



# Compendium of arbitration practice

October 2017

**IBA Arb40 Subcommittee**





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# Chapter 1: Introduction

As arbitration gained prominence as a favoured dispute resolution mechanism for international disputes, time and cost efficiency were often cited as key advantages. That is no longer necessarily the case. Cost is now ranked as one of the worst features of international arbitration, followed by lack of effective sanctions during the arbitral process and lack of insight into arbitrators' efficiency.<sup>1</sup>

Various innovations have been implemented to tackle concerns around increasing costs, including, most notably, innovations in procedure and practice by the arbitration institutions. Such examples include more robust pre-appointment scrutiny of arbitrator availability,<sup>2</sup> greater transparency regarding tribunal deliberations and imposition of deadlines for issuance of the award,<sup>3</sup> and summary dispositions or fast-track procedures for suitable cases.<sup>4</sup> In 2007, the International Chamber of Commerce (ICC) Commission on Controlling Time and Costs in Arbitration also produced a comprehensive report containing various suggestions at different stages of the arbitration so as to more efficiently manage the proceedings.

Through this compendium, the IBA Arb40 Subcommittee offers its own contribution to tackling concerns around costs and efficiency. Although there may be many different reasons why inefficiency has crept into the arbitration process, due process concerns are often cited. That is to say that tribunals are concerned that if they take a robust procedural approach, their orders and awards will ultimately be challenged.

The resulting risk is that there is a common default to widely-accepted standard procedure, even if it is not the most efficient way of proceeding.<sup>5</sup> At the same time, while there are individual procedural innovations, it is harder for them to gain broader acceptance given the often closed nature of arbitration proceedings. This compendium seeks to overcome that problem by being a platform for sharing innovative practice.

## 1.1 Aim

The aim of this compendium is to bring together, in one place, procedural suggestions for improving or adapting the arbitration process. To that end, members of the IBA Arb40 Subcommittee have interviewed leading practitioners in the field with two principal goals in mind: (i) identifying whether 'typical' practices have emerged in international arbitration and which of those practices could be improved; and (ii) identifying innovative or creative practices that could be shared with other practitioners.

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1 Queen Mary University of London & White & Case, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration; IBA Arb40 Subcommittee, *The Current State and Future of International Arbitration: Regional Perspectives*, September 2015.

2 Article 5.4 of the LCIA Arbitration Rules, Article 13.1 of the ICC Arbitration Rules, Rules 13.3 of the SIAC Arbitration Rules, Article 11.4 of the HKIAC Administered Arbitration Rules.

3 ICC Note to the Parties and Arbitral Tribunals on the Conduct of the Arbitration.

4 Many of the major arbitral institutions offer expedited procedures. SIAC Arbitration rules include provisions for the early dismissal claims and defences.

5 Klaus Peter Berger and Jole Jensen, *Due Process Paranoia and the Procedural Judgement Rules: A Safe Harbour for Procedural Management Decisions by International Arbitrators*, *Arbitration International* 415, 2016.

In compiling this compendium, we have not sought to repeat detailed guidance issued by others or establish a list of 'best practices'. Instead, we recognise as a guiding principle of this work that there is both a cultural and a practical dimension to maintaining 'flexibility' in the practice of international arbitration. Every case is unique and those skilled in the practice of arbitration will devise a procedure suitable for the particularities of any given case. What is suitable could depend on a range of factors: the cultural background of the parties and counsel, the complexity of the case, the value of the dispute, the likely enforcement jurisdiction, and the preferences and wishes of the parties, to name but a few.

As a consequence, the suggestions contained in the compendium are not recommendations. Some will be suitable for certain cases, but not for others. The compendium is intended to serve as a useful reference point to be dipped into as and when appropriate. The goal of the compendium is to supplement the 'informal' sharing of ideas that takes place at arbitral conferences and through practitioner discussions with a guide that gathers together in a single place the learning and experience of practitioners from around the world.

This is the inaugural compendium of the IBA Arb40. At this time, it has not been possible to interview all those working in the field who we would have liked to reach. We intend to update the compendium on a regular basis with the ideas and contributions of others. The aim is for the compendium to evolve as a 'living' project as a forum for creative and substantive procedural innovations, and in turn facilitating their broader usage and acceptance.

