number or at least provide comments, with the tribunal then making a selection from the remainder. Alternatively, the parties might individually be asked to rank from a list prepared by the arbitrator. Another possibility is to allow a certain number to be vetoed as of right, with others able to be challenged for just cause. Another possibility is to ask the parties to submit their own ordered lists.(182)

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A difficulty with any list is that the longer the list, the harder it is to ensure that all candidates are fully suitable and available and the more time consuming it is to identify this information. In some cases the tribunal might seek recommendations from a particular professional organisation or utilise lists of experts such as that promulgated by the International Centre for Technical Expertise of the International Chamber of Commerce. A number of other organisations include the Academy of Experts, EuroExpert, Expert Witness Institute and the Society for Expert Witnesses. The hope is that an institutional list will provide some quality control, both as to initial expertise and feedback from performances in other cases. There may be problems in that regard with issues of confidentiality, defamation and a conservative approach once a person is already on the list. If the tribunal is making an independent appointment without utilising recommendations of the parties, it might also wish to provide the parties with curriculum vitae and afford them an opportunity to make comments or state any objections.

12.11.6. Criteria for Appointment

In selecting an expert, the tribunal, in consultation with the parties should, consider independence; expertise; communication and language skills; ability to undertake any necessary testing and investigation in a timely and efficient manner; availability for the hearing; fees and expenses.(183) Some take the view that, wherever possible, a tribunal-appointed expert should not be a citizen of the country of either party unless that flows as a matter of course from the area of expertise needed. Ideally expert witnesses will be fluent in the language of the arbitration as they are attempting to communicate what will often be difficult concepts to laypersons. This can be particularly problematic where professional jargon is involved as would be the case with legal experts.(184) While the expert will generally be an individual, this may not always be so. CIETAC Rules 2012 Article 42.1 indicates that an expert or appraiser may be either an organisation or citizen.

The tribunal should consider what would be an appropriate number of experts to appoint. This would depend on the range of matters on which expert opinion is desirable, and the breadth of expertise of the potential candidates for appointment.

Where the tribunal appoints an expert, one question is whether a challenge could be made to the tribunal itself based on bias. In theory at least, if the evidence of bias ought to have been apparent to the tribunal at the time of the appointment, such behaviour would appear to offend against the right to equal treatment.(185)

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12.11.7. Timing of Appointment

Timing of appointment of a tribunal expert may differ from that of the parties. The parties independently determine their case strategies, determine the witnesses that are desirable and will comply with general duties of disclosure in that regard. An important aspect is to give the other party appropriate warning of the case that will be put. The tribunal appoints an expert for a different reason, namely to assist it in coming to a conclusion. A tribunal might find that the desirability of such assistance arises at different times and for differing reasons. In some cases a tribunal might know at an early stage that a matter will be sufficiently complex that it would wish to have its own expert assistance throughout. In other cases it may only be after the tribunal views the party-appointed expert reports that it feels the need for help in reconciling and understanding that material.

A tribunal ought to ensure that it is sufficiently familiar with the material presented before determining that its own expert would be beneficial. Once that view is taken, the parties should be informed at the earliest opportunity as this may impact upon their ultimate choice of witnesses to present and the manner in which reports will be written. For example, a party-appointed expert might include more complex material if he or she knows that a tribunal expert will be involved. The complex material might be the best way to convince the tribunal expert, but could confuse a non-expert tribunal that does not have such assistance.

12.11.8. Independence and Challenges to Experts

A tribunal-appointed expert should be independent and impartial and should have no conflict of interest with any party to the

proceedings.[186] While this is an important general principle that should apply as a matter of course, there is no uniform express basis for seeking to exclude an expert for lack of impartiality as is the case with arbitrators, although this is likely to be the emergent norm. If there is no entitlement to challenge as to a concern about the impartiality of an expert, it could simply be left for the advocate to challenge the validity of the expert's evidence on that basis. The IBA Rules of Evidence 2010 allow for a challenge as to the independence of the tribunal-appointed expert.[187] Even absent express provisions, such challenges ought to be appropriate[188] and can be dealt with under broad procedural page "941" powers.[189] The tribunal's general power of appointment should be seen as having an inherent duty to consider challenges to the proposed exercise of that power. The expert should also consider matters needing disclosure and form a view as to independence.

Any challenge to a tribunal expert witness should occur as soon as possible in order to avoid wasting time and money. More complex is the question of whether an untimely challenge could constitute a waiver of the challenge right. That would depend on which principles of waiver would be applicable. A conclusion as to waiver would be unlikely, given that a compelling argument that a particular expert does not in fact have the relevant expertise, or has a fundamental conflict undermining veracity, is hardly likely to be ignored by a tribunal, at least on questions of weight. That said, Article 6.2 of the IBA Rules of Evidence 2010 states with respect to tribunal-appointed experts that late objections may only be made if they relate to reasons of which the party only became aware after an appointment was made. But even if the parties are expressly bound by the IBA Rules, barring of a late formal objection cannot be a bar to submissions as to the lack of weight to be given to the particular expert's evidence.

It is less clear whether party-appointed experts need to meet the same standards of independence as tribunal-appointed experts. Some civilian experts view the whole notion of independence of party-appointed experts as a fiction.[190] Others argue that party-appointed experts should also be independent.[191] This is supported by Article 5.2(c) of the IBA Rules of Evidence 2010, which is significantly different to the 1999 Rules. It is easy to state an obligation of independence for a party-appointed expert, but it is more difficult to identify exactly what that entails given that this particular type of witness is expected to take money from a party and consult with the party and counsel. There is a difference between impartiality and objectivity, that should apply in any event, and independence, which should relate to the limits of permissible directions or suggestions from a party or counsel. All would agree that any opinion they present should certainly be honest, objective and independent, even though the relationship itself cannot be described as wholly independent.[192] The opinion of an expert should not be distorted for the benefit of the party appointing. The Chartered Institute of Arbitrators Protocol states that '(a)n expert's opinion shall be impartial, objective, unbiased and uninfluenced by the pressures of the dispute resolution process or by any party'.[193] Conversely, it has page "942" been suggested that, given the reality of party-appointed legal experts, 'the required standard for neutrality of legal experts should be less stringent than that of arbitrators'.[194] How a less stringent standard might be justifiable is not easy to discern. The CIArb Protocol makes clear that receiving a fee does not in and of itself impact upon independence. Nevertheless, most would see a contingency fee based on success in the proceedings as being an unacceptable interference with independence. Mark Kantor makes the valid observation that the desire to please the party hiring the expert and the desire for ongoing business already provides incentives of this nature that are not easily distinguished from a contingent or success fee arrangement. Furthermore, experts are rarely engaged before there has been questioning to determining whether their opinion is likely to be advantageous.[195] On this view, a tribunal might not be able to override the wishes of a party, particularly if contingency fees are the norm for remuneration in particular professions.

If a challenge is made and rejected, the aggrieved party might say that reliance on a partisan expert breaches due process and transnational public policy. Conversely, improper exclusion of a party-appointed expert could be argued to be an interference with its right to be heard and adequately present its case. Such challenges are unlikely to succeed except on clear-cut factual situations. Even less likely would be a successful challenge by a party after a tribunal accepted the opposing party's complaint about lack of independence of the tribunal-appointed expert. If the tribunal rejected that expert, it would no doubt appoint another, so due process would hardly be interfered with.

The IBA Rules of Evidence 2010 require a statement of independence before accepting an appointment for tribunal-appointed experts,[196] and a statement of independence in the report of a party-appointed expert.[197] The 2010 IBA Rules now call for disclosure of relationships with the tribunal and legal counsel as well as in relation to the parties themselves.[198] In some cases an expert may believe that they are independent on accepting appointment but then will see potential conflicts arising after viewing the material. The obligation of independence is an ongoing one. Expert groups may also impose particular obligations. For example, the ICC International Centre for Expertise calls for a statement of independence and disclosure of relevant factors.[199]

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As to the kinds of factors that may be relevant, an expert should not be a competitor of either party, which in some cases may severely restrict the choice.[200] Another potential problem is if a leading expert habitually appears in front of a leading arbitrator or at times sits as a co-arbitrator. There may also be problems where the expert is knowingly contending for different positions in one arbitration as opposed to another, when acting for the same party. While a tribunal might wish to probe such inconsistency, confidentiality duties in relation to the previous arbitration might pose some challenges.[201]

The Commentary to the IBA Rules of Evidence 2010 raises the special situation of an expert that may have been appointed by a European national court immediately after an injury occurs, to determine either causes of damage, possible remedies or to preserve evidence. This can occur long before an arbitration commences. Such a person does not presumptively lack independence but fairness to common law adversaries unfamiliar with this process may need special sensitivity in such circumstances.[202]

12.12. Challenges as to Expertise

The tribunal should ensure that the hearing is not taken up with challenges to the expertise of opposing witnesses. Hence, curriculum vitae should be exchanged well beforehand alongside the expert reports or even earlier so that if necessary, preliminary rulings can be made as to expertise. In most cases, the tribunal will simply allow the parties to present the experts of their choice and allow submissions as to relative expertise to go to questions of weight.

12.13. Powers, Rights and Duties Of Experts

12.13.1. The Differences between Party and Tribunal-Appointed Experts

As noted, there are two broad types of experts, the first being the experts presented by the parties as witnesses and the second, any experts appointed by the tribunal. They are discussed together in this section with similarities and differences noted. There is greater uncertainty with the role of party-appointed experts. While in each case an expert must present an honest and objective view, a party-appointed expert is nonetheless part of a team whose objective is to help the party page "944" win. As noted above, the party-appointed expert is paid by the party and confers with the party and counsel in preparing a report. Hence, it is more problematic to determine the nature and extent of any duty of independence. The emerging albeit still contentious view is that it is still important to establish that even a party-appointed expert's role is to assist the adjudicator in a reasoned and independent manner and not advocate the position of the appointing party. Nevertheless, little is said in arbitral statutes or rules about any ethical duties of party-appointed arbitrators. Because of the consensual basis of arbitration, any such ethical standards tend to be limited to the parties and the tribunal. Even legal counsel are not generally subject to express ethical norms pertaining to arbitration processes. This poses a particularly challenging issue for party-appointed experts, particularly in view of the differences from a comparative law perspective, where lawyers from the common law tradition see such experts as a natural part of the adversarial process while many civilians see ‘guns for hire’ with little probative value and insufficient scope for adequate tribunal control.[203] Mark Kantor also makes the observation that the ethical obligations on an expert will impact upon the ethical behaviour of counsel.[204] A party-appointed expert may also need to consider the contractual obligations with the appointing party. It may even be that there are tortious obligations to the other party, particularly in relation to misrepresentation.[205]

All would agree that tribunal-appointed experts are simply there to help the tribunal come to the correct view, regardless of which side that favours. Redfern and Hunter describe the role of experts being 'to assist, educate, and advise the arbitral tribunal, in a fair and impartial manner in specialist fields (e.g., technical, forensic accountancy, legal, etc.) in which the arbitrators (or some of them) do not themselves have relevant expertise in specific issues in dispute between the parties'.(206) The key is to maintain objectivity. The comment does not distinguish between the two types.

The ClArb Protocol indicates that:

> An expert's duty in giving evidence is to assist the arbitral tribunal to decide the issues in respect of which expert evidence is adduced; and page "945" An expert opinion shall be impartial, objective, unbiased and uninfluenced by the pressures of the dispute resolution process or by any party.(207)

The IBA Rules of Evidence 2010 do not go as far as the ClArb Protocol in articulating an express duty to assist the tribunal for party-appointed experts. Instead, the IBA Rules tend to articulate the specific behaviour rather than the overriding duty. For example, the Rules call for experts to express their 'genuine belief in their opinions as opposed to 'the truth'.(208) A genuine belief must articulate a view that reconciles conflicting perspectives. While limited to the approach of courts, the Reporters for the Principles of Transnational Civil Procedure involved in developing the ALI/UNIDROIT principles appended their own proposed rules to those principles. Rule 26.1 requires court-appointed experts to be 'neutral'. Rule 26.3 indicates that party-appointed experts are subject to the same standards for objectivity and neutrality as is the case with court-appointed experts.(209) A party-appointed expert is also obliged to perform the task in good faith and in accordance with the standards of the expert's profession. Where party-appointed experts are concerned, another issue is the extent to which legal counsel may be involved in helping shape their reports and testimony. Issues discussed in section 12.5.2 and 12.6 above would again be relevant. A practical issue is that questions of privilege and limited document discovery will generally prevent forced disclosure of communications between counsel and party-appointed experts,(210) which adds to the difficulty in having any ethical standard impact significantly on the commercial incentives for partiality and advocacy. Mark Kantor suggests three core duties to promote the ethical responsibilities of party-appointed experts. He suggests:

(1) a duty of 'disclosure': to disclose material relationships with respect to the parties, their affiliates, counsel or the dispute, including compensation arrangements;

(2) a duty to provide 'full information' even if adverse: to include in any written and oral evidence all material information, whether supportive or adverse to the professional analyses and conclusions found in that expert's evidence; and

(3) a duty to 'assess reasonableness': a duty to use diligence to assess, to the extent the expert has the professional background to do so, the reasonableness of assumptions provided by counsel or a party on which that expert relies in the expert evidence.(211)

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There are practical and strategic considerations as well. Party-appointed experts need to know from the outset that they are only useful to their appointing party if they help a particular position be adopted by a tribunal and that will result from their logic and qualifications. Otherwise it is easy to wrongly see themselves as having some advocacy role. There may also be some incentive to downgrade contrary indicators that they might in other circumstances concede to have more relevance, but if they are caught out doing so, it can undermine their credibility. It is also important to remember that the first role a party-appointed expert may play is to give general advice to the party about the strengths and weaknesses of its case and how the case might best be presented.(212) That should still be provided in an impartial and objective manner.

Counsel also need to understand that there is a world of difference between advocates arguing contrary positions in different cases before the same arbitrator and party-appointed experts acting in the same manner. An advocate is simply concentrating on those arguments that best serve their client's interests. If a leading arbitrator sees the same expert arguing opposing positions in different cases, that person's veracity is naturally undermined.

12.13.2. The Tribunal's Duty Not to Delegate Decision-Making

It is also important to consider the powers of the expert in the context of the rights and duties of the tribunal, particularly in the context of tribunal-appointed experts. A tribunal-appointed expert does not have determinative power over any factual matter. Experts provide reasoned opinions for the benefit of the tribunal. A tribunal is not bound by the opinions of experts even if appointed by the tribunal. An arbitrator's duty to complete the mandate requires the arbitrator to make a determination even if a tribunal-appointed expert is involved. At most, the express or implied power to appoint an expert allows the tribunal to seek such assistance, but does not allow the tribunal to delegate the adjudicatory function. More generally, legal systems support the view that a delegated duty cannot generally be further delegated without permission.(213) The obligation not to delegate decision-making should be considered in a purposive rather than formalistic manner. For example, page "947" if an expert is entitled to interview parties in relation to factual matters for ultimate determination, it is important that the expert does not make findings of fact in lieu of the tribunal.

The prohibition against delegation of decision-making power is more problematic if an expert is used because of confidentiality claims so as to shield material from the parties and the tribunal. For example, in *Bechtel Inc*, an Iran-US Claims Tribunal directed that an independent accounting firm inspect non-public stockholding records to ensure that sufficient stock was beneficially owned by natural persons who were citizens of the US to ground jurisdiction.(214)

The final decision on any and all issues must truly be that of the tribunal itself. The tribunal must consider the evidence of the experts, determine its relevance and weight and apply independent judgment in resolving conflicting testimony. If a party-appointed expert does not provide adequate reasons behind an opinion, a tribunal could be justified in rejecting the evidentiary value of their report or testimony. Obviously a tribunal must have valid reasons for coming to a different conclusion. Where one or more of the arbitrators has relevant expertise in the area where an expert witness is being utilised, it must ensure that it does not make independent assessments without giving the parties an appropriate opportunity to know the tribunal's thinking and to respond.(215) If it is a tribunal-appointed expert, the tribunal can naturally call for reasoning to be elaborated.