## **1.2 Themes**

The compendium is organised by reference to different stages and themes in the arbitration process. From the interviews that the IBA Arb40 Subcommittee conducted, some themes that stand out in particular are as follows.

Earlier engagement from the tribunal is essential. In Chapter 2 on the Procedural Order No 1 we set out a range of different suggestions as to how issues may be tackled upfront in an arbitration. We have also allocated a full chapter, Chapter 3, to the 'case review conference' or a 'mid-stream conference', which seems to be gaining real traction as a way of promoting early tribunal engagement and shaping the arbitration more acutely for the procedural requirements of a case. Many of the sections of the compendium interplay with the suggestion of a case review conference.

There is growing frustration in relation to the way in which the Redfern Schedule is used for complex and document heavy cases. Chapter 4 on document management considers ways in which those frustrations can be addressed.

Written submissions, and in particular their length and lack of focus, have attracted some criticism. In Chapter 5 we have set out the many suggestions made as to the way in which they can be focused and repetition avoided.

Quantum and effective engagement with expert evidence is also an area where innovative practices are emerging to ensure that issues between experts are narrowed and the tribunal has a better understanding of the expert evidence. This is explained in Chapter 6.

One area which may be for further future consideration is the question of internal tribunal management. Experienced arbitrators shared some of their suggestions on how to approach the question of engagement between the arbitrators, which are set out in Chapter 10. This is an area we expect may garner more attention in future.

Finally, one area that may be of particular importance for those getting their first arbitrator appointments is the handling of arbitrations where the respondent is non-responsive. Balancing caution in respect to procedural requirements with a cost-effective procedure is something that requires careful consideration. We have therefore included a separate chapter on this topic – see Chapter 9.

### **1.3 Vote of thanks**

The IBA Arb40 Subcommittee would like to thank all those arbitration practitioners who kindly gave up their valuable time to be interviewed for this project. Their willingness to share their expert insights is much appreciated, and it is hoped will form the foundation for future contributions and the development of more innovative practice in the field of international arbitration. (The names of those interviewed is included in Appendix A to the compendium). The suggestions contained in this compendium represent a summary of the suggestions made and should not be taken to be endorsed by every practitioner who was interviewed.

Those members of the IBA Arb40 Subcommittee who conducted the interviews included: André de A Cavalcanti Abbud, Dr Rouven Bodenheimer, Kristin Campbell-Wilson, Sarah Grimmer, Daniel Kalderimis, Amani Khalifa, Swee Yen Koh, Sue Hyun Lim, Ignacio Minorini Lima, Jennifer Permesly, Noradèle Radjai and Angeline Welsh. The compendium was conceived and drafted by Angeline Welsh.

**Angeline Welsh and Swee Yen Koh**

*Co-Chairs, IBA Arb40 Subcommittee*

# Chapter 2: Procedural Order No 1

## 2.1 Introduction

A tribunal will often seek to define the general procedural rules and timetable for the arbitration early in the proceedings in the form of a procedural order. Typically referred to as the Procedural Order No 1 (PO1), it tends to cover matters such as written communications, standard of evidence, the content and format of written submissions, content of witness statements and expert reports, and organisation issues for the final hearing as well as the overall procedural timetable.

This is a crucial document because it will often shape the entire arbitration process. The danger with the PO1 is that the tribunal and parties can approach it as a standard form filling exercise, lifting a standard procedure without tailoring it to the circumstances of the case, either at the outset or as it develops. This approach could import procedural inefficiency from the outset.

Consider the issue of the evidence required to determine a case. At one extreme, witness statements may not be required because the documents are sufficient. Perhaps a documents-only procedure would be suitable without the need for an oral hearing. Equally, the parties may have different cultural expectations that would inform their approach to the procedure; perhaps an expectation that there should be a limited document production phase (if any) or that cross-examination plays a smaller role in the testing of evidence (if at all).

Taking into account these different considerations, we start this chapter by considering suggestions for different approaches to settling the PO1. Thereafter we consider specific suggestions for provisions to be included in the PO1. In doing so, we have sought not to replicate the provisions already set out in standard PO1s (see for example 'The ICCA Reports No 2: ICCA Drafting Sourcebook for Logistical Matters in Procedural Orders').

## 2.2 Approach

Interviewees suggested a number of approaches to the drafting of the PO1.