A tribunal needs to ensure that it properly establishes the respective roles of the tribunal on the one hand and a tribunal-appointed expert on the other. In some legal systems it is inappropriate to ask the expert the very question that the adjudicator is to decide as that would appear to usurp the latter's function.(216) One example noted above is where the tribunal asks the expert to sift through documents that the tribunal does not wish to analyse. A tribunal at least needs to understand and accept the methodology and logic and accept the thoroughness and likely accuracy of the assessment. Allowing parties to challenge the assessment is a further way to ensure that the tribunal exercises sufficient independent judgment. It is less contentious if the expert is merely assisting the tribunal to sort the evidence, understand the technical terms and collate testimony to the various issues being considered.(217)

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12.13.3. Tribunal Experts and Tribunal Deliberations

Tribunal-appointed experts should not be allowed to sit in on the tribunal's final deliberations or assist in any way in the drafting of the final award,(218) although in *Luzon Hydro Corp* recourse against the award was denied when the expert simply reviewed a draft of the award to check for technical errors.(219) Such assistance should not be problematic where the tribunal has already deliberated and decided and simply seeks advice as to terminological errors or ambiguities, but it would always be preferable to ask the parties permission.

While the expert should not be involved in deliberations, a situation might arise where a tribunal is uncertain of a matter during its deliberations and would wish for input from the expert. If the tribunal would naturally have asked the expert the question if it occurred to it during proceedings, there should be a prima facie entitlement to do so during deliberations. At this stage, however, there is an additional due process concern. Where this is considered necessary, it would be preferable to make that request in writing, notify the parties and allow them a short but reasonable opportunity to comment on the

expert's responses.

12.13.4. The Expert's Right to Evidence and Assistance

Arbitral rules do not generally allow tribunal-appointed experts to question the parties or their witnesses. Express assistance tends to be limited to requiring the parties to deliver documents and relevant materials as required. An example is Article 6.3 of the IBA Rules of Evidence 2010. A party who has been asked to provide information may object on the grounds stipulated in Article 9.2. While there is no express reference to questions, if an expert believed certain questions were necessary for the opinion, it could either explain why this is so, leaving the tribunal to elicit the information, or invite the tribunal to call for the information prior to the report being concluded. While experts do not have a direct right to question factual witnesses, in some cases it may be helpful if they are allowed to do so.(220) If that was to occur, an appropriate protocol should be devised by the tribunal to ensure due process.

A tribunal-appointed expert must in fact follow procedures analogous to due process norms in all appropriate activities.(221) While an expert is entitled to call for page "949" assistance, all correspondence should be sent to all parties. Meetings should not be held without representatives of all present, absent agreement to the contrary.(222) Communication between the tribunal and the experts should also be communicated to the parties' representatives so that they have the chance to comment on questions and directions that are contained in such communications.(223) If a party fails to provide information, this should be dealt with scientifically by the expert as part of the overall evidentiary matrix. Any adverse inferences that may be merited should be left to the tribunal.

12.13.5. Party Access to Expert Experimentation

One question is whether the parties have an absolute entitlement to be present during the tribunal expert's experimentation and analysis or only in relation to consideration of their testimony and report. The latter approach was taken by the Paris Court of Appeal in *Carter v. Alsthom*.(224) Commentators have differed in their response to this case.(225) The parties' entitlement to be involved in the report preparation stage is also supported in the European context by Article 6(1) ECHR, although this does not go so far as to require access to every document viewed or meeting undertaken by the expert.(226) If an expert opinion is to be based on some experimentation, the parties' representatives could be invited to be present or some other appropriate record made so that they can test the process and not be bound by the conclusions reached. The parties should at least have access to all information considered by the expert.

12.13.6. Experts as to Applicable Law

In common law litigation, questions of foreign law are questions of fact to be proven via witnesses and/or via exhibits of primary and secondary sources. Civilian legal systems generally rely on the judges to know foreign law. page "950" In international commercial arbitration, particularly where there are three arbitrators, at least one of the tribunal members is likely to be an expert on the particular law. It is not accurate to describe it as foreign law.

There is no express stipulation as to the way international commercial arbitration tribunals are to determine the content of applicable law. This is discussed in sections 10.6 and 13.16. At this point it merely needs to be noted that experts will often give evidence as to applicable law. One difficulty with legal experts, whether party or tribunal appointed, is that they may find it harder to follow their mandate to assist the tribunal with reasoned opinions rather than make an ultimate determination on the legal question in issue. A key difference is between providing an opinion on what the law actually is in aid of the tribunal's subsequent application of such law to the facts as ultimately found, or conversely tendering an opinion as to the proper conclusion based on the factual material presented. The latter is inappropriate but in many cases it will be difficult to easily ensure a distinction. The situation is different where the key issue in dispute is the content and meaning of that law. A tribunal can deal with these problems by indicating a number of factual scenarios to the expert and asking what the legal conclusion would be in each case.

Typically each party will have counsel who are experienced in the relevant law. Written submissions will cover legal issues. The same will occur with oral submissions. Because there are no strict rules

as to the tendering of documentary evidence, legal counsel can provide all relevant primary and secondary sources as to the nature of the relevant law, leaving it to an expert if necessary to deal with matters of analysis and opinion. In some jurisdictions, a tribunal might require counsel to submit an affidavit in support of their contentions.(227) The problem in relying on legal counsel alone is that they are by definition partisan. While they may not mislead the tribunal, they will naturally and quite properly argue for the view of the law that suits the client where there is any grey area involved. While that may be the reality with some party-appointed experts as well, that is not as ethically legitimate as partisan counsel submissions.

If all members of the tribunal are qualified in the applicable law, it could be reasonable to reject an application for any tribunal-appointed legal expert evidence. If only one member of the tribunal is expert in the particular law, this is more problematic as it will often be a party-appointed arbitrator. This will often be because one party succeeded in the negotiations in having their national law applicable and chose a local person as arbitrator accordingly.

Tribunals should be wary if they are expert in similar but not identical legal regimes to that applicable in the case as they could too easily overlook nuances and variations. Examples would be common law arbitrators familiar with UK law page "951" dealing with Commonwealth countries where the laws are presumed to be highly derivative. In selecting a tribunal-appointed legal expert, there might also be prejudices by some arbitrators as to whether they prefer the opinions of practitioners or law professors. Those from a civilian background can tend to respect the views of professors.(228) Common law practitioner/arbitrators can at times have a more negative opinion of academia!

12.14. Controlling Expert Assistance and Testimony

12.14.1. Introduction

Tribunals generally have a broad discretion as to the way they will hear expert evidence. If the parties are allowed to present their own expert evidence, this will invariably conflict. There is then the difficult question as to how a tribunal should resolve which of the conflicting views to prefer. The key challenge is that a tribunal will typically need to find a way to resolve conflicting expert testimony on matters that are often outside the expertise of the tribunal members themselves. Because of this, the traditional approach of hearing experts individually and then trying to synthesise conflicting testimony, is thought by many arbitrators to be sub optimal. Avoiding that problem by relying instead on tribunal-appointed experts raises other contentious issues. A number of alternative approaches are gaining favour. These include joint appointments, pre-hearing meetings between experts, expert conferencing at the hearing, an amalgam of party and tribunal-appointed experts, expert teaming, expert facilitators and codes of conduct for experts.

If a tribunal intends to engage in any of such ongoing processes, this should be made clear at the outset as there is a very different mindset needed between separately presenting an opinion and working collegially, albeit with opposing party-appointed experts.

12.14.2. Number of Experts

There can be no blanket rule as to the number of party-appointed and/or tribunal experts. Nevertheless, the ICC recommends that each party is allowed only one expert for any particular area of expertise.(229) A party advocating a higher number should need to be able to clearly explain why this is required.

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12.14.3. Questions for the Expert, the Expert Brief and the Content of Expert Reports

As noted above, a key issue in expert evidence is to allow the tribunal to make an independent decision, albeit aided by experts and in doing so, find a method of assistance that truly allows the tribunal to exercise independent judgment. In this sense the expert's report and the brief upon which it is based are both crucial. A tribunal should do everything reasonable within its power to ensure that each report is prepared in a way that aids the tribunal in its mandate. The need is the same regardless of whether it is a party-appointed expert or a tribunal-appointed expert, although the procedure and entitlements may vary in each case.

The overriding suggestion is that the clearer the brief and directions to any expert, the more likely that the report will be useful. In turn, the more that all expert reports are optimised in this way, the less concern there may be as to whether experts are party or tribunal-appointed. Similarly, the more that the reports clearly articulate all required material, the less there may be a need for innovative conferencing options or conversely, the more efficient such options are likely to be. Hence, the key suggestion is that a tribunal should give particular attention to the brief it provides to a tribunal-appointed expert and the directions it may give as to the required content of the reports of all experts, whether party-appointed or tribunal-appointed.

12.14.4. Tribunal-Appointed Experts

The very appointment of a tribunal expert is based on a tribunal view that some expert assistance is required. At an appropriate stage, the tribunal can identify the particular questions on which the expert opinion is sought. The more that experts get such guidance from the tribunal, the more focused their work is likely to be. Conversely, too much direction at an early stage may prejudge key issues, particularly as the direction will typically be given before the entire evidentiary record is known and the tribunal itself may not be fully across all technical matters.(230)

The tribunal might identify the questions independently or in some cases seek to do so in consultation with the parties.(231) Even if the tribunal decides independently to ask the questions, it would be appropriate to give the parties an opportunity to comment on those proposed, or suggest additional questions to be presented to the experts. There is also a difference between posing neutral page "953" questions or providing questions that show the thinking of the tribunal and which require confirmation or challenge by the expert. Where there is more than one expert, the questions might be put to them individually for their individual response. The parties might be granted an opportunity to make written submissions to the selected experts prior to the latter rendering their report. Once the expert reports are provided, the parties might then be given a further opportunity to make comments on them.

The terms of reference of an expert should consider the questions being asked, the information to be considered, the tests and investigations if any to be conducted and the logistical aspects of the process.(232) Logistics should include the permissible contact or methods of contact between the expert and the parties; obligations on the parties to assist and provide specific information; styles, format and length of the opinion; timetable; duties of independence and confidentiality; fees and expenses including timing and methods of payment. A tribunal needs to consider whether contact with parties and requests for information should occur directly or through the tribunal. It has been suggested that it would be desirable for the tribunal, the parties and the experts to all sign terms of reference,(233) but this may not always be practical.

12.14.5. The Content of Expert Reports

There are a number of suggestions as to the material to be included in reports. The IBA Rules of Evidence 2010 Article 5.2 indicates in relation to *party-appointed* experts that the report shall contain:

- The full name and address.
- A statement regarding his or her present and past relationship (if any) with any of the parties, their legal advisers and the tribunal.
- A description of his or her background, qualifications, training and experience.
- A description of the instructions pursuant to which the opinion and conclusions are provided.
- A statement of independence from the parties, their legal advisers and the tribunal.
- A statement of the facts on which the opinions and conclusions are based.
- The opinions and conclusions including a description of the methods, evidence and information used in arriving at the conclusions.
- If translated, a statement as to the language in which it was originally prepared and the language in which the expert anticipates giving testimony at the hearing. page "954"
- An affirmation of a genuine belief in the opinions expressed.
- Signature, date and place.

- Documents relied on that have not already been submitted shall be provided. If the report is signed by more than one person there is to be attribution of the entirety or specific parts to each author.(234)

When acknowledging the nature of an independent opinion the Civil Justice Council Expert Witness Protocol makes a sensible suggestion that 'a useful test of "independence" is that the expert would express the same opinion if given the same instructions by an opposing party'.(235)

Section 12.5.3 above looked at the role of counsel in assisting in the preparation of witness statements and witness preparation. The same ethical issues arise in relation to party-appointed expert reports. The main difference is that an experienced expert will typically draft the report on their own. Nevertheless, circumstances may arise where counsel would have hoped that the expert report came to different conclusions or stated conclusions more forcefully. The Civil Justice Council Expert Witness Protocol suggests that '(e)xperts should not be asked to, and should not, amend, expand or alter any parts of reports in a manner which distorts their true opinion, but may be invited to amend or expand reports to ensure accuracy, internal consistency, completeness and relevance to the issues and clarity'.(236)

There are difficult policy questions as to the disclosure of instructions to experts. On the one hand, to properly understand the nature of an opinion and to confirm its independence, one might well wish to see the instructions. However, for a party-appointed expert, such communications could be claimed to fall within the policy ambit of legal professional privilege. While that would depend on the law of privilege that applies, the presumption would be against privilege applying as the instructions are for a document to be presented to the tribunal.

Article 5.3 allows for revised or additional expert reports that respond to matters contained in other reports and witness statements or submissions not previously presented. Tribunals may need to keep careful control to ensure that tactical manoeuvring does not misuse this provision to try and get the last word with a plethora of submissions on or near a cut-off date.(237) Article 6.4 of the IBA Rules of Evidence deals with the contents of reports of *tribunal-appointed* experts. The above headings are again relevant, save that a tribunal appointed expert does not need to describe the instructions pursuant to which the opinion was provided (which would have been circulated by the tribunal in any event) or a *page "955"* statement of independence (which would have been dealt with at the appointment stage).(238)

The ClArb Protocol also outlines the matters that ought to be dealt with in an expert's written opinion. These include:

- Details of any past or present relationship with any of the parties.
- Background, qualifications, training and experience of the expert.
- A statement as to the instructions the expert has received and the basis of remuneration.
- A statement as to the facts and matters including assumptions which have been considered in reaching the opinion.
- A statement of the facts and matters including assumptions upon which the opinion is based.
- A statement of the opinions and conclusions reached and a description of the methodology and evidence used in reaching the opinions and conclusions.
- A statement as to matters on which the expert has been unable to form an opinion.
- A statement of the matters, if any, outside of the area of expertise.(239)

The Protocol requires that the opinion only address the issue or issues approved by the tribunal. It must also contain an expert declaration.(240) The Protocol calls for reports to be as brief as possible, reference all appropriate documents and sources, but not unduly extract material from other documents. Annexed material should be reasonably necessary in support of the opinion reached. Experts could be asked to declare their availability to perform the specified tasks as well as their independence.

Because a key part of expert testimony is as to opinion, an important way to analyse its probative value is to understand the expertise of the person and the methodology and reasoning behind their conclusions. If the report does not indicate the qualifications and experience to a significant degree, this should be tested by the tribunal. However, protracted arguments about qualifications and

expertise would potentially add to the costs and delay.

The most significant aspect of the report is the reasoning, including any assumptions, the evidence on which it is based, degree of certainty and an explanation of why contrary opinions are not preferred. Here it may well be appropriate for a tribunal to give even more detailed guidance than outlined above. A number of useful suggestions have been made in domestic court practice directions, protocols or codes of professional bodies.(241) Court rules will tend to require the expert page "956" to acknowledge reading Court promulgated guidelines, which in some jurisdictions, will elaborate that the expert witness has an overriding duty to assist the court and is not an advocate for a party. The expert might be asked to acknowledge that they understand their role being to assist the court and that this inevitably has an educative function and demands enough reasoning and analysis to allow the adjudicator to make an independent determination. The expert should make clear to what extent the opinion is based on personal knowledge or on assumptions. Where it is assumptions, the report should indicate whether the assumptions are provided through the instructions of counsel or are assumptions of a professional nature.