*Start with a clean slate:* some practitioners consider that the starting point should be to ascertain, with the parties, what procedure is required to fit the circumstances of the dispute and the culture of the parties. Rather than propose a draft PO1, it may be better to call a first procedural hearing and circulate in advance an agenda of procedural points for discussion. Only after this first procedural hearing has taken place, should the tribunal and/or the parties draw up the draft PO1.

*Tribunal circulates draft PO1:* many practitioners confirmed that circulating a first draft of the PO1 prior to the first procedural call is the most efficient way of proceeding in many instances. It will give the parties and the tribunal definitive provisions to discuss and make



the tribunal's expectations for the arbitration clearer. A variant of this is to circulate a draft PO1 with the 'nuts and bolts' of the arbitration procedure, but invite suggestions from the parties on other matters which could shape the arbitration procedure, ie, disclosure, timetable for submission of pleadings.

*Parties are invited to jointly draft PO1:* where the parties are represented by sophisticated counsel, the tribunal might invite them to jointly produce the first draft of the PO1 and, to the extent there are any disputes as to what may be included, refer those to the tribunal for determination.

## **2.3 Specific provisions which may be included in the PO1**

The following specific provisions were suggested for inclusion in PO1 where appropriate (beyond standards found in the 'ICCA Drafting Sourcebook for Logistical Matters in Procedural Orders' and where appropriate):

*Jurisdictional issues:* in circumstances where the parties have agreed changes to, or further detail in respect of, an arbitration agreement, those differences should be included in the PO1. Where it is important to reflect the agreement of the parties to the revised arbitration agreement, consider having the PO1 signed by the parties (this may not be required in an ICC arbitration where one would expect the revised arbitration agreement to be included in the terms of reference).

*Managing expectations on tribunal availability:* some practitioners advocated sharing the diary or availability of the tribunal members with the parties either before the first procedural hearing and/or thereafter for the duration of the arbitration. The purpose of this is to manage the parties' expectations before the timetable was fixed in the PO1 and also so that the parties understood the implications of any extensions/delays to the procedural timetable.

*Supervision of procedure:* consider whether it would be appropriate to schedule regular status conference calls at reasonable intervals to allow the tribunal to check in with the parties. Practitioners who adopt this practice suggest that while it is not always necessary for the calls to go ahead, it can be helpful to have those times set aside in advance and creates a more tribunal-engaged supervision of the process.

*Case review conference:* include provisions for a case review conference to be held following the first round of substantive submissions. See the discussion in Chapter 3 of this compendium.

*Expedited procedure:* in the event that the parties agree on an expedited procedure, the tribunal may consider inserting a provision in the PO1 to inform them that the award may be issued with only brief reasons in order to keep to the expedited timetable.

*Setting expectations on submissions:* aside from setting out what documents are to be filed by way of written submissions, tribunals can also include provisions to make it clear what approach they expect the parties to take in their submissions. See Chapter 5 for suggestions in respect of written submissions.

*Documents-only arbitration:* consider whether the arbitration would be suitable to be determined on the basis of documents only. If it is not clear at the outset, leave a placeholder in the schedule to revisit this issue with the parties prior to the submission of witness evidence.

*Bifurcation:* consider whether dispositive issues should be dealt with early in the process. Consider whether to set two parallel schedules rather than explicit bifurcation, with the dispositive issue being ruled on sometime before the rest of the case.

*Confidentiality:* there is no international consensus on the treatment of the issue of confidentiality,<sup>6</sup> with the result that parties and legal counsel with different cultural or legal backgrounds may have different expectations. The tribunal may wish to proactively check with the parties whether their expectations on the subject on confidentiality are the same. If not, this may be an issue that requires resolution and to be recorded in the PO1.

*Translation of documents:* practitioners were in general agreement that a tribunal could greatly reduce costs and increase efficiency by only requiring translation to the language of the arbitration of those documents that are being relied on by the parties, not those that are exchanged as part of the disclosure process. The tribunal and parties may also consider limiting this yet further to translation of the relevant portions of the documents.

*Witnesses:*

- consider whether witnesses are needed from the outset; that is, with the first submission or only at a later stage for specifically contested evidence;
- consider defining upfront whom the parties can approach as witnesses and what they can discuss with the witnesses – this may be especially important where the arbitration may involve third-party witnesses and/or the parties are likely to have different ethical approaches to this issue;<sup>7</sup> and
- specify that the non-calling of witnesses by a party does not mean that it has waived its right to dispute their evidence.

*Experts:* consider whether at this stage it would be appropriate to make provision for any of the devices identified in Chapter 6 of this compendium dealing with the narrowing of issues between party-appointed experts. Alternatively these points may be left to the case review conference suggested at Chapter 3.

*Guidelines for document production:*

- The PO1 should indicate whether there will be a document production procedure or not and what standards will apply. As there can be different cultural expectations on this issue, tribunals may wish to invite a discussion between the parties to establish

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6 For a recent review of the case law in this area see 'Raising the Curtain on English Arbitration', Partasides QC and Maynard, in *Arbitration International*, 2017, 33, 197–202.

7 See different options for dealing with each eventuality at 10.4 and 10.5 of draft PO1 in *The ICCA Reports No 2: ICCA Drafting Sourcebook for Logistical Matters in Procedural Orders*. Also see Guidelines 18–25 of the IBA *Guidelines on Party Representation in International Arbitration* which may be adopted as a common standard for handling of expert and fact witnesses.

whether there is a common understanding about what document production involves;<sup>8</sup>

- it is often helpful to set out the standards which will apply to the document production phase and in particular set out strict guidelines in the PO1 as to how parties should, in any document requests, identify documents and discuss their relevance to the case so as to avoid overburdening the parties; and
- consider imposing a cut-off date for the submission of documents upon which a party intends to rely prior to the final hearing, save for exceptional circumstances. This helps to prevent a last-minute ambush.

*Costs:* some practitioners include provisions in the PO1 which obligate the parties to conduct themselves in a cost-effective manner and that any unreasonable behaviour shall be taken into account by the tribunal when exercising its direction to allocate costs. The PO1 may cite examples of unreasonable behaviour such as excessive document requests, cross-examination or legal argument, failure to meet deadlines and comply with procedural orders. Including such provisions upfront is crucial because it sets the expectation of the tribunal early in the proceedings and warns them of the potential cost consequences of their actions.

## 2.4 Reference materials

- The ICCA Reports No 2: ICCA Drafting Sourcebook for Logistical Matters in Procedural Orders<sup>9</sup>
- CI Arb Documents-Only Arbitrations Procedures<sup>10</sup>
- IBA Guidelines on Party Representation in International Arbitration (2013)<sup>11</sup>

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8 See Guidelines 12–17 of the IBA Guidelines on Party Representation in International Arbitration, which may be adopted as a common standard for handling of document production.

9 [www.arbitration-icca.org/publications/ICCA\\_Sourcebook.html](http://www.arbitration-icca.org/publications/ICCA_Sourcebook.html)

10 [www.ciarb.org/guidelines-and-ethics/guidelines/arbitration-guidelines](http://www.ciarb.org/guidelines-and-ethics/guidelines/arbitration-guidelines)

11 [www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx)

## Chapter 3: Case review conference

### 3.1 Introduction

At the outset of an arbitration, it is often difficult to assess the full extent of the issues involved and the scope of the required evidence and documentation. Frequently, the full extent of the parties' case only becomes clearer after the first round of substantive submissions. Consequently, the procedural timetable imposed by the tribunal at the beginning of an arbitration may not be as specifically tailored to the dispute to the extent required to impose time and cost-efficiency savings. With this in mind, it is perhaps not surprising that in recent years there have been a number of suggestions aimed at increasing tribunal engagement at a later stage in the arbitration.

Neil Kaplan has suggested that the parties open their case before the tribunal mid-way through the process – at a convenient point in the proceedings, normally after the first round of submissions but well before the main hearing.<sup>12</sup> Opening of the case would involve each side's counsel and experts outlining each side's case. The primary advantage is that the tribunal will have a better understanding of the case so that it can take better informed case management decisions (for example, identifying where evidence may be unnecessary and where legal issues require a specific response).

Constantine Partasides QC and Scott Vesel built upon this suggestion, arguing for an arbitration of two halves separated by a 'case review conference'. At the beginning of the arbitration, the procedural steps are fixed up to the case review conference. In this first half there would be meaningful engagement on the merits of the case. At the case review conference, the tribunal would issue procedural directions addressing matters such as document production, further written submissions and any discrete points suitable for accelerated determination – steps focused by a tribunal-led discussion on the issues and evidence necessary to determine the parties' requests for relief.<sup>13</sup>

Our research also revealed that a number of practitioners sitting as arbitrators typically schedule a case management conference mid-way through the arbitration for the purposes of tailoring the remaining procedural steps in a more focused way.