If the opinion is based on disputed facts, the report must be particularly clear as to what assumptions of fact the opinion is based upon. When considering the facts, material and assumptions upon which the opinion is based, facts and literature should be identified and the expert should attest to having made all of the inquiries they believe are desirable and appropriate and have not withheld any matters of significance. When providing their opinion they should indicate whether it is provisional or qualified, and whether further information would allow a more concrete conclusion either way. If the opinion is incomplete or provisional for any reason, the expert should clearly explain why this is so and what added material would be appropriate. This will help the tribunal make assessments as to the weight of evidence. If an expert has relied on the research of others, this should be explained and an indication given as to why the methodology of that research is sufficient. Where tests have been undertaken, the report should indicate the methodology used, who undertook the test, under what supervision, with what qualifications and ideally a justification for the methodology employed.

The expert's report should also indicate the factors that affect the certainty of the proffered opinion. For example, an expert should indicate if the opinion is based on a theoretical view about which there is a significant divide in the professional community. Similarly, if the expert was denied access to key information or did not have time to do the most appropriate tests, this should also be indicated. This will not only help the tribunal evaluate the opinion and allow the other parties to consider how to challenge it, but will also assist the tribunal in the inferences it draws from non-disclosure, in considering further orders as to testing and even in possibly getting an agreement by the parties to resolve the matter by the result of the more elaborate test.

An expert's obligations are ongoing. Hence, if an expert subsequently changes his or her opinion, this should be immediately notified to all relevant parties. This might occur on simple reflection or after reviewing other reports. In other cases, further testing or newly published research may lead them to modify their view.

12.14.6. A Proposed Code of Conduct

The following is a model code of conduct on matters that might be relevant for proposed experts as proposed by the author. These might be included in directions or converted into questions for an expert to consider in the report, with a page "957" requirement of an acknowledgment that the Code has been followed. Conversely the items could simply be used as an aid to drafting specific questions, directions or terms of reference. The format should be less important than the clear articulation of the requirements. It is not intended as a boilerplate for all cases but merely a guide to aspects that may be appropriate on a case-by-case basis and is based on the foregoing reflections and some of the leading models used to date in arbitration and domestic litigation. Many might disagree with the utility of directions alone. Nevertheless, the key point as noted at the outset is that the better the instructions, the more likely the utility of the report. This must be of significant value in its own right and also as a result of the ongoing debate about party appointed versus tribunal appointed experts versus conferencing and other methods. The debate deals with what would appear impressionistically at least, to be some dissatisfaction among the arbitral community with the way expert testimony is generally dealt with.

Proposed Code of Conduct

The Code aims to cover both party-appointed and tribunal-appointed experts (although if actually utilised, it would be preferable to separate out for each type. Thus the following items are applicable to both party-appointed and tribunal-appointed experts, save where specifically referring to one type only).

1. *The expert's function and duties.*

   I acknowledge that my role is to assist the tribunal to decide issues where expert evidence is appropriate and to do so in an independent, impartial, objective, expeditious and efficient manner. I understand that it is not my task to make a decision in place of the tribunal but, rather, it is to provide the tribunal with a sufficiently reasoned opinion to allow it to make an independent determination of the matters in issue before it. I understand that my role is therefore that of providing reasoned advice so as to not only present my opinion but to also do so in an educative way that helps the tribunal understand the reasons behind it and helps the tribunal to form an independent view on whether and to what extent my opinion should be accepted.

2. *Statement of independence*

   I acknowledge that I am required to be independent from the parties, counsel and the tribunal. In accepting the appointment I declare that I have the necessary independence and there are no conflicts of interest of which I am aware. I also acknowledge a distinct obligation to disclose any fact of which I am aware that could allow a party to form a contrary view as to my independence.

   I acknowledge that my duty of independence and the related duty of disclosure is ongoing until such time as my evidence is completed. Consequently, if any circumstance arises or comes to my attention that may allow any reasonable observer to question my independence, I will disclose it to the tribunal.

   (For party-appointed experts) I also understand that while I may confer with the party appointing me and its counsel by way of briefing and while my page "958" fees may be paid for by a party, my role nevertheless remains as outlined above and that it is not my role to advocate the position of the party who has appointed me. I acknowledge that the acceptance of a fee for my report from a party does not itself compromise my independence but it would if the fee was dependent on the result in the dispute and I acknowledge that my fee schedule is not of that nature. (For party-appointed experts) I acknowledge that my opinion was not influenced by any party, party counsel or any other person. While I am aware that counsel is allowed to invite me to clarify a draft, ensure completeness, relevance, internal consistency and accuracy, nevertheless, I have not been asked to and will not construct any part of my report in a way which distorts my true opinion. The approach I will take to my task means that the opinion that I will express in this matter would be the same if my instructions were received from the opposing party or the tribunal.

4. *Expertise*

   In accepting the appointment I attest to my qualifications and experience being suitable for the provision of an expert report. In areas where I do not claim sufficient expertise, these will be articulated and explained in the report. In appropriate cases, the report will include an indication as to why I believe I am particularly suitable to provide an expert report of this nature.

5. *Availability*

   I acknowledge that in agreeing to provide this report, I am willing and able to provide my report and testimony within the timeframe indicated at the time of my appointment.

   I understand that, in giving evidence, I may be asked to do so separately or may be involved in conferencing with other experts, either before the hearing, during the hearing or both. In such circumstances I acknowledge that I may be called on to seek to generate a joint report with other experts, indicating areas of agreement and disagreement and providing full and adequate reasons for the latter. I acknowledge my willingness to do so in good faith and expeditiously.

6. *Brief and contact with the parties*

   I will indicate in my report the instructions on which my report is based (for party-appointed experts – save for matters properly covered by legal privilege as applicable in the arbitration).

   (For a tribunal-appointed expert) I am entitled to seek documents from the parties and may do so (directly or via request to the tribunal). I may pose questions for the parties (directly or only via request to the tribunal, which can determine which questions will be put). I am aware that I should not make contact with either party without the consent and the presence of the other.

7. *Methodology*

   I acknowledge that an important part of my report is, where appropriate, to indicate to the tribunal the methodology I have adopted, the reasons for doing so, my reasons as to why alternative methodologies were not thought appropriate, the advantages and disadvantages of differing methodologies,  *page "959" any presumptions of fact or theory my opinion is based on and an indication of any methodology I would have wished to have employed where I was not able to do so. In the latter event, I will explain why the methodology was not adopted, why I think it would have been preferable and, if possible, the likely implications if it had been employed.*

8. *Testing and experimentation*

   Where testing and/or experimentation is involved in the preparation of my report, I will give particular attention to explaining why those tests and experiments were conducted, why they were thought optimal, what if any problems there are with that methodology and the potential benefits and problems with alternative methodologies. I will follow any reasonable procedures directed by the tribunal, such as in relation to access of the parties to the tests themselves and their results.

9. *Findings and reasons*

   I acknowledge that my key function is to provide a reasoned explanation for the opinion I have formed. In providing my opinion, I will include any assumptions on which it is based, explain the basis of those assumptions, generally indicate the degree of certainty of my opinion and explain why contrary opinions are not preferred. (For party-appointed experts) If I have been directed to provide an opinion based on a particular assumption that I am not to evaluate independently, I will make this clear in my report.

   (Conversely, the Code could indicate that a party-appointed expert is nonetheless under a duty to evaluate the reasonableness of any assumptions that are required to be utilised.)

   In giving an indication as to the level of certainty of my proffered opinion, I will indicate the factors that affect certainty.

   I will indicate the evidence upon which my opinion is based, including the extent to which it is based on personal knowledge and experience. I understand that my role is to consider and allude to all material facts, including those which might detract from my ultimate opinion. If my opinion is based on the research or experiments of others, this will be explained with appropriate discussion and citation of the work relied on. If it is based on speculation, I will explain the reasons and justification.

   I will indicate whether the conclusions are provisional or qualified and the reasons for this and, in either event, whether further information would allow a more concrete conclusion, and if so, what information would be appropriate.

   I acknowledge that I am to deal with all of the questions posed by the tribunal and not deal with matters outside of those questions. If I feel that other matters are also important or have any concerns about the nature of the questions, I should seek prompt instructions from the tribunal. If I am unable to proffer an opinion on any matter, I will make this clear and indicate the reasons for this.

   I acknowledge that my report should reference all appropriate documents and sources that should reasonably be considered in support of the opinion reached.

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10. *Confidentiality*

    I acknowledge that the arbitration proceedings are confidential and I may not divulge any aspect of the process without the agreement of the parties and the tribunal.

Signed:[242]

> Another way to achieve the same outcome is through terms of reference or specific questions in a brief. The following is a list of topics that could be covered in draft terms of reference. The detail could obviously draw on the above proposed code:

Draft terms of reference for expert reports

1. *Role of expert*.
2. *Duties of independence*.
3. *Qualification and expertise*.
4. *Questions for consideration*.
5. *Required tests and investigations, including protocols*.
6. *Contact with the parties including requests for information and questions*.
7. *Obligations on parties to assist the expert*.
8. *Time limits for report and ramifications if late*.
9. *Duty to appear at a hearing and confer with other experts if required*.
10. *Style, format and length of report*.
11. *Language of report and oral evidence and translations*.
12. *Confidentiality*.
13. *Fees and expenses*.
14. *Accompanying documentation*.
15. *Affirmation of genuine belief*.
16. *Signature (if joint report, providing indication of individual responsibility for parts)*.

12.14.7. Joint Reports of Party-Appointed Experts

As noted above, one problem with the use of party-appointed experts is that their reports and testimony will invariably conflict. A tribunal then has a difficulty in knowing how to reconcile the conflicting opinions. One possibility is to ask them to prepare a joint report for the tribunal, identifying common views, areas of *page "961"* disagreement, the basis for that disagreement, and methods by which the tribunal could legitimately resolve the conflict. Cross-examination in relation to separate party-appointed expert reports is often time consuming and repetitive.[243] The above code could be modified for such purposes, highlighting the need for clear reasons for differences and the way to resolve them.

Even if a joint report is not possible, it is important to have distinct reports follow an identical order and explain the reasons for points of difference. Another suggestion is to have experts exchange draft reports at an early stage.[244] Another approach is to invite each party to provide specific questions to be addressed by the opposing experts,[245] subject to tribunal scrutiny and acceptance.

12.14.8. Pre-hearing Meetings between Party-Appointed Experts

Another methodology in support of refining the opinions to aid the tribunal is to try and have the experts meet before the hearing so as to identify the issues they agree upon, the areas of difference, and allow them to concentrate on the latter before the tribunal. Pre-hearing meetings between opposing experts can '(1) clarify technical and factual issues, (2) outline areas of agreement and disagreement, (3) focus on relevant points, (4) narrow down the differences between expert reports, (5) encourage scientific debate and, as a consequence, (6) render the taking of expert evidence more time and cost efficient'.[246] Meetings at various stages may also inspire experts to act more independently and objectively. The ICC Task Force recommended the use of pre-hearing expert conferencing.[247] Experts may be more willing to present a nuanced view to their peers than they would in the context of confrontational cross-examination. Drafting joint reports is more likely to lead to attention being primarily directed to the most significant issue, with peripheral matters appropriately relegated. Witness conferences may increase certainty by binding expert positions taken during conferences, although this could also induce experts to be reticent as a result.

Some important practical issues arise. The first is timing. Should such meetings occur before the experts have drafted their first reports or after; should meetings be allowed with counsel or the

parties present; if the parties and/or counsel are entitled to be present, should there be a protocol as to any comments they can page "962" make; should the tribunal and/or the parties set an agenda or list of questions for the expert? It is also important to determine from the outset of the procedural discussions with the parties whether the content of any discussion between the experts is privileged or may be referred to at an ensuing hearing. Most importantly, there is also a need to determine whether any agreement reached between the experts is binding on the parties, absent their own agreement to that effect.(248) Absent express agreement by the parties, a tribunal will need to make decisions on these issues on a case-by-case basis. It is better to clarify permitted behaviour at the outset than try and resolve some of these questions after the event.

Article 5.4 of the IBA Rules of Evidence 2010 allows for the tribunal to order party-appointed experts to meet and confer on such issues. It provides that at such a meeting the party-appointed experts shall attempt to reach agreement on those issues as to which they have differences of opinion. The new Rules now contemplate that such a meeting could be called for either before the first draft reports or after.

The ClArb Expert Protocol also deals with pre-hearing meetings between experts and attempts a more elaborate Code. The ClArb Expert Protocol calls on the experts to meet before they prepare their first report. Experts are to hold a conference to identify issues on which opinions will be sought, identify tests or other methods of analysis to be conducted, if possible by agreed methodologies and the manner of conduct of any such tests. A tribunal may direct the experts to exchange draft summary opinions for such meetings which will be privileged from production to the adjudicator and, hence, are without prejudice to the parties' positions in the dispute. After such a discussion, the experts would then prepare and serve a statement setting out issues and opinions on which they agree, tests and methods of analysis agreed upon, and any reasons for disagreement as to tests, analyses or methodologies. If there is no agreement on the tests or the methodology, individual tests should still be conducted in the presence of the other experts. After any necessary testing, written opinions are completed and exchanged. The Protocol also allows each expert to provide a further written opinion dealing only with matters raised in the written opinion of the other experts. The tribunal may also direct further conferral between the experts and further written reports, either jointly or separately. The tribunal may also hold preliminary meetings with the experts. Each expert who has presented a written opinion must be available for oral evidence unless the parties agree to the contrary and the tribunal accepts the agreement. If the expert does not appear and does not have an adequate reason, the tribunal shall disregard the opinion unless the parties agree otherwise and the tribunal supports the agreement. Agreement that an expert need not give evidence is not taken to be acceptance of the content of the written opinion. Tony Canham argues to the contrary that it would normally be better to exchange reports before the first meeting, as conclusions on complex technical matters are usually only the result of careful study of the facts page "963" and reasoning in the opposing expert's report.(249) Obviously it is harder to have an expert change their mind after they have already prepared a report.(250)

The items of agreement or otherwise are sometimes described as a Scott Schedule, being a statement between experts as to the matters where they agree and where they differ and the reasons for differences in view.(251) Wherever such schedules are used, it is important that the tribunal take a controlling interest to ensure that matters of disagreement are not simply presented in adversarial form, but instead, provide the best outline of competing arguments in order for the tribunal to render its own determination.

It is important to carefully consider that while it might always seem desirable to attempt to refine the issues in dispute before a hearing, there can be problems when party-appointed experts are directed to attempt such a process if one or more take it upon themselves to act as advocates for their appointing party or are intransigent and refuse to acknowledge facts that ought readily be conceded,(252) either on their own volition or based on instructions of counsel or would only contemplate agreement subject to ratification by counsel.(253) This can add to the costs without commensurate benefit, and can lead to tensions between expert witnesses.(254) Furthermore, if the experts have already lodged differing opinions, requiring them to attempt to reach agreement almost forces them into an adversarial and advocacy role where they remain convinced that they were right. One can direct that party-appointed experts confer but one cannot easily force them to leave any mindset they might wrongly have as to an advocacy role on behalf of their appointing party. A party-appointed expert who truly believes that

they have an ethical duty of complete openness and honesty and an obligation to assist the tribunal, can write a valuable unilateral report to that effect. Conversely, a party-appointed expert who believes that they must help the party win or at least not be of assistance in helping them lose, may be reticent in discussing technical matters with counterpart experts, be reluctant to agree on issues that might undermine their party's position,(255) and may generally see the meeting as an opportunity for advocacy or probing for weaknesses, rather than a good faith attempt to provide the page "964" tribunal with clearly delineated points of agreement and clearly explained points of difference. One response to this would be to demand that disagreement be based on an expressly reasoned position which could then be analysed in subsequent proceedings.(256) Pre-hearing meetings might also be taped as an inducement to proper conduct.