In contrast, some of the practitioners interviewed believed that tribunals should take a more limited approach to case management. This stemmed from a belief that the arbitration process should be guided by party autonomy; in other words, that it is for the parties to set the tone for the proceedings. Therefore, while these practitioners did not oppose a case review conference, they were reluctant for the tribunal to engage in proactive issue identification, or at least cautioned against doing so without having secured the prior consent from the parties.

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12 'If It Ain't Broke, Don't Change It', N Kaplan, (2014) 80 Arbitration, Issue 2.

13 'A Case Review Conference, or Arbitration in Two Acts', Constantine Partasides QC and Scott Vesel, (2015) 81 Arbitration, Issue 2.

Bearing in mind this range of views, we have set out below more detailed suggestions relating to scheduling a case review conference. While the case review conference may not be appropriate in every arbitration, it could be useful in a range of contexts, whether that be as part of a proactive approach of issue and evidence identification, or to deal with procedural disputes to be resolved.

## 3.2 Case review conference

*Timing:* practitioners agreed that a case review conference is likely to be most useful after the first round of substantive submissions such as the statement of case/memorial and statement of defence/counter-memorial, especially where the parties have filed their factual and expert evidence together with their substantive submissions. By this point, the tribunal should have a fuller understanding of the parties' respective cases so as to enable it to take consequential decisions if it chooses to do so (suggestions for which are set out below). In the event that the arbitration is expected to result in significant document requests, it may also be prudent to schedule the case review conference after the initial exchange of document requests and answers for the reasons set out in Chapter 4 of this compendium.

Cognisant of the fact that it can be difficult to set aside time for hearings involving busy tribunal members and counsel, it is likely to be prudent to fix a procedural timetable for the arbitration at the outset, including the provision for a main hearing. If, by the time the case review conference is held, it is clear that less time is required for a hearing, either the hearing time can be reduced or new dates set. The advantage of this proposal is to ensure that what is intended to be a procedure to speed matters up, does not slow matters down due to difficulties in finding hearing dates for a substantive hearing.

*Submissions:* at the case review conference the parties may be asked to briefly make opening submissions in relation to their case or have their experts attend in order to explain the basis of their evidence.

*Determinations which may be made:* depending on how proactive a tribunal and/or parties consider appropriate, the following issues may be dealt with at a case review conference:

- the tribunal may use the case review conference to identify the key issues in a case and those upon which it requires further submissions. The tribunal may do this either by asking the parties to identify the key issues prior to the case review conference and/or by themselves identifying the key issues. Thereafter, the tribunal may identify those issues it would like the parties to address in their second round of written submissions and evidence;
- the tribunal may be more confident about setting page limits for reply written submissions;
- the tribunal and/or the parties may identify some issues as being suitable for accelerated determination;

- the tribunal may resolve any issues relating to disclosure requests. This may include directing the parties to meet to narrow the issues by agreement prior to the case review conference; or directing that the parties make brief submissions to the tribunal as to the relevance of their document requests to the issues in disputes and/or answer the tribunal's questions on their document requests (see Chapter 4 for further discussion of the issues which arise in relation to the document production phase);
- the tribunal and/or the parties may consider whether any of the techniques identified in Chapter 6 for narrowing the issues in dispute between the experts are suitable; and
- the tribunal may give more specific directions for the organisation of documents for the main hearing (see Chapter 4).

### **3.3 Reference materials**

- A pro forma section of a draft procedural order, which may be included in the PO1 for arbitrations using a case review conference or operate as a checklist for issues for consideration at a case review conference, appears in Appendix B to this compendium.

## Chapter 4: Document management

### 4.1 Introduction

Practitioners felt there was particular room for improvement in organising and determining document requests as described below. However, it is worth noting that technology is likely to continue to have a significant impact on the arbitration process, not only in terms of the volume and types of relevant communications, but also the way in which documents are managed and shared throughout the arbitration and specifically for substantive hearings. One topic which is beginning to gather momentum is cybersecurity and how the tribunal can best establish protocols which deal with threats to the process which might arise.<sup>14</sup>

In terms of the issues identified in the organising and determination of document requests, first many practitioners felt that it is helpful to establish standards applicable to document disclosure at the outset of the arbitration. It is common for the PO1 to specify that document production will be conducted in accordance with the 'IBA Rules on the Taking of Evidence in International Arbitration', although other practitioners use other rules such as the International Centre for Dispute Resolution (ICDR). It is important that a clear hierarchy in case of conflict be agreed where more than one standard is specified. It is also common for the PO1 to specify that the parties produce, with their submissions, all documents that they intend to rely on. Some practitioners remind parties early on that discovery/disclosure should be commensurate to the amount in dispute. Others remind the parties that document disclosure will not be granted for matters where the burden of proof is on the other party and state that there should be no fishing expeditions.

Second, it may be appropriate not to have any specific procedure for determining document requests if the dispute is small or not expected to be document heavy. As an alternative, in appropriate cases, parties may be directed to submit all the documents they wish to rely on with their substantive pleadings and give leave to the parties to apply to make document requests prior to a certain point in proceedings. One advantage of proceeding in this way is that it encourages parties to the default position that there will be no document requests unless it is deemed to be sufficiently important. The alternative, of including a standing document request process, can have the effect of encouraging parties to make document requests for the sake of it.

Third, a number of practitioners observed that the Redfern Schedule,<sup>15</sup> which is frequently used as the means for organising document requests, has become cumbersome. Practitioners noted that while it has been good as a way of isolating questions for the tribunal to determine, it is not always useful for relating those questions to the wider issues in the case so the tribunal has a real sense of the importance of each request and how they relate to each other.

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<sup>14</sup> Debevoise & Plimpton, Protocol to Promote Cybersecurity in International Arbitration (2017).

<sup>15</sup> The purpose of this schedule is to keep a record, in separate columns, of a party's request for documents, its reasons for that request, the response of the opposing party to that request and, where necessary, the determination of the tribunal.

The principal difficulties identified include: (a) document requests are overly broad and repetitive; (b) repetitive 'standard' objections; and (c) due to the repetitive nature of requests, it is sometimes difficult to identify how the requests interplay with each other as well as a party's case and which categories of documents are the most important – for example, it may be that the tribunal's view of one issue in a case has a knock-on impact on several issues.<sup>16</sup>

## 4.2 Suggestions for improving the document request process

Practitioners did not suggest that document requests could be organised in a better schedule or other means, but certain practices were identified which would overcome some of the issues identified. Those suggestions included:

- presenting the Redfern Schedule using horizontal cells not vertical columns. Although this is a simple change, it can make it much easier to review;
- organising document requests by issue and cross-referencing to the submission documents;
- including a short overview written submission with the Redfern Schedule to explain the relevance and materiality of the document requests to a party's case;
- directing that document production requests are made in the briefs, preferably within the factual narrative, so that the tribunal can review and assess these in context and in a separate document at the end of the brief, list the documents requested and cross-refer back to where in the brief a request is discussed. By tying the document requests to the submissions, it means that parties focus on what they actually need, and so has the result of reducing document production requests;
- a tribunal may determine the requests on the basis of guiding principles if it is unsure about the basis and interplay of each individual request, but give leave to the parties to apply for documents after the final round of submissions before the main hearing;
- some arbitrators indicated that they imposed meet and confer obligations on the discovery/disclosure disputes before the issue is raised with the tribunal; and
- if necessary, holding a hearing to allow the tribunal to ask questions on the document requests. In Chapter 3, we discuss the suggestion of a case review conference. To the extent that tribunals would benefit from more interaction with the parties in relation to the document requests, then a case review conference would be the opportune moment to do this.

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<sup>16</sup> See also Sam Luttrell and Peter Harris, 'Reinventing the Redfern', *Journal of International Arbitration*, Kluwer Law International; Vol 3, Issue 4, 2016, pp353-364.