Expert meetings should normally not seek to agree on facts in dispute as this is a matter for evidence before the Tribunal.(257)

12.14.9. Expert Facilitation

Because of these problems with expert meetings, one possible solution is to have an independent neutral as co-ordinator. Van Houtte has recommended the use of an experts facilitator for that task.(258) In complex matters, the facilitator can co-ordinate a range of expert opinions covering different issues and disciplines and organise dialogue and timetables. Van Houtte advocates a person with expertise in the particular area.(259) The advantage is that they speak the appropriate 'language'. The disadvantage is that they would need to be careful to keep their own views to themselves. A substantive expert who has also had arbitral experience might be ideal, given their understanding of the kind of reports that will assist the tribunal. Unless there is complete agreement among the experts, the reasoning is at least as important as the conclusions themselves as without reasoning, the tribunal has no meaningful way to form an independent judgment. Van Houtte argues that the parties themselves should agree on the facilitator. If the parties are not able to come to a speedy agreement, the tribunal may suggest a list and allow for reasoned objections leading to an individual's selection.(260) Another possibility is to use a selection body such as the International Centre for Expertise of the International Chamber of Commerce.(261)

In a domestic arbitration in Australian, *Anaconda Operation Pty Ltd v. Fluor Australia Pty Ltd* which involved numerous expert witnesses, the tribunal appointed two 'independent assessors' whose role was simply to chair meetings between the experts and produce schedules outlining the key issues and the views of the party-appointed experts on each of them. The assessors also sought to identify areas of agreement so that the matters truly in dispute could be clearly identified.(262)

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It is important to clarify the exact status of the facilitator, including whether the expert facilitators could be called to give evidence at an oral hearing and could be cross examined. That would not be desirable and should be clearly articulated, especially as the IBA Rules of Evidence 2010 allow the parties to question a tribunal-appointed expert and without a clear statement to the contrary, the facilitator could be seen as such.

12.14.10. Experts and Oral Hearings

Similar rules apply to the obligations of experts at a hearing as with other witnesses. For party-appointed experts, the other party can generally decide whether to call the expert for cross-examination. If they do and the expert does not appear, the report will typically only be accepted in exceptional circumstances. As noted, if a party does not call for an opposing witness, that does not constitute acceptance of the content of their report where the parties concurred(263) but care needs to be taken with unilateral decisions to that effect and the impact on the weight to be given to unchallenged opinions. Parties must also be entitled to comment on the views of tribunal-appointed experts and seek to test that evidence. Article 26(2) of the Model Law indicates that if the tribunal appoints an expert, the parties must be given an opportunity to challenge the evidence unless they have agreed to the contrary. A number of other statutes and rules also expressly allow for such entitlements.(264)

Expert witnesses will usually be heard after fact witnesses and be heard back to back if not being conferenced, so that there is a

broader factual record on which they can comment. Conversely, in some cases a hearing might be bifurcated, with experts heard at an earlier stage if that will help promote efficiency in the ensuing proceedings. An example might be hearing experts on applicable law in support of a partial award on that issue. It might even be the case that a party seeks to utilise expert evidence in aid of an application for interim measures.

The traditional means of examining and cross-examining experts in the common law can be highly problematic. Direct examination can too often flow from rehearsed preparation. Cross-examination can be too controlled in order to elicit unfavourable responses and bar the expert from expanding on their opinion in a more nuanced way.(265) One issue is whether experts will be allowed to provide added arguments in oral testimony over and above their written opinions. Here a tribunal will need to balance fairness to the other party and appropriate pursuit of the truth. Where the IBA Rules of Evidence apply, Article 6.5 indicates that page "966" questions are to be limited to the issues covered in the expert report. As noted below, this may be more problematic with expert conferencing.

12.14.11. Expert Conferencing Before the Tribunal

Another methodology to resolve conflicting expert opinions is to have a roundtable discussion with the entire group of expert witnesses and the tribunal. The experts would explain and debate the differences in such a way that the tribunal can make a meaningful determination.(266) Broad tribunal discretions ought in principle to allow for witness conferencing. Nevertheless, Redfern and Hunter suggest that a tribunal will rarely employ expert conferencing techniques without agreement of the parties. If the parties both want witness conferencing, the tribunal should accept it.(267) Conferencing of experts or fact witnesses is contemplated by Article 8.3(f) of the IBA Rules of Evidence 2010.

12.14.12. Advantages and Disadvantages

Many experienced practitioners extol the virtues of witness conferencing. It is still desirable to consider the advantages and disadvantages of the process for two reasons. First, different cases suggest different procedures and an understanding of the advantages and disadvantages will help determine whether it is an appropriate technique for a particular dispute. Second, where it is utilised, an understanding of the potential problems should forewarn the tribunal and the parties how best to engage to optimise the outcome. The following discussion is mostly concerned with expert witness conferencing but the policy issues also apply to many aspects of general witness conferencing, discussed in section 12.8.9 above. Wolfgang Peter, the most influential proponent of witness conferencing in international arbitration, in fact contemplated simultaneous conferencing of all witnesses, expert and factual, in appropriate circumstances.(268) There will obviously be differences in the cost/benefit and fairness issues depending on whether conferencing involves an entire witness team against the other, or whether there is a separation between experts and factual witnesses or a further separation on an issue-by-issue basis. General policy comments below need to be looked at in that context.

Key advantages of witness conferencing are that a skilled arbitrator can ask particular experts why they disagree with the views of others, and ask for their views as to the appropriate process or methodology to resolve the conflict; in some page "967" cases the mere exchange of views will allow the tribunal to form an opinion; in other cases the experts may agree on the kind of tests that might be conducted that would best resolve the issue.; people are less likely to lie in front of their peers;(269) discussions in conference will often help parties recollect events (where that is relevant);(270) there should be a diminution of the utility of unethical coaching in preparation for cross-examination;(271) and it allows for a more relaxed environment.(272) Witness conferencing can also identify over-simplifications in expert testimony.(273) Where opinions are based on theoretical or factual assumptions, conferencing is more likely to bring these to the attention of the tribunal and allow attention to be shifted to the validity of the assumption itself. Another advantage of witness conferencing is that experts are usually more experienced with round-table discussions of technical issues than with cross-examination by expert legal counsel. Expert conferencing can also help the experts come to understand the legal issues in contention. When operating separately, they might see the key issues quite differently to the way a legal adjudicator will. Conferencing also helps each expert understand the factual, assumption and methodological bases of conflicting expert opinion which should help in finding a way forward in resolving the

differences. Conferencing also forces counsel to consider opposing witness testimony and reports in their own preparation, integrate the evidence in evaluating the strengths of their case and develop an optimal case strategy. Time efficiencies may also arise through the use of information technology with witness conferencing, whereby a number of witnesses can view documents, models, videos and the like simultaneously.(274)

Conferencing in the presence of parties may also assist settlement, given that all can see the conflicting body of evidence and opinion that the tribunal will ultimately need to resolve,(275) although there is also a danger that the inevitable involvement of the tribunal in controlling the discussion could lead parties to draw conclusions about the tribunal's supposed predilections. If the assessment by the tribunal is accurate, this may not be problematic but there is a danger that a probing question by a tribunal member might be wrongly looked at as a negative view. Furthermore, concerns that the parties might misconstrue questions might be a disincentive to tribunals appropriately managing the discussion. Even if such a process is used, cross-examination is still typically allowed to ensure that due page "968" process challenges are less likely and to allow counsel to raise matters that might not have been dealt with under the tribunal's direction.

Any option must also be evaluated against alternatives. Under the traditional sequential approach, allowing individual experts to explain why transcripts of earlier experts are wrong makes it extremely difficult for assessment by adjudicators.(276) Redfern and Hunter suggest that the transcript of such a direct dialogue between opposing experts is typically more helpful than cross-examination between legal counsel and opposing experts.(277) Witness conferencing may ultimately prove to be a useful means to try and reconcile the differences in view between common law and civil law jurisdictions as to the probative value of party-appointed experts. A dialogue through witness conferencing of experts is not dissimilar to calling for expert meetings and joint reports which also aim to elucidate the points of similarity and difference for the benefit of the tribunal.(278) Finally, it is suggested that witness conferencing is likely to significantly reduce the time taken to deal with witness evidence at the hearing.(279) Born questions whether witness conferencing actually saves time, given that it is most appropriately used in addition to traditional cross-examination.(280) This might depend on the controls, if any, that a tribunal imposes on counsel in cross-examination when attempting to cover matters seemingly addressed at length at the conferencing stage.

There are some potential disadvantages as well. Psychological studies show that if people express an opinion openly, a person with a dissenting view hearing a range of views to the contrary is more reluctant to present their true thoughts. An example would be a famous expert giving evidence first followed by a more junior colleague who would not wish to be seen to contradict such an eminent person. A further disadvantage of conferencing is that a number of experts on the one team can hear a question and answer and might tailor their own answers to maximise consistency in favour of their appointing party. The problem of tailoring evidence based on what is heard from others is diminished when written reports have already been written and exchanged.(281) Conferencing will not work well if the expert is acting as an advocate on instructions from counsel. If that were the case, that may well be more readily evident to the tribunal during the conferencing process, rather than if the witness were cross-examined in the traditional manner. A related issue is that bringing experts together in an oral discussion will favour those who have page "969" stronger personalities, who find it easier to present arguments orally and who think more quickly ‘on their feet’.

12.14.13. Organising Witness Conferencing

For conferencing to be fair and effective, the parties must get sufficient advance notice that the technique will be utilised and a clear indication as to whether cross-examination will be allowed. The tribunal must ensure that it knows the file sufficiently well, so that it can properly manage the discussion both in terms of timing and direction. A tribunal also needs to be sensitive to the concerns of counsel unfamiliar with such processes who will naturally be worried about losing control and losing their ability to challenge adverse contentions, and the witnesses themselves who may have differing experiences with the process. That is no different to other more traditional aspects of handling witnesses such as cross-examination, where counsel may have different experiences and abilities as may the witnesses themselves. A tribunal also needs to be prepared to ask questions on matters where they have little

understanding and not be concerned with losing face.[282]

Costs might be wasted if experts are included in discussion of matters not important to their central testimony. In such circumstances it might be better to separate the witnesses into discrete issues,[283] although with experts, it may not be absolutely clear that they cannot meaningfully comment on matters raised outside of their statements. This raises another important issue with witness conferencing. As a general rule, a witness ought not to present evidence at a hearing that clearly goes beyond the written statement without permission to do so and without the tribunal considering the due process implications for the opposing party. Yet a round-table discussion under witness conferencing will typically have one expert commenting on the views of the others in a way which will inevitably lead to this occurring. The difference is that when the challenge to one expert comes from a question or comment from counsel or the tribunal, such interventions are not new evidence. At the very least, forewarning as to conferencing techniques will mean that the opposing party is aware that its expert's views may be open to challenge from peers as well as counsel and the tribunal.

A tribunal chairing a round-table discussion amongst people representing opposing positions needs to be in control, dissuade inappropriate behaviour and still allow all parties to feel that they had an adequate opportunity of presenting their case through their appointed experts. The latter consideration will also arise in the way a tribunal deals with interventions sought to be made by counsel. The tribunal needs to ensure that each party is given an appropriate opportunity to express their views to ensure that there are no potential due process challenges. page "970" A key skill in conferencing is knowing when to move back and forward between the opposing teams for questions and responses.[284] The tribunal will need to explain to each the requirement of truthful evidence, administer oaths where necessary and identify a protocol for speaking, in particular to allow the tribunal to remain in control, assist any transcription that is being conducted and ensure that witnesses do not speak on top of each other. In controlling such a round-table discussion, the tribunal needs to ensure that appropriate questions are asked. This will include ensuring that the order of questioning is appropriate in the context of the claims, defences and counterclaims as made and the burden of proof that applies, and in terms of the content of the written statements and the level of expertise. There may also be challenges in chess-clock arbitration if there is an imbalance in the level of discussion between each party's witnesses.

There will be added difficulties if experts speak different languages and simultaneous or sequential translation is required. The more complex the technical issue, the more difficult it is to have expert translators that can cope with both legal and scientific jargon and nuances. While this may pose problems, it is not a particular problem of conferencing per se and would apply if the witnesses gave separate evidence in any event.

A tribunal will also need to carefully manage its own questions and at the same time allow counsel for each party to feel sufficiently involved. Raeschke-Kessler suggests that questioning by the tribunal should not deal with credibility.[285] The latter should occur during cross-examination.[286] There is also a question as to whether the witnesses can themselves decide who is best able to answer a particular question or whether counsel and/or the tribunal ought to be able to give directions as to who must respond. The tribunal will also need to consider to what extent one expert can question the other during a conferencing session. A tribunal will need to be mindful that some experts might take on the role of cross-examining other experts. While this would not be desirable, in practice, it may be difficult to distinguish between legitimate questions put by one expert to another to elicit the reasoning behind a professional opinion and instead, an expert undertaking an advocacy role, seeking to undermine a perceived opponent.

Even the shape of the room can be important and should seek to maximise dialogue between the conferring witnesses, still allowing the tribunal to be the central focus. Martin Hunter has suggested a variation in the seating arrangements with the experts on a platform and a semi-circular ‘audience’ of the tribunal in the centre and advocates and other persons on each side, in the hope that this would reduce the tendency for inappropriate cross-examination techniques.[287] page "971" In complex matters, there will need to be an adequate mechanism for them all to view and discuss key documents, plans, pictures, videos and models.

12.14.14. Cross-Examination after Conferencing

Common law counsel's concern with witness conferencing may be exacerbated if their entitlement to cross-examination is held over until after a round-table discussion with the tribunal, as by that stage key concessions may have already been made. This also relates to the broader question of efficiency and the extent to which a tribunal will limit cross-examination of matters it feels were adequately covered in the conference. On the one hand, undue duplication should be avoided. However, the very essence of cross-examination is to allow previous testimony to be challenged. Thus a tribunal would find it difficult to impose *a priori* controls as opposed to interceding where cross-examination seems unproductive.

Where a subsequent cross-examination occurs, there is a question as to whether the witnesses should then be separated. If not, a further question is whether other members of the team can answer instead of the witness in whose direction the cross-examination is targeted. Cross-examination flows from evidence in chief and witness statements. At times there may be a need to be clear as to which expert said what during conferencing that may then be explored on cross-examination.

12.14.15. Expert Teaming of Tribunal-Appointed Experts

Klaus Sachs has proposed a protocol in relation to tribunal-appointed experts as an alternative to party-appointed expert processes. The suggestion is for an expert team to combine the advantages of party-appointed and tribunal-appointed expert models. The tribunal would consult with the parties at an early stage and invite them to provide the tribunal and the opposing party with a short list of potential experts. The tribunal might invite the parties to comment on the experts proposed by the other, particularly as to conflicts of interest. The tribunal would then choose two experts, one from each list and appoint them jointly as an 'expert team'. The tribunal would then meet with the expert team in conjunction with the parties in order to establish terms of reference. The expert team would prepare a preliminary joint report based on the terms of reference. The report would be circulated to the tribunal and the parties with each having the opportunity to comment on the preliminary report. The expert team would then review the comments and take them into consideration in preparing a final joint report to be submitted to the parties and the tribunal. On the request of either party or the tribunal, the members of the expert team would be present at the evidentiary hearing and might be page "972" questioned on relevant issues by the tribunal, the parties or by any party-appointed expert.(288)

The Sachs proposal argues that a team of experts selected by the tribunal overcomes most of the concerns with tribunal-appointed experts. The selection is based on lists provided by the parties and not purely on the tribunal's own selection. The parties are given an opportunity to make comment although it was noted in section 12.11.5 above that a range of list options are available for any tribunal appointment, and consultation is not dependent on a team model. One value of an expert team is that it has internal checks and balances not available with a single expert. The two experts are more likely to act independently as assistants to the tribunal as they are not independently selected and paid for by the parties, although there may be a problem in parties approaching potential experts prior to drafting the initial list. It would be hard to proscribe that as counsel could legitimately argue that they need to interview potential experts to see if they are available and suitable.

The reports are prepared in conjunction with the parties and the tribunal and hence ought to be more cost effective. Because the parties, tribunal and the experts meet together, it is less likely that the report would miss the key points.(289) The parties can still comment on the report and cross examine the expert team. A major advantage is the fact that there would not be conflicting reports for the tribunal to handle, although conflicts could of course be included within the joint report itself. Even here, the differences will be set out more logically and can be more efficiently understood as compared to synthesising and cross-referencing multiple expert reports.

One key benefit is likely to be party acceptance where they have influenced at least one selection, and the hope that two experts will promote broader coverage of the matters of concern and a more concerted effort to unite in aid of the tribunal's deliberations. Problems would arise if the two experts cannot agree, as in many cases they might be unlikely to be able to concur on a recommended methodology by which the tribunal can resolve the issue. There are unavoidable problems if the opinions depend on which of competing respected theories each expert adheres to, although if this is known at the outset, ideally one expert could be selected from each of the two key methodological schools so that the tribunal is clearly and impartially seeking the best possible

briefing as to both. Other problems may still arise. Having two experts rather than one also does not itself overcome the risk that the tribunal delegates too much of the actual decision-making to the team. There is also the same issue as to counsel control of strategy and party control over information flows. In addition to the information in the custody and control of the parties there are also the assumptions upon which various expert opinions are commonly based.(290)

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The utility of the Sachs protocol may vary depending on whether party-appointed experts are also utilised. The right to be heard must imply a right to present conflicting evidence to that of the expert team as well as to challenge the team through cross-examination. At the very least, there will be logistical issues about the extent to which the expert team can explore the assumptions and instructions given to the party-appointed experts. Mark Kantor makes the important observation that a greater amount of information typically flows between counsel and party-appointed experts than would be provided to a tribunal expert. In such circumstances, there may be issues as to when and how broad information may be called for and the applicability of adverse inferences.(291)

Sachs suggests that it would be advisable that the terms of reference provide, *inter alia* that:

(i) both experts retained must be impartial and independent;

(ii) the task of the expert team is to assist the tribunal in deciding the issues in respect of which expert evidence is adduced;

(iii) the expert team shall only address issues identified in the terms of reference;

(iv) the expert team is expected to submit a joint report providing only the joint and mutual findings;

(v) each member of the expert team shall refrain from communicating separately with the parties, the tribunal or any third party;

(vi) the expert team shall prepare its report 'from scratch' and shall rely only on its own expertise;

(vii) the expert team shall seek any input and assistance required from the parties;

(viii) in the preparation of the report, the expert team shall carefully examine all briefs and documents submitted by the parties and shall address the parties' views and concerns; and

(ix) the expert team shall be prepared to testify during an oral hearing and to respond to questions asked by the tribunal and the parties, their counsel and consultants. Areas of disagreement on which the experts cannot reach a joint conclusion shall be identified and, if necessary, the parties will be permitted to comment or submit additional (expert) evidence on these.(292)

The following are suggested modifications to the proposed terms of reference. Following on from the observations about the expert brief in section 12.14.3 above, the expert team might be advised that their assistance task involves them carefully explaining the methodology used, the information relied upon, the reasons underlying the conclusions, including, in particular, any assumptions made and any impact upon the methodology and findings of schools of thought about page "974" which experts may legitimately differ. This is important to ensure that the expert team truly assists the tribunal in coming to its own conclusions, rather than effectively taking over one key part of the decision-making process. This is particularly important as a tribunal might feel even more reluctant to depart from the view of a concurring expert team than a single tribunal-appointed expert. A tribunal needs to be particularly sensitive to situations where it is asked to evaluate the assumptions on which the expert opinion is to be based. The issue may be circular where the parties disagree as to those assumptions and where the appropriate assumption is itself a matter for expert opinion.

As to para (iii) above, the expert team might be expressly entitled to invite the tribunal to consider expanding the terms of reference where this is subsequently seen to be necessary for a meaningful report. Reference to a joint report in para (iv) above should not preclude the expert team providing a joint report indicating that they cannot agree, as long as they give reasons for that. In some cases the joint report might simply indicate what test they agree would be appropriate to take the matter further and to finally resolve a key factual question. For example, a case might concern the cause of a failure of a bridge. The experts might propose a particular scientific test of a section of a steel beam to resolve whether this was the likely cause.

As to (vii) the terms may indicate that if the parties do not believe certain assistance would be appropriate, a procedural ruling would be obtained from the tribunal. As to (viii), if the expert team believed that the briefs and documents submitted were unnecessarily voluminous and in part irrelevant, a ruling might also be sought from the tribunal. Mark Kantor also alludes to an alternative where each of the two experts is allowed to work with a party with a view to preparing competing reports if a joint report is not possible.(293)

12.15. Witness Costs and Expenses

The costs of each type of expert are treated differently. Tribunal experts are part of tribunal costs.(294) Because each party is responsible for presenting its own witnesses, this implies that each party will cover costs and expenses of its own witnesses and then seek recovery under a costs order through the tribunal's discretion.(295) Because witnesses of fact voluntarily agree to assist a party, a question is then what entitlement they have to fees as opposed to indemnification page "975" for expenses.(296) There is also a characterisation question as to whether it is really a fee for the giving of evidence or instead an indemnification for lost income from the time away from other activities. Where there is an entitlement to fees, not only is there a problem as to the amount but also as to whether the evidence might be tainted simply because of the commercial relationship.

There is no consensus as to whether witnesses of fact are automatically entitled to fees which can be sought from the losing party. Oetiker, for example, suggests not,(297) but Gélinas argues in favour of such an entitlement.(298) The situation is different for experts as their very profession is to provide expert opinions for a fee. A party-appointed expert will receive a fee as agreed with the appointing party. Where the costs award is concerned, a tribunal is not bound by the figure agreed where it is considered to be excessive. Even where indemnification for expenses is concerned, there are variations in hotels and airline status. There may also be questions as to cancellation fees for both expert and general witnesses.

As for tribunal-appointed experts, the tribunal, perhaps with the assistance of an institution, will appoint the expert. Having agreed on the fee at the outset, the tribunal is unlikely to review it in the context of a costs award, although it is conceivable in an extreme case that it may believe that a tribunal-appointed expert on an hourly rate has done excessive work and that the losing party should not be responsible for all of this. Even in such a circumstance, the better view would be a direct challenge to the expert's fee by way of breach of an express or implied term of the contract. There would be issues as to whether a tribunal-appointed expert is in a contractual relationship with the tribunal, institution and/or the parties. In either event there is a question as to the applicable law of the contractual agreement.(299)

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1 Laurent Lévy & Lucy Reed, 'Managing Fact Evidence in International Arbitration', in *International Arbitration 2006: Back to Basics?*, ICCA Congress Series No. 13, ed. Albert Jan van den Berg (The Hague: Kluwer Law International, 2007), 637–638.

2 UNCITRAL Arbitration Rules 2010 Art. 17.3; ICC Rules 2012 Art. 25; Swedish Arbitration Act Art. 24(1); German Code of Civil Procedure Art. 1047; Belgian Judicial Code Art. 1694(2) and (3); Dutch Code of Civil Procedure Art. 1039(2).

3 See, e.g., IBA Rules of Evidence 2010 Art. 4.7.

4 IBA Rules of Evidence 2010 Art. 4.8.

5 Netherlands Code of Civil Procedure Art. 1039(3).

6 Mauro Rubino-Sammartano, *International Arbitration Law and Practice*, 2nd edn (The Hague: Kluwer Law International, 2001), 666.

7 Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Thomson/Sweet & Maxwell, 2007), 472.

8 A decision by Professor Lalive as sole arbitrator in ICC Case No. 1512 to refuse to hear oral evidence because he felt able to decide on the documents was upheld by the Queen's Bench and appears to have been conceded by the appellant in the Court of Appeal in *Dalmia Dairy Industries Ltd (India) v. National Bank of Pakistan* [1978] 2 Lloyd's Rep 223.

9 Judgment of 7 January 2004, Swiss Federal Tribunal, *ASA Bulletin* 22, no. 3 (2004): 598. See also Cesare Jermini, 'Note –

Tribunal fédéral, Ire Cour civile, 7 Janvier 2004 (4P.196/ 2003), Witnesses and the Right to Be Heard in International Arbitration: Some Remarks on Recent Decisions of the Swiss Federal Court', *ASA Bulletin* 22, no. 3 (2004): 605–609.

[10] See, e.g., *Dombo Beheer BV v. Netherlands*, Application No. 14448/88, Case No. 37/1992/382/ 460, Judgment of 27 October 1993 (Merits and Just Satisfaction), ECHR Series A, Volume 274; (1994) 18 EHRR 213, para. 35.

[11] See section 9.2 as to documents-only arbitration.

[12] Karl-Heinz Böckstiegel, 'Presenting, Taking and Evaluating Evidence in International Arbitration', in *AAA/ICDR Handbook on International Arbitration and ADR*, ed. Thomas E. Carbonneau & Jeanette A. Jaeggi (Huntington: Juris Net, 2006), 138–144.

[13] Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 1843.

[14] Section 7 of the US Federal Arbitration Act is an exception.

[15] Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 1901.

[16] David D. Caron, Lee M. Caplan & Matti Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford: Oxford University Press), 575. The current provisions are Arts 27 and 28.

[17] See Werner Melis, 'Presentation of Documentary Evidence and Witnesses', in *Planning Efficient Arbitration Proceedings/The Law Applicable in International Arbitration*, ICCA Congress Series No. 7, ed. Albert Jan van den Berg (The Hague: Kluwer Law International, 1996), 512–513.

[18] George M. von Mehren & Claudia T. Salomon, 'Submitting Evidence in an International Arbitration: The Common Lawyer's Guide', *Journal of International Arbitration* 20, no. 3 (2003): 289–290.

[19] Parties should not be presumed to have impliedly consented to a shorter time period when they know leading arbitrators are working at a lower than normal fee. Absent express agreement at the time of appointment to a shorter time frame (which would be entirely acceptable), other reasonable expectations of the parties seem more likely. Parties should reasonably expect that high quality arbitrators will always give the appropriate attention to the particular case based on the demands of legal and factual analysis that the case presents. They would not presume that effort is dependent on the return for effort that the case affords the arbitrator. Second, any logical argument to the effect that parties could expect a shortened time frame when arbitrators receive below average fees, would have to have a countervailing presumption that they will spend longer than necessary in more lucrative cases. That is unlikely. Trying to identify what the parties would reasonably expect should also involve looking objectively at what an arbitrator could be seen to reasonably agree to when taking a less lucrative case. The more likely presumption is that leading arbitrators used to very different fee schedules understand that an acceptable return for effort is based on an average return. This would entail a mix of ad hoc arbitrations agreeing to their preferred daily rate, to institutional arbitrations with a generous scale for large amounts involved that at times will apply to very simple cases intellectually, through to very significant institutional fee constraints such as through ICSID schedules. A less lucrative case might simply have been accepted because there was a gap in the arbitrator's schedule that would not otherwise be filled.

[20] Werner Melis, 'Presentation of Documentary Evidence and Witnesses', in *Preventing Delay and Disruption of Arbitration/Effective Proceedings in Construction Cases*, ICCA Congress Series No. 5, ed. Albert Jan van den Berg (Deventer: Kluwer Law and Taxation Publishers, 1991), 513.

[21] Laurent Lévy & Lucy Reed, 'Managing Fact Evidence in International Arbitration', in *International Arbitration 2006: Back to Basics?*, ICCA Congress Series No. 13, ed. Albert Jan van den Berg (The Hague: Kluwer Law International, 2007), 642–643.

[22] This is discussed further in sections 12.14.11-13 below.

[23] See, e.g., HKIAC Arbitration Rules Art. 23.5. This was formerly the case under the UNCITRAL Arbitration Rules 1976 Art. 25.2, but is now subject to the broad discretion in Art. 28.2.

[24] Michael Hwang & Andrew Chin, 'The Role of Witness Statements in International Commercial Arbitration', in *International Arbitration 2006: Back to Basics?*, ICCA Congress Series No. 13, ed. Albert Jan van den Berg (The Hague: Kluwer Law International, 2007), 656.

[25] *Military and paramilitary activities in and against Nicaragua (Nicaragua v. USA), Merits, Judgment*, ICJ Reports, 27 June 1986, para. 68.

[26] Bernard Hanotiau, 'The Conduct of the Hearings', in *The Leading Arbitrators' Guide to International Arbitration*, 2nd edn, ed. L. Newman & R. Hill (Huntington: Juris Publishing, 2008), 372; Laurent Lévy & Lucy Reed, 'Managing Fact Evidence in International Arbitration', in *International Arbitration 2006: Back to Basics?*, ICCA

Congress Series No. 13, ed. Albert Jan van den Berg (The Hague: Kluwer Law International, 2007), 636. Lévy and Reed suggest that it is relatively standard that subject to tribunal discretion, no witness will be allowed to testify if they have not submitted a written statement.

[27] Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 1843.

[28] See Yves Derains, 'La pratique de l'administration de la preuve dans l'arbitrage commercial international' *Revue de l'Arbitrage* (2004): 796–797. See also Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, 5th edn (Oxford: Oxford University Press, 2009), 403–404. Note that, although some jurisdictions, such as Germany and Austria, do not permit parties to appear *in the capacity* of a witness, they are, of course, still permitted to present their case. See also Charles Brower, 'Evidence before International Tribunals: The Need for Some Standard Rules', *International Lawyer* 28, no. 1 (1994): 50, n. 14. Brower notes that the early common law also disqualified interested parties as witnesses. Civilian systems have also changed significantly. See case of *Dombo Beheer BV v. The Netherlands* [1993] ECHR 49.

[29] Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Thomson/Sweet & Maxwell, 2007), 557. See also Klaus Peter Berger, *International Economic Arbitration* (The Hague: Kluwer Academic Publishers, 1993), 441.

[30] IBA Rules of Evidence 2010 Art. 4.2.

[31] See, e.g., the comments in *W Jack Buckamier v. Islamic Republic of Iran* 28 Iran-US Claims Tribunal Reports 53, 74–76 (1992).

[32] Michael Straus, 'The Practice of the Iran-US Claims Tribunal in Receiving Evidence from Parties and from Experts', *Journal of International Arbitration* 3, no. 3 (1986): 58–63; Charles Brower, 'Evidence before International Tribunals: The Need for Some Standard Rules', *International Lawyer* 28, no. 1 (1994): 49.

[33] David D. Caron, Lee M. Caplan & Matti Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford: Oxford University Press), 612–613.

[34] Charles Brower, 'Evidence before International Tribunals: The Need for Some Standard Rules', *International Lawyer* 28, no. 1 (1994): 50.

[35] *Ibid.*, 49. In ICC Case No. 7319, the sole arbitrator decided that a party, including its legal representatives (in this case its directors), could not be heard as a witness in the arbitration. The sole arbitrator referred in this context to Art. 14 of the then applicable 1988 ICC Rules of Arbitration, which distinguished between hearing the 'parties' and hearing 'any other person'. Statements made by the directors would be treated merely as declarations of the party that they represented. In contrast, an officer of the party – an employee, not its legal representative – could be heard as a witness.

[36] Charles Brower, 'Evidence before International Tribunals: The Need for Some Standard Rules', *International Lawyer* 28, no. 1 (1994): 49, n. 11.

[37] Edoardo F. Ricci, 'Evidence in International Arbitration: A Synthetic Glimpse', in *Liber Amicorum Bernado Cremades*, ed. M.Á. Fernández-Ballesteros & David Arias (Madrid: La Ley, 2010), 1027. Attitudes to written witness statements are also impacted upon by a person's cultural attitude to the entitlement of counsel to confer with prospective witnesses which is not the norm in civilian systems.

[38] See IBA Rules of Evidence 2010 Art. 4.4 and 4.5. This is also dealt with under ICDR Arbitration Rules 2009 Art. 20.5 which provides a discretion in that regard.

[39] IBA Rules of Evidence 2010 Art. 4.6.