### **4.3 Reference materials**

- International Chamber of Commerce, ICC Commission Report Information Technology in International Arbitration (2017)
- Debevoise & Plimpton, Protocol to Promote Cybersecurity in International Arbitration (2017)

## Chapter 5: Written submissions

### 5.1 Introduction

Lengthy and unfocused written submissions have attracted criticism as being a significant driver in decreasing efficiency and pushing up costs. Rather than present a concise and focused legal case, the approach of some parties has been described as ‘put everything in now and select later’.<sup>17</sup> This can have the following impact(s):

- increasing the parties’ costs of producing the submissions and responding to them;
- knock-on impact on other stages of the arbitration proceedings, such as increasing the number of documents relevant to the issues and the need for witnesses and expert evidence;
- the submissions of the parties may not be focused in addressing the other party’s case, with the result that they become like ‘ships passing in the night’ making it harder for the tribunal to discern the parties’ case;
- increasing the likelihood that the tribunal will decide the issues in the case by reference to preconceptions and biases because they are unable to process all the information presented to them;<sup>18</sup> and
- increasing the length of time it takes to draft an award to dispose of all the issues raised by the parties.

While many of these problems may be easy to spot, it is harder to identify practical ways to address them.

### 5.2 Suggested practices

First, counsel can adapt their style in order to produce shorter and more concise submissions, and it has been suggested that this will be more persuasive for arbitrators.<sup>19</sup>

Second, there is scope for tribunals to be more active in issue identification and directing the course of the proceedings, which could have the impact of narrowing the number of issues on which submissions are required. In Chapter 3, the suggestion of the case review conference is discussed, and specifically the way this can be used to narrow the second round of written submissions. The tribunal can use such a hearing to invite the parties to make suggestions for the tailoring of submissions to their case.

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<sup>17</sup> [www.enyolaw.com/blog/breakfast-event-summary-effective-written-advocacy-in-international-arbitration](http://www.enyolaw.com/blog/breakfast-event-summary-effective-written-advocacy-in-international-arbitration)

<sup>18</sup> Lucy Reed, ‘Arbitral Decision-making: Art, Science or Sport?’, The Kaplan Lecture 2012, [www.arbitration-icca.org/media/4/42869508553463/media113581569903770reed\\_tribunal\\_decision-making.pdf](http://www.arbitration-icca.org/media/4/42869508553463/media113581569903770reed_tribunal_decision-making.pdf).

<sup>19</sup> *Ibid*

As an alternative, some practitioners have devised a less formal way of issue identification; for example, by producing apparent lists of uncontested facts and issues for determination for party comment. Tribunals may invite the parties to focus their submissions on those issues and undisputed facts need not be addressed.

Third, there are practical ways in which a tribunal and/or the parties can agree on a more focused approach for written submissions. These include:

- *Specifying page limits on the submissions*: this may not always be appropriate for at least the initial round of submissions where the parties are defining their case, but once the parties have had the opportunity to state their case, it may be appropriate to limit the number of pages the parties have to state their case. Some arbitrators believe that page limits should be imposed from the outset, albeit erring on the side of caution.
- *Setting expectations as to what should be addressed*: some arbitrators seek to set expectations as to the content of written submissions in the PO1. For example:
  - it might be useful to state that the first submission from each party should present all relevant circumstances of the case and subsequent submissions should only be responsive;
  - direct the parties to specify in their submissions which exhibits and paragraphs of the witness statements and expert reports are relied on; and
  - ask the parties to align their submissions with the prayers for relief.
- *Rounds of submissions*: consider whether more than one round of submissions is required, or whether the request for notice of arbitration/answer or response can stand as the first round of submissions.
- *Identifying common issues*: a number of interesting ways of identifying the issues between the parties were suggested:
  - parties may exchange bullet points of issues to be addressed in their written submissions;
  - for complex arbitrations, it may be helpful to track the parties' pleadings through a master chart recording the relevant parts of the parties' pleadings which address the specific issues; and
  - for smaller disputes, one practitioner asks parties to continuously submit marked-up versions of a party's earlier submission so as to eliminate repetition, as well as making it easier for the tribunal to identify any 'shifting' argumentation.
- *Oral closing submissions versus post-hearing briefs*: serious consideration may be given as to whether post-hearing briefs are required at all. While there is no

doubt they can be helpful documents, particularly for complex arbitrations where there is significant value in organising the evidence of a lengthy oral hearing by reference to the parties' cases, they can also have the effect of adding significantly to the cost and time of an arbitration. For short hearings, oral closings may be a more efficient use of time. At the minimum, the tribunal and parties may wish to keep this as an open issue when the timetable is set down at the outset of the arbitration, with the option to review and come to a final decision during the course of the main hearing. By that stage, the parties and the tribunal are likely to have a better sense of what will be required. A closing 'colloquy' among counsel and arbitrators, where specific questions can be addressed by counsel, may work better than closing arguments.