[40] Laurent Lévy, 'Testimonies in the Contemporary Practice: Witness Statements and Cross-Examination, in *Arbitral Procedure at the Dawn of the New Millennium: Reports of the International Colloquium of CEPANI, October 15, 2004*, ed. Stephen Bond et al. (Brussels: Bruylant, 2005), 118.

[41] Charles Brower, 'Evidence Before International Tribunals: The Need for Some Standard Rules', *International Lawyer* 28, no. 1 (1994): 51. Brower considers that these advantages and disadvantages led to affidavits being seen as a suitable and even preferred substitute to oral testimony in some cases before the Iran-US Claims Tribunal.

[42] Laurent Lévy, 'Testimonies in the Contemporary Practice: Witness Statements and Cross-Examination, in *Arbitral Procedure at the Dawn of the New Millennium: Reports of the International Colloquium of CEPANI, October 15, 2004*, ed. Stephen Bond et al. (Brussels: Bruylant, 2005), 120.

[43] *Ibid.*, 119. See also IBA Rules of Evidence 2010 Arts 4.7, 8.3.

[44] This is supported by rules such as: ICC Rules 2012 Art. 25(2) and (3); LCIA Arbitration Rules 1998 Art. 21.2.

[45] IBA Rules of Evidence 2010 Art. 4.8.
[46] The most difficult strategic challenge for counsel is where the witness asserts facts in a very general manner, without sufficient particulars. Absent refutation, a tribunal might accept the broad testimony. Conversely, calling for the witness and exploring the particulars might lead to them bolstering an inadequate written submission. Because counsel cannot know in advance the evidentiary weight that the tribunal will give to an assertive statement, a tactical choice needs to be made.
[47] See the discussion in footnote 97 below as to the common law rule in *Browne v. Dunn*.
[48] Cited in Laurent Lévy, 'Testimonies in the Contemporary Practice: Witness Statements and Cross Examination', in *Arbitral Procedure at the Dawn of the New Millennium*, Report of the International Colloquium of CEPANI, 15 October 2004, ed. Stephen Bond et al. (Brussels: Bruylant, 2005), 115.
[49] For forceful criticisms of the abuse of written witness statements see V.V. Veeder, 'Introduction' , in *Arbitration and Oral Evidence: Dossier of the ICC Institute of World Business Law*, ed. Laurent Lévy & V.V. Veeder (Paris: ICC Publishing, 2004), 7.
[50] For a discussion of control over counsel and counsels' ethical standards see section 9.7.
[51] Michael Hwang & Andrew Chin,' The Role of Witness Statements in International Commercial Arbitration', in *International Arbitration 2006: Back to Basics?*, ICCA Congress Series No. 13, ed. Albert Jan van den Berg (The Hague: Kluwer Law International, 2007), 658.
[52] *Ibid.*
[53] Gerald Aksen states that he advises counsel to do this in most of his arbitrations. See Donald Donovan, 'Act III: Advocacy with Witness Testimony', *Arbitration International* 21, no. 4 (2006): 588.
[54] I am indebted to Justice Clyde Croft for this observation.
[55] Michael Bühler & Carroll Dorgan, 'Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbitration: Novel or Tested Standards?', *Journal of International Arbitration* 17, no. 1 (2000): 14.
[56] Laurent Lévy, 'Testimonies in the Contemporary Practice: Witness Statements and Cross Examination', in *Arbitral Procedure at the Dawn of the New Millennium*, Report of the International Colloquium of CEPANI, 15 October 2004, ed. Stephen Bond et al. (Brussels: Bruylant, 2005), 107, 115.
[57] Laurent Lévy, 'Testimonies in the Contemporary Practice: Witness Statements and Cross-Examination', in *Arbitral Procedure at the Dawn of the New Millennium*, Reports of the International Colloquium of CEPANI, October 15, 2004, ed. Stephen Bond et al. (Brussels: Bruylant, 2005), 114.
[58] Karl-Heinz Böckstiegel, 'Case Management by Arbitrators: Experiences and Suggestions', in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner*, ed. Gerald Aksen et al. (Paris: ICC Publishing, 2005), 124.
[59] Michael Hwang & Andrew Chin, 'The Role of Witness Statements in International Commercial Arbitration', in *International Arbitration 2006: Back to Basics?*, ICCA Congress Series No. 13, ed. Albert Jan van den Berg (The Hague: Kluwer Law International, 2007), 653.
[60] IBA Rules of Evidence 2010 Art. 4.5.
[61] See section 12.3.4.
[62] Laurent Lévy, 'Testimonies in the Contemporary Practice: Witness Statements and Cross-Examination', in *Arbitral Procedure at the Dawn of the New Millennium*, Reports of the International Colloquium of CEPANI, October 15, 2004, ed. Stephen Bond et al. (Brussels: Bruylant, 2005), 116. See also Laurent Lévy & Lucy Reed, 'Managing Fact Evidence in International Arbitration', in *International Arbitration 2006: Back to Basics?*, ICCA Congress Series No. 13, ed. Albert Jan van den Berg (The Hague: Kluwer Law International, 2007), 636.
[63] Michael Hwang & Andrew Chin, 'The Role of Witness Statements in International Commercial Arbitration', in *International Arbitration 2006: Back to Basics?*, ICCA Congress Series No. 13, ed. Albert Jan van den Berg (The Hague: Kluwer Law International, 2007), 658.
[64] *Ibid.*, 657–658.
[65] 1999 IBA Working Party & 2010 IBA Rules of Evidence Subcommittee, 'Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration', (2010), 17.
[66] Hans van Houtte, 'Counsel-Witness Relations and Professional Misconduct in Civil Law Systems', *Arbitration International* 19, no. 4 (2003): 461.
[67] The UNCITRAL Notes on Organizing Arbitral Proceedings do not expressly take a position on interviewing witnesses but instead

suggest that the tribunal should clarify the kinds of contacts the parties may be permitted to have. See UNCITRAL, 'UNCITRAL Notes on Organizing Arbitral Proceedings', para. 67.

[68] Emmanuel Gaillard & John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999), 698, 701; Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Thomson/Sweet & Maxwell, 2007), 559. See also Swiss Rules 2012 Art. 25.2. Some national Bars have moved to confirm this position, including the Paris Bar. See Ordre des Avocats de Paris, 'L'avocat et le témoin dans l'arbitrage international', *Le Bulletin du Barreau de Paris* 9 (2008): 45–46. This tended to be the historical position in civilian jurisdictions although that is changing over time. See, e.g., Pascal Hollander & Maartin Dreye, 'Brussels Bar Lifts the Traditional Prohibition on Preparatory Contacts between Attorneys and Witnesses', *ASA Bulletin* 29, no. 2 (2011): 496–500. See also Christian Dieryck, 'Procédure et moyens de preuve dans l'arbitrage commercial international', *Revue de l'Arbitrage* (1988): 270–271.

[69] IBA Rules of Evidence 2010 Art. 4.3. That view is also replicated in the Swiss Rules 2012 Art. 25.2.

[70] Otto L.O. de Witt Wijnen, 'Collection of Evidence in International Arbitration', in *Liber Amicorum Bernardo Cremades*, ed. M.Á. Fernández & David Arias (Madrid: La Ley, 2010), 358.

[71] Hans van Houtte, 'Counsel-Witness Relations and Professional Misconduct in Civil Law Systems', *Arbitration International* 19, no. 4 (2003): 462.

[72] *Ibid.*

[73] C. Mark Baker, 'Advocacy in International Arbitration', in *The Leading Arbitrators' Guide to International Arbitration*, 2nd edn, ed. L. Newman & R. Hill (Huntington: Juris Publishing, 2008), 395.

[74] Lawrence W. Newman, 'Cross Examination in International Arbitration – Opportunities and Challenges', in *The Leading Arbitrators' Guide to International Arbitration*, 2nd edn, ed. L. Newman & R. Hill (Huntington: Juris Publishing, 2008), 412.

[75] Michael Hwang & Andrew Chin, 'The Role of Witness Statements in International Commercial Arbitration', in *International Arbitration 2006: Back to Basics?*, ICCA Congress Series No. 13, ed. Albert Jan van den Berg (The Hague: Kluwer Law International, 2007), 658.

[76] Lawrence W. Newman, 'Cross Examination in International Arbitration – Opportunities and Challenges', in *The Leading Arbitrators' Guide to International Arbitration*, 2nd edn, ed. L. Newman & R. Hill (Huntington: Juris Publishing, 2008), 412.

[77] Paulo Michele Patocchi & Harold Frey Brentano, 'The Provisional Timetable in International Arbitration', in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner*, ed. Gerald Aksen et al. (Paris: ICC Publishing, 2005), 63.

[78] For contrary suggestions see Hans van Houtte, 'Counsel-Witness Relations and Professional Misconduct in Civil Law Systems', *Arbitration International* 19, no. 4 (2003): 457–463.

[79] See generally Catherine Rogers, 'The Ethics of Advocacy', in *The Art of Advocacy in International Arbitration*, 2nd edn, ed. Doak Bishop & Edward G. Kehoe (Huntington: JurisNet LLC, 2010).

[80] William W. Park, 'Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion', *Mealey's International Arbitration Report* 19, no. 5 (2004): 20, n. 74.

[81] Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 1827. Born notes, however, that the practice in this regard is not uniform. This was also considered in section 11.5 above as to duties of disclosure generally and section 11.7.2 where consideration was given as to whether a request for production of documents to be relied on in cross-examination, is sufficiently specific.

[82] But see Procedural Order in ICC Case No. 7170 in *Collection of Procedural Decisions in ICC Arbitration 1993–1996* (1997), ed. Dominique Hascher (Paris: ICC Publishing, 1997), 55.

[83] International Centre for Dispute Resolution, 'ICDR Guidelines for Arbitrators Concerning Exchanges of Information', para. 6(b).

[84] Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 1904–1905.

[85] Siegfried H. Elsing & John M. Townsend, 'Bridging the Common Law-Civil Law Divide in Arbitration', *Arbitration International* 18, no. 1 (2002): 61.

[86] Charles N. Brower, 'Evidence before International Tribunals: The Need for Some Standard Rules', *International Lawyer* 28, no. 1 (1994): 51–52.

[87] Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 1844.

[88] Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 1845.

[89] *Ibid.*
[90] Karl-Heinz Böckstiegel, 'Case Management by Arbitrators: Experiences and Suggestions', in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner*, ed. Gerald Aksen et al. (Paris: ICC Publishing, 2005), 123.
[91] The Working Party which prepared the 1999 IBA Rules considered that witness statements may be evidence in chief so as to allow examination by the other party to start immediately. IBA Working Party, 'Commentary on the New IBA Rules of Evidence in International Commercial Arbitration', *Business Law International* 2 (2000), 27.
[92] See Siegfried H. Elsing & John M. Townsend, 'Bridging the Common Law-Civil Law Divide in Arbitration', *Arbitration International* 18, no. 1 (2002): 62–64.
[93] R. Doak Bishop, 'Advocacy in International Commercial Arbitration: United States', in *The Art of Advocacy in International Arbitration*, ed. R. Doak Bishop (Huntington: JurisNet, 2004), 344.
[94] Michael Hwang & Andrew Chin, 'The Role of Witness Statements in International Commercial Arbitration', in *International Arbitration 2006: Back to Basics?*, ICCA Congress Series No. 13, ed. Albert Jan van den Berg (The Hague: Kluwer Law International, 2007), 656.
[95] E. David & B. Tavender, 'To Restore Speed and Cost Effectiveness, Arbitrators Must Focus on Time Allocation', *Alternatives to the High Cost of Litigation* 28, no. 8 (2010): 163.
[96] A challenge on that basis was rejected in *Generica Ltd v. Pharmaceutical Basics, Inc.*, 125 F. 3d 1123 (7th Cir 1997).
[97] Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, 5th edn (Oxford: Oxford University Press, 2009), 420.
[98] See V.V. Veeder, 'The Lawyer's Duty to Arbitrate in Good Faith', *Arbitration International* 18, no. 4 (2002): 445.
[99] English common lawyers are also used to applying the rule in *Browne v. Dunn* (1984) 6 R 67 that provides that unless sufficient prior notice is given of a contention being relied upon, the contention must be put to an opposing witness who is asserting a contrary position in cross-examination so they have a meaningful opportunity to respond. The logic is to allow the witness to respond to the case against his or her testimony. The rule also leads to the corollary that if the contention is put and the witness does not refute the contention, it is accepted as made out unless otherwise contradicted. The rule itself does not apply in arbitration but the obligation in arbitration to present arguments and documents before a hearing satisfies the same policy aim. If matters had not been properly notified in arbitration there is a problem either way, undue surprise if asked and lack of opportunity if not.
[100] Section 6.2.4 dealt with the general right of a tribunal to override a procedural agreement of the parties.
[101] See Hilmar Raeschke-Kessler, 'Witness Conferencing', in *The Leading Arbitrators' Guide to International Arbitration*, 2nd edn, ed. L. Newman & R. Hill (Huntington: Juris Publishing, 2008), 418. See also the discussion of tandem witness examination and a draft protocol discussed in Mauro Rubino-Sammartano, *International Arbitration Law and Practice*, 2nd edn (The Hague: Kluwer Law International), 690–691.
[102] Wolfgang Peter, 'Witness "Conferencing"', *Arbitration International* 18, no. 1 (2002): 56; Clifford J. Hendel, 'Witness Conferencing Involving Witnesses of Fact: A Good Idea Whose Time Has Not Yet Come?', *IBA Arbitration News* 16, no. 1 (2011): 88.
[103] Doug Jones, 'Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last', *Arbitration International* 24, no. 1 (2008): 149.
[104] Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, 5th edn (Oxford: Oxford University Press, 2009), 423.
[105] See, e.g., English Arbitration Act 1996 s. 38(5). The provision does not indicate the form of any oath or affirmation. The power is also expressly referred in the Belgian Judicial Code Art. 1696(1) and the Netherlands Code of Civil Procedure Art. 1041(1). See also Israeli Arbitration Law Art. 14.
[106] Swiss law does not allow a private person to administer an oath. Redfern and Hunter describe such a provision as mandatory. Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, 5th edn (Oxford: Oxford University Press, 2009), 317. Likewise, the German Code of Civil Procedure does not allow arbitral tribunals to administer oaths, although its express prohibition has been removed from the Code. See Klaus Sachs & Torsten Lörcher, 'Conduct of Arbitral Proceedings', in *Arbitration in Germany: The Model Law in Practice*, ed. Karl-Heinz Böckstiegel, Stefan Michael Kröll & Patricia Nacimiento (Alphen aan den Rijn: Kluwer Law International, 2007), 325. Swedish and Finnish law also specifically prohibit arbitrators from administering oaths. See Swedish Arbitration Act s. 25(3); Finnish Arbitration Act s. 27(2). See also

French New Code of Civil Procedure Art. 1467.

[107] Roberto Ceccon, 'UNCITRAL Notes on Organizing Arbitral Proceedings and the Conduct of Evidence: A New Approach to International Arbitration', *Journal of International Arbitration* 14, no. 2 (1997): 78.

[108] German Code of Civil Procedure Art. 1050; Swiss Law on Private International Law Art. 184(2); Austrian Code of Civil Procedure Arts 306–309; UNCITRAL Model Law Art. 27. Jurisdictions vary as to whether criminal sanctions apply to false testimony not made under oath.

[109] English Arbitration Act 1996 s. 38(5).

[110] ICSID Arbitration Rules Art. 35(3).

[111] IBA Rules of Evidence 2010 Art. 8.4.

[112] Bernard G. Poznanski, 'The Nature and Extent of an Arbitrator's Powers in International Commercial Arbitration', *Journal of International Arbitration* 4, no. 3 (1987): 105.

[113] Axel H. Baum, 'International Arbitration: The Path toward Uniform Procedures', in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner*, ed. Gerald Aksen et al. (Paris: ICC Publishing, 2005), 54. Common law jurisdictions were more inclined to use verbatim transcripts of oral proceedings.

[114] Charles N. Brower, 'Evidence before International Tribunals: The Need for Some Standard Rules', *International Lawyer* 28, no. 1 (1994): 51.

[115] Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, 5th edn (Oxford: Oxford University Press, 2009), 421.

[116] Judgment of 16 November 1993, *Société Ganz Mozdony et al. v. SNCFT*, Cour d'Appel de Paris (Paris Court of Appeal) in *Revue de l'Arbitrage* 1995, no. 3: 477. Even if successful, the party providing such a transcript would be unlikely to be compensated for the expense in the costs order.

[117] I am indebted to Pierre Karrer for this observation.

[118] See section 6.16 in relation to on-line arbitration generally.

[119] IBA Rules of Evidence 2010 Art. 8.1.

[120] 1999 IBA Working Party & 2010 IBA Rules of Evidence Subcommittee, 'Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration' (2010), 18.

[121] I am indebted to Tony Canham for this observation.

[122] Charles N. Brower, 'Evidence Before International Tribunals: The Need for Some Standard Rules', *International Lawyer* 28, no. 1 (1994): 53.

[123] Michael W. Bühler & Thomas H. Webster, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* (London: Sweet & Maxwell, 2005), 276.

[124] Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 1845, n. 545.

[125] Michael Hwang & Andrew Chin, 'The Role of Witness Statements in International Commercial Arbitration', in *International Arbitration 2006: Back to Basics?*, ICCA Congress Series No. 13, ed. Albert Jan van den Berg (The Hague: Kluwer Law International, 2007), 656.

[126] *Ibid.*, 652.

[127] *Ibid.*, 654.

[128] Laurent Lévy, 'Witness Statements', in *De Lege Ferenda - Réflexions sur le droit désirable en l'honneur du Professeur Alain Hirsch 95*, ed. A. Hériter Lachat & L. Hirsch (Geneva: Slatkine, 2004), 95, 101.

[129] While it is more natural for a civilian lawyer to have the adjudicator direct questions, common law judges will also intervene on matters of importance.

[130] Cited in Laurent Lévy, 'Testimonies in the Contemporary Practice: Witness Statements and Cross Examination', in *Arbitral Procedure at the Dawn of the New Millennium*, Report of the International Colloquium of CEPANI, 15 October 2004, ed. Stephen Bond et al. (Brussels: Bruylant, 2005), 115.

[131] Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, 5th edn (Oxford: Oxford University Press, 2009), 420.

[132] Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 1846.

[133] These arguments also relate to the advantages and disadvantages of witness conferencing, discussed below.

[134] See, e.g., Swiss Rules 2012 Art. 25.6. Some rules provide an express discretion to the tribunal.

[135] Emmanuel Gaillard & John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999), 700.

[136] Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 1847.

[137] UNCITRAL Model Law Art. 27; US Federal Arbitration Act § 7;

English Arbitration Act 1996 s. 43; Swiss Private International Law Art. 184(2); Belgian Judicial Code Art. 1496(4).

[138] Martin H. Hunter, 'The Procedural Powers of Arbitrators under the English Act', *Arbitration International* 13, no. 4 (1997): 346.

[139] IBA Rules of Evidence 2010 Art. 4.9.

[140] Pierre A. Karrer, 'Freedom of an Arbitral Tribunal to Conduct Proceedings', *ICC International Court of Arbitration Bulletin* 10, no. 1 (1999): 24. See also Laurent Lévy, 'Testimonies in the Contemporary Practice: Witness Statements and Cross-Examination', in *Arbitral Procedure at the Dawn of the New Millennium*, Reports of the International Colloquium of CEPANI, October 15, 2004, ed. Stephen Bond et al. (Brussels: Bruylant, 2005), 122.

[141] Marianne Roth, 'False Testimony at International Arbitration Hearings Conducted in England and Switzerland: A Comparative View', *Journal of International Arbitration* 11, no. 1 (1994): 16–19; Mauro Rubino-Sammartano, *International Arbitration Law and Practice*, 2nd edn (The Hague: Kluwer Law International), 689.

[142] See section 11.8.1 These may be in a special category as they are not experts as to an issue in dispute but experts assisting in the arbitral procedure. Some express rules as to expert witnesses may not therefore apply, although the position still has some uncertainty.

[143] Yves Derains & Eric A. Schwartz, *A Guide to the New ICC Rules of Arbitration* (The Hague: Kluwer Law International), 258.

[144] The use of experts in arbitration proceedings is also quite different to the alternative dispute resolution technique of expert determination. Dana H. Freyer, 'Assessing Expert Evidence', in *The Leading Arbitrators' Guide to International Arbitration*, 2nd edn, ed. L. Newman & R. Hill (Huntington: Juris Pub, 2008), 437. This is also described as 'expertise arbitrale', 'schiedsgutachten' and valuation; Jean-François Poudret & Sébastien Besson, *Comparative law of International Arbitration*, 2nd edn (London: Thomson/Sweet & Maxwell, 2007), 562.

[145] Yves Derains, 'La pratique de l'administration de la preuve dans l'arbitrage commercial international', *Revue de l'Arbitrage* (2004): 800.

[146] See, e.g., UK Civil Procedure Rules, Practice Direction 35 – Experts and Assessors, but note that the US allows for more in the way of promotion of party interests.

[147] See the discussion in Mark Kantor, 'A Code of Conduct for Party-Appointed Experts in International Arbitration - Can One Be Found?', *Arbitration International* 26, no. 3 (2010): 324–325.

[148] *Ibid.*, 326–327.

[149] Klaus Sachs, 'Experts: Neutrals or Advocates', paper given at the ICCA Annual Conference 2010 (Rio de Janeiro, 23–26 May 2010), para. 8. Klaus Sachs & Nils Schmidt-Ahrendts, 'Protocol on Expert Teaming: A New Approach to Expert Evidence', in *Arbitration Advocacy in Changing Times*, ICCA Congress Series No. 15, ed. Albert Jan van den Berg (The Hague: Kluwer Law International, 2011), 135.

[150] Mark Kantor, 'A Code of Conduct for Party-Appointed Experts in International Arbitration – Can One Be Found?', *Arbitration International* 26, no. 3 (2010): 336.

[151] *Ibid.*, 364.

[152] Arthur Marriott, 'Arbitrators and Settlement', in *New Horizons in International Commercial Arbitration and Beyond*, ICCA Congress Series No. 12, ed. Albert Jan van den Berg (The Hague: Kluwer Law International, 2005), 534.

[153] Klaus Sachs & Nils Schmidt-Ahrendts, 'Protocol on Expert Teaming: A New Approach to Expert Evidence', in *Arbitration Advocacy in Changing Times*, ICCA Congress Series No. 15, ed. Albert Jan van den Berg (The Hague: Kluwer Law International, 2011), 139.

[154] Klaus Sachs, 'Experts: Neutrals or Advocates', paper given at the ICCA Annual Conference 2010 (Rio de Janeiro, 23–26 May 2010), paras 21–23.

[155] Doug Jones, 'Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last', *Arbitration International* 24, no. 1 (2008): 154.

[156] See D. Juan & R. Gutiérrez, 'Expert Testimony, Economic Evidence and Asymmetry of Information in Antitrust Cases', *CEDEC Competition Law & Economics Working Paper No. 07-04* (2007).

[157] Mark Kantor, 'A Code of Conduct for Party-Appointed Experts in International Arbitration – Can One Be Found?', *Arbitration International* 26, no. 3 (2010): 335.

[158] Professor Doug Jones, 'International Dispute Resolution in the Global Financial Crisis', *The Arbitrator and Mediator* (October 2009): 45, 46.

[159] Klaus Sachs, 'Experts: Neutrals or Advocates', paper given at the ICCA Annual Conference 2010 (Rio de Janeiro, 23–26 May 2010), paras 25–29.

[160] Noel G. Bunni, 'Some Thoughts from Experiences in

Construction Arbitration', in *International Arbitration 2006: Back to Basics?*, ICCA Congress Series No. 13, ed. Albert Jan van den Berg (The Hague: Kluwer Law International, 2007), 794.

[161] The American common law approach still remains somewhat distinct. See Julian D.M. Lew QC, Loukas A. Mistelis & Stefan M. Kröll, *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003), 576. For a comprehensive analysis of the ethical basis of party-appointed expert conduct see Mark Kantor, 'A Code of Conduct for Party-Appointed Experts in International Arbitration: Can One Be Found?', *Arbitration International* 26, no. 3 (2010): 323.

[162] See, e.g., Austrian Code of Civil Procedure Art. 601(2) and (4).

[163] Klaus Sachs & Nils Schmidt-Ahrendts, 'Protocol on Expert Teaming: A New Approach to Expert Evidence', in *Arbitration Advocacy in Changing Times*, ICCA Congress Series No. 15, ed. Albert Jan van den Berg (The Hague: Kluwer Law International, 2011), 137.

[164] Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Thomson/Sweet & Maxwell, 2007), 561.

[165] Doug Jones, 'Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last', *Arbitration International* 24, no. 1 (2008): 150.

[166] UK Civil Justice Council, 'Protocol for the Instruction of Experts to give Evidence in Civil Claims', (2009), para. 17.15.

[167] UNCITRAL Model Law Art. 26; English Arbitration Act 1996 s. 37; Swedish Arbitration Act s. 25; Netherlands Code of Civil Procedure Art. 1042.

[168] Klaus Sachs & Nils Schmidt-Ahrendts, 'Protocol on Expert Teaming: A New Approach to Expert Evidence', in *Arbitration Advocacy in Changing Times*, ICCA Congress Series No. 15, ed. Albert Jan van den Berg (The Hague: Kluwer Law International, 2011), 137, referring to the laws of France, Switzerland and the US where there are no specific provisions for expert evidence.

[169] Tribunal-appointed experts are referred to in: UNCITRAL Arbitration Rules 2010 Art. 29 and LCIA Arbitration Rules 1998 Art. 21. For other rules dealing with tribunal appointed experts, see: ICC Rules of Arbitration 2012 Art 25; ICDR Rules Art. 22; Swiss Rules 2012 Art. 27; HKIAC Rules Art. 25; SIAC Rules Art. 23; SCC Rules Art. 29.

[170] Emmanuel Gaillard & John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999), 704. However, the authors note that Swiss law would allow a limited ground of challenge.

[171] Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, 5th edn (Oxford: Oxford University Press, 2009), 407.

[172] Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 1861.

[173] IBA Rules of Evidence 2010 Art. 6.1.

[174] Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 1861.

[175] Decision 102LA493, unpublished Note 8; Decision 4T.23/1991 of 25 May 1992, Note 5B cited in Georg von Segesser & Petra Rihar, 'The Right to a Tribunal Appointed Expert', <http://kluwerarbitrationblog.com/blog/2011/08/09/the-right-to-a-tribunal-appointed-expert/ >, 9 August 2011.

[176] Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, 5th edn (Oxford: Oxford University Press, 2009), 407.

[177] Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Thomson/Sweet & Maxwell, 2007), 560.

[178] Claus von Wobeser, 'The Arbitral Tribunal-Appointed Expert', in *International Arbitration 2006: Back to Basics?*, ICCA Congress Series No. 13, ed. Albert Jan van den Berg (The Hague: Kluwer Law International, 2007), 807.

[179] Yves Derains & Eric A. Schwartz, *A Guide to the New ICC Rules of Arbitration* (The Hague: Kluwer Law International, 2009), 278–279.

[180] Gillian M. White, *The Use of Experts by International Tribunals* (Syracuse: Syracuse University Press, 1965), 73.

[181] Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Thomson/Sweet & Maxwell, 2007), 562.

[182] Choosing a candidate ranked more highly by one of the parties would not offend equal treatment obligations, at least where the other party considered the candidate suitable as well, albeit less so.

[183] Claus von Wobeser, 'The Arbitral Tribunal-Appointed Expert', in *International Arbitration 2006: Back to Basics?*, ICCA Congress Series No. 13, ed. Albert Jan van den Berg (The Hague: Kluwer Law International, 2007), 807–808.

[184] Kap-you (Kevin) Kim & John P. Bang, 'Commentary on Using Legal Experts in International Arbitration', in *International Arbitration*

2006: Back to Basics?, ICCA Congress Series No. 13, ed. Albert Jan van den Berg (The Hague: Kluwer Law International, 2007), 783.

185 A challenge on this basis was unsuccessful before the Swiss Federal Supreme Court in part because of lack of evidence of bias and because of the delay in bringing the challenge. See Christoph Brunner, 'Note: Federal Supreme Court, 28 April 2000: Procedural Public Policy as a Ground for Setting Aside International Arbitral Awards', *ASA Bulletin* 18, no. 3 (2000): 566.

186 While not directly relevant to international arbitration, the Rules of Conduct for WTO Dispute Settlement Art. II.1 are a useful guide to the way experts ought to behave.

187 IBA Rules of Evidence 2010 Art. 6.2. Express provision is made for challenging tribunal appointed experts in German Code of Civil Procedure Art. 1049(3).

188 Emmanuel Gaillard & John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999), 704.

189 Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Thomson/Sweet & Maxwell, 2007), 563.

190 Mark Kantor citing the views of Professor Thomas Walde. Mark Kantor, 'A Code of Conduct for Party-Appointed Experts in International Arbitration – Can One Be Found?', *Arbitration International* 26, no. 3 (2010): 334.

191 Julian D.M. Lew QC, Loukas A. Mistelis & Stefan M. Kröll, *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003), 575.

192 Mark Kantor, 'A Code of Conduct for Party-Appointed Experts in International Arbitration – Can One Be Found?', *Arbitration International* 26, no. 3 (2010): 329.

193 Chartered Institute of Arbitrators, 'Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration', Art. 4(1).

194 Kap-you (Kevin) Kim & John P. Bang, 'Commentary on Using Legal Experts in International Arbitration', in *International Arbitration 2006: Back to Basics?*, ICCA Congress Series No. 13, ed. Albert Jan van den Berg (The Hague: Kluwer Law International, 2007), 784.

195 Mark Kantor, 'A Code of Conduct for Party-Appointed Experts in International Arbitration – Can One Be Found?', *Arbitration International* 26, no. 3 (2010): 335.

196 Chartered Institute of Arbitrators, 'Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration', Art 8. This Article also requires a declaration of independence. If the tribunal subsequently determines that the declaration is incorrect, it may disregard the written opinion and testimony unless in exceptional circumstances it determines otherwise.

197 Article 5.2(c).

198 Article 5.2(a) IBA Rules of Evidence 2010.

199 See ICC, 'Rules for Expertise' <http://www.iccwbo.org/court/expertise/id4379/index.html#art3 >, Art. 3.3. See also Jean-François Bourque, 'L'expérience du centre international d'expertise de la CCI et le développement de l'expertise internationale', *Revue de l'Arbitrage* (1995): 252.

200 Emmanuel Gaillard & John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999), 704.

201 Dana Freyer, 'Assessing Expert Evidence', in *The Leading Arbitrators' Guide to International Arbitration*, 2nd edn, ed. L. Newman &and R. Hill (Huntington: Juris Publishing, 2008), 442.

202 1999 IBA Working Party & 2010 IBA Rules of Evidence Subcommittee, 'Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration' (2010), 20–21.

203 The difference between the policy models is between establishing a duty of an expert and relying instead on a court power.

204 Mark Kantor, 'A Code of Conduct for Party-Appointed Experts in International Arbitration – Can One Be Found?', *Arbitration International* 26, no. 3 (2010): 339.

205 Tony Canham, 'The Expert Witness in Arbitration and ADR: A Practical Approach', The Academy of Experts 27, at 28 available at <http://www.tonycanham.com>. See also the recent UK Supreme Court decision holding that there should not be immunity for expert witnesses from being sued for negligence in *Jones v. Kaney* [2011] UKSC 13.

206 Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, 5th edn (Oxford: Oxford University Press, 2009), 423. The situation is different with an expert who is merely part of a legal team helping to prepare the case, with no intention of giving evidence. Care needs to be taken, however, if such a person is ultimately selected to give evidence if earlier behaviour has compromised their independence.

207 Chartered Institute of Arbitrators, 'Protocol for the Use of Party-

Appointed Expert Witnesses in International Arbitration', Art. 4.1.

208 IBA Rules of Evidence 2010 Arts 5.2(g), 6.4(e) and 8.4.

209 Cited in Mark Kantor, 'A Code of Conduct for Party-Appointed Experts in International Arbitration – Can One Be Found?', *Arbitration International* 26, no. 3 (2010): 326, n. 10, who notes that the rules were not formally adopted by ALI or UNIDROIT but are recommendations of the Reporters.

210 *Ibid.*, 334.

211 *Ibid.*, 375. Kantor also thoroughly analyses the ethical standards of various professional bodies that may also impact upon the behaviour of experts in individual cases.

212 Noel G. Bunni, 'Some Thoughts from Experiences in Construction Arbitration', in *International Arbitration 2006: Back to Basics?*, ICCA Congress Series No. 13, ed. Albert Jan van den Berg (The Hague: Kluwer Law International, 2007), 790.

213 See Case No. 24, Award No 314-21-1 of 14 August 1987, *Starrett Housing Corporation v. The Government of the Islamic Republic of Iran*, 16 Iran-US Claims Tribunal Reports 112, 196. In that case, the Tribunal spoke of the use of expert assistance to 'guide (the tribunal) in the search for the truth'. It also stated that '(i)t is fundamental that an arbitral tribunal cannot delegate to (the expert) the duty of deciding the case'. See also *Corfu Channel (United Kingdom v. Albania)* [1949] ICJ 4, 196. A challenge on the basis that a tribunal expert was too engaged in the assessment of evidence and did not provide the report to the parties was rejected in the Singapore High Court in *Luzon Hydro Corp v. Transfield Philippines* [2004] 4 SLR 705.

214 Case 181, Award No. 294-181-1, *Bechtel Inc et al. v. Islamic Republic of Iran*, 14 Iran-US Cl Trib Rep 149 (1987). Such persons are a distinct category and may not readily be subject to the typical rules applicable to tribunal appointed experts as they are dealing with a procedural matter and not an ultimate issue in dispute.

215 Alan Redfern, 'Experts and Arbitrators – An International Perspective', *International Arbitration Law Review* 4, no. 4 (2001): 106.

216 See, e.g., *Longley (James) & Co. Ltd v. South West Thames Regional Health Authority* [1983] 25 BLR 56.

217 *Luzon Hydro Corp. v. Transfield Philippines Inc.* [2004] SGHC 204 at para. 16.

218 Klaus Sachs, 'Experts: Neutrals or Advocates', paper given at the ICCA Annual Conference 2010 (Rio de Janeiro, 23–26 May 2010), para. 30.

219 *Luzon Hydro Corp. v. Transfield Philippines Inc* [2004] SGHC 204 at para. 16.

220 Hilmar Raeschke-Kessler, 'Witness Conferencing', in *The Leading Arbitrators' Guide to International Arbitration*, 2nd edn, ed. L. Newman & R. Hill (Huntington: Juris Publishing, 2008), 426. One ICC panel appears to have sought to do this, although one party was very reluctant. See Final Award in ICC Case No. 6497, in *Yearbook of Commercial Arbitration Volume XXIVa*, ed. Albert Jan van den Berg (The Hague: Kluwer Law International, 1999), 77–78.

221 In *Tang Ping-Choi and Anor v. Secretary for Transport* [2004] 2 HKLRD 284, an expert's testimony was given no weight, because the expert had obtained the evidence by secretly recording a conversation. See Doug Jones, 'Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last', *Arbitration International* 24, no. 1 (2008): 152.

222 Emmanuel Gaillard & John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999), 705.

223 Entitlement to receive information, attend inspections and examine documents used by the expert are covered in the IBA Rules of Evidence 2010 Art. 6.3, 6.4 and 6.5.

224 Judgment of 6 February 1997, *Carter v. Alsthom*, Cour d'appel de Paris, *Revue de l'Arbitrage* (1997), no. 4: 556–557.

225 Compare Pierre Mayer, 'Note – Cour d'appel de Paris' (1re Ch. C) 6 février 1997), *Revue de l'Arbitrage* (1997), no. 4: 562, Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Thomson/Sweet & Maxwell, 2007), 479 and Emmanuel Gaillard & John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999), 704.

226 *Mantovanelli v. France*, Application No. 21497/93, paras 33–35. See also Case C-276/01, *Joachim Steffensen* [2003] ECR I-3735, paras 77–78.

227 Kap-you (Kevin) Kim & John P. Bang, 'Commentary on Using Legal Experts in International Arbitration', in *International Arbitration 2006: Back to Basics?*, ICCA Congress Series No. 13, ed. Albert Jan van den Berg (The Hague: Kluwer Law International, 2007), 780.

228 *Ibid.*, 782–783.

229 ICC, 'Techniques for Controlling Time and Costs in Arbitration', <http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf>, 2007,

para. 68.

230 Emmanuel Gaillard & John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999), 704.

231 The Iran-US Claims Tribunal at times invited input from the parties in relation to the expert's terms of reference, called for a preliminary report by the expert, allowed the parties to comment and directed the expert to take these comments into account in the final report. See Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, 5th edn (Oxford: Oxford University Press, 2009), 408 referring to *Starrett Housing Corp. v. The Government of the Islamic Republic of Iran* (1987) 16 Iran-US Claims Tribunal Reports 117–119.

232 Claus von Wobeser, 'The Arbitral Tribunal-Appointed Expert', in *International Arbitration 2006: Back to Basics?*, ICCA Congress Series No. 13, ed. Albert Jan van den Berg (The Hague: Kluwer Law International, 2007), 808.

233 *Ibid.*, 810.

234 This will allow parties to decide which of a group of co-signatories may be needed to give evidence.

235 UK Civil Justice Council, 'Protocol for the Instruction of Experts to give Evidence in Civil Claims', (2009), para. 4.3.

236 *Ibid.*, para. 15.2.

237 Detlev Kühner, 'The Revised IBA Rules on the Taking of Evidence in International Arbitration', *Journal of International Arbitration* 27, no. 6 (2010): 673.

238 IBA Rules of Evidence 2010 Art. 6.2.

239 Chartered Institute of Arbitrators, 'Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration', Art. 4.4.

240 *Ibid.*, Art. 8.

241 See, e.g., Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia, Practice Direction May 2008; Civil Justice Counsel, Expert Witness Protocol; UK Civil Procedure Rules – CPR 35.12; The Academy of Experts Code of Practice for Experts, 22 June 2005; ICC Rules for Expertise (2003).

242 To similar effect Bunni recommended a draft expert's declaration covering duty to the tribunal; indication of facts within own knowledge and belief in truth; identification of adverse issues and qualifications; identification of sources; attestation of an independent view; confirmation that advice will be provided if views change; acknowledgement that the report will form the evidence to be given; acknowledgement that cross-examination may ensue; and acknowledgement that there may be public adverse criticism if reasonable care has not been taken. Noel G. Bunni, 'Some Thoughts from Experiences in Construction Arbitration', in *International Arbitration 2006: Back to Basics?*, ICCA Congress Series No. 13, ed. Albert Jan van den Berg (The Hague: Kluwer Law International, 2007), 792.

243 Hans van Houtte, 'The Document Production Master and the Experts' Facilitator: Two Possible Aides for an Efficient Arbitration', in *Liber Amicorum Bernardo Cremades*, ed. M. Á Fernández-Ballesteros & David Arias (Madrid: La Ley, 2010), 1154.

244 Doug Jones, 'Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last' *Arbitration International* 24, no. 1 (2008): 143.

245 Kap-you (Kevin) Kim & John P. Bang, 'Commentary on Using Legal Experts in International Arbitration', in *International Arbitration 2006: Back to Basics?*, ICCA Congress Series No. 13, ed. Albert Jan van den Berg (The Hague: Kluwer Law International, 2007), 784–785.

246 Klaus Sachs, 'Experts: Neutrals or Advocates', paper given at the ICCA Annual Conference 2010 (Rio de Janeiro, 23–26 May 2010), para. 47.

247 ICC, 'Techniques for Controlling Time and Costs in Arbitration', <http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf>, 2007, para. 82.

248 As per UK Civil Procedure Rules 35.12(5).

249 Tony Canham, 'The Expert Witness in Arbitration and ADR: A Practical Approach', The Academy of Experts 27 available at <http://www.tonycanham.com>.

250 *Ibid.*

251 Noel G. Bunni, 'Some Thoughts from Experiences in Construction Arbitration', in *International Arbitration 2006: Back to Basics?*, ICCA Congress Series No. 13, ed. Albert Jan van den Berg (The Hague: Kluwer Law International, 2007), 791.

252 It would be difficult for a tribunal to make distinct cost orders about allegedly inappropriate behaviour in pre-hearing meetings where there is no accurate record of what occurred.

253 Doug Jones, 'Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last', *Arbitration International* 24, no. 1 (2008): 144.

[254] If such a process is being managed by a tribunal appointed expert, there might be less scope for such parochial behaviour. This is discussed below in the following section dealing with expert facilitation.
[255] Hans van Houtte, 'The Document Production Master and the Experts' Facilitator: Two Possible Aides for an Efficient Arbitration', in *Liber Amicorum Bernado Cremades*, ed. M.Á. Fernández-Ballesteros & David Arias (Madrid: La Ley, 2010), 1155.
[256] Doug Jones, 'Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last', *Arbitration International* 24, no. 1 (2008): 144.
[257] Jane Jenkins & Simon Stebbings *International Construction Arbitration Law* (The Hague: Kluwer Law International, 2006), 213.
[258] Hans van Houtte, 'The Document Production Master and the Experts' Facilitator: Two Possible Aides for an Efficient Arbitration', in *Liber Amicorum Bernado Cremades*, ed. M.Á. Fernández-Ballesteros & David Arias (Madrid: La Ley, 2010), 1155–1159.
[259] *Ibid.*, 1157.
[260] *Ibid.*, 1156.
[261] A fee is charged by the Centre for suggestions made.
[262] Andrew Stephenson, 'Creating Efficient Dispute Resolution Processes: Lessons Learnt from International Arbitration', *Building and Construction Law Journal* 20, no. 3 (2004): 58.
[263] See, e.g., IBA Rules of Evidence 2010 Arts 5.5, 5.6 and 8.1.
[264] See ICC Rules 2012 Art. 25(4); UNCITRAL Rules 2010 Art. 29.5; LCIA Rules Art. 21.2; HKIAC Rules Art. 25.4; SIAC Rules Art. 23.3; ICDR Rules Art. 22.4; Swiss Rules 2012 Art. 27.3 and 27.4; See also German Code of Civil Procedure Art. 1049(2).
[265] J. Martin & H. Hunter, 'Expert Conferencing and New Methods', in *International Arbitration 2006: Back to Basics?*, ICCA Congress Series No. 13, ed. Albert Jan van den Berg (The Hague: Kluwer Law International, 2007), 823.
[266] Use of conferencing in certain common law courts has been described as 'hot tubbing'.
[267] Wolfgang Peter, 'Witness "Conferencing"', *Arbitration International* 18, no. 1 (2002): 56.
[268] *Ibid.*, and comments of Clifford J. Hendel, 'Witness Conferencing Involving Witnesses of Fact: A Good Idea Whose Time Has Not Yet Come?', *IBA Arbitration News* 16, no. 1 (2011): 88.
[269] Hilmar Raeschke-Kessler, 'Witness Conferencing', in *The Leading Arbitrators' Guide to International Arbitration*, 2nd edn, ed. L. Newman & R. Hill (Huntington: Juris Publishing, 2008), 418.
[270] *Ibid.*, 419.
[271] *Ibid.*
[272] *Ibid.*, 421.
[273] Gary B. Born, *International Commercial Arbitration* (The Hague, Kluwer Law International, 2009), 1850.
[274] See Wolfgang Peter, 'Witness "Conferencing"', *Arbitration International* 18, no. 1 (2002): 55.
[275] Doug Jones, 'Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last', *Arbitration International* 24, no. 1 (2008): 148.
[276] Wolfgang Peter, 'Witness "Conferencing"', *Arbitration International* 18, no. 1 (2002): 48.
[277] Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, 5th edn (Oxford: Oxford University Press, 2009), 424.
[278] See David Rivkin, 'Towards a New Paradigm in International Arbitration; The Town Elder Model Revisited', *Arbitration International* 24, no. 3 (2008): 384.
[279] Hilmar Raeschke-Kessler, 'Witness Conferencing', in *The Leading Arbitrators' Guide to International Arbitration*, 2nd edn, ed. L. Newman & R. Hill (Huntington: Juris Publishing, 2008), 420.
[280] Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 1850.
[281] Wolfgang Peter, 'Witness "Conferencing"', *Arbitration International* 18, no. 1 (2002): 52.
[282] *Ibid.*, 51.
[283] Hilmar Raeschke-Kessler, 'Witness Conferencing', in *The Leading Arbitrators' Guide to International Arbitration*, 2nd edn, ed. L. Newman & R. Hill (Huntington: Juris Publishing, 2008), 424.
[284] Wolfgang Peter, 'Witness "Conferencing"', *Arbitration International* 18, no. 1 (2002): 51–52.
[285] Hilmar Raeschke-Kessler, 'Witness Conferencing', in *The Leading Arbitrators' Guide to International Arbitration*, 2nd edn, ed. L. Newman & R. Hill (Huntington: Juris Publishing, 2008), 424.
[286] *Ibid.*, 427.
[287] J. Martin & H. Hunter, 'Expert Conferencing and New Methods', in *International Arbitration 2006: Back to Basics?*, ICCA Congress Series No. 13, ed. Albert Jan van den Berg (The Hague: Kluwer Law International, 2007), 824.

[288] Klaus Sachs & Nils Schmidt-Ahrendts, 'Protocol on Expert Teaming: A New Approach to Expert Evidence', in *Arbitration Advocacy in Changing Times*, ICCA Congress Series No. 15, ed. Albert Jan van den Berg (The Hague: Kluwer Law International, 2011), 145.
[289] *Ibid.*, 147.
[290] Mark Kantor, 'A Code of Conduct for Party-Appointed Experts in International Arbitration – Can One Be Found?', *Arbitration International* 26, no. 3 (2010): 338.
[291] *Ibid.*, 339.
[292] Klaus Sachs & Nils Schmidt-Ahrendts, 'Protocol on Expert Teaming: A New Approach to Expert Evidence', in *Arbitration Advocacy in Changing Times*, ICCA Congress Series No. 15, ed. Albert Jan van den Berg (The Hague: Kluwer Law International, 2011), 145–146.
[293] Mark Kantor, 'A Code of Conduct for Party-Appointed Experts in International Arbitration – Can One Be Found?', *Arbitration International* 26, no. 3 (2010): 339.
[294] This may make a difference when there is differential treatment between these two broad cost categories.
[295] Julian D.M. Lew QC, Loukas A. Mistelis & Stefan M. Kröll, *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003), 573; Bernard Hanotiau, 'The Conduct of the Hearings', in *The Leading Arbitrators' Guide to International Arbitration*, ed. L. Newman & R. Hill, 2nd edn (Huntington: Juris Publishing, 2008), 372.
[296] Peter F. Schlosser, 'Generalisable Approaches to Agreement with Experts and Witnesses Acting in Arbitration and International Litigation', in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner*, ed. Aksen et al. (Paris: ICC Publishing, 2005), 775 and 778.
[297] Christian Oetiker, 'Witnesses Before the International Arbitral Tribunal', *ASA Bulletin* 25, no. 2 (2007): 266.
[298] Paul A Gélinas, 'Evidence Through Witnesses', in *Arbitration and Oral Evidence*, ed. Lévy & Veeder (Paris: ICC, 2005), 34.
[299] See section 2.3.