- *Post-hearing briefs*: by the end of the proceedings, it may be possible to focus the content of the post-hearing briefs if they are required. Suggestions made for focusing oral closings and/or post-hearing briefs are as follows:
  - parties be directed to make their post-hearing submissions by taking the opening PowerPoint and supplementing it with hearing information, which has the effect of forcing parties to limit their presentations;
  - parties be directed to exchange bullet points of what they will cover in their post-hearing briefs (only to be shared with each other and not the arbitrator), which has the effect of ensuring that the parties are not like 'ships passing in the night';
  - parties be encouraged to cross-refer to prior submissions to limit repetitions (hyperlinks to previous submissions can be helpful);
  - the tribunal may direct the parties to address a list of specific issues. Alternatively, they may take a softer course of indicating they require assistance on particular issues, giving the parties greater freedom as to the content of their post-hearing briefs; and
  - consider a relatively short period of time after the hearing for the filing of the post-hearing briefs on the basis that the shorter the period of time that the parties have to work on the post-hearing submissions, the more focused they will be and less likely to repeat their earlier written submissions.

## Chapter 6: Expert handling

### 6.1 Introduction

For complex arbitrations, it is frequently the case that quantum is the most important part of the case. However, this is often the area where arbitrators are heavily reliant on expert evidence. More often than not, lawyers are appointed as arbitrators. While eminently qualified to decide the complex legal issues that may arise, they are not quantum experts and may lack the necessary computational and quantum expertise. The challenge for the tribunal is how it should best come to grips with the expert evidence.

The focus of the suggestions from practitioners was on how best for tribunals to: (a) seek consensus between the experts and narrow the issues in dispute; and (b) understand the expert evidence and have their own assessments verified. Generally speaking, there was no significant appetite for tribunal-appointed experts as a means of narrowing the issues. The suggestions below therefore focus on party-appointed experts.

### 6.2 Devices to seek consensus/narrow the issues

A number of ways of achieving this were identified. A tribunal may:

- *establish a separate protocol for experts*: make a direction in the PO1 that the parties identify who will act as their expert and on what matters by a particular date. Direct experts to meet prior to finalising any reports on a without prejudice basis. The tribunal may wish to monitor the progress of the experts with regular conference calls;
- ask the parties to agree or submit the factual assumptions for damages in advance so that the differences can be identified, and once the tribunal has made a determination, ask the experts to calculate the difference;
- schedule a 'meet and greet' between experts after the initial round of expert reports for the purposes of narrowing issues in dispute. It should be made clear that they can speak on an open or without prejudice basis, following which the party-appointed experts could submit supplemental reports only on those issues where there is disagreement;
- direct that the parties agree on a common document set for the experts before the final expert reports are produced. If the experts are working from the same document set, it means they have to take the same evidence into account and lessens the risk that reports are produced which do not 'meet' on the evidential issues;
- suggest a list of issues to be submitted by the parties on which the expert(s) is/are being briefed, especially in technical cases where different experts may be dealing with different points;

- ask the party-appointed experts to produce a joint report setting out their areas of agreements and disagreement with reasons for the disagreements. The pro forma section of a draft procedural order for arbitrations using a case review conference includes some suggestions for orders in this regard;
- witness conferencing/hot-tubbing at the hearing. Some practitioners thought it was more helpful to have the experts meet and seek to narrow issues than attempt to do this through witness conferencing/hot-tubbing. This is because where there is witness conferencing/hot-tubbing, experts will commit to a view in evidence from which it can be harder to retreat. Sometimes, discussions can be a better way of exploring common areas of agreement or compromise; and
- rather than following the usual approach of structuring a hearing on the basis of hearing one parties' experts and then another, in certain cases it might be helpful to hear testimony by reference to issues. This could reflect a logic tree which records the respective experts' answers to the different questions – for example, using a table such as the one below:

Issue	Expert A opinion	Expert B opinion
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This analysis could then be used to produce a mathematical model applying different quantum outcomes depending on the tribunal's determination on the key questions.

### 6.3 Suggested practices for engaging with experts

*Presentation of expert evidence:* it is not unusual for experts to give a short presentation of their evidence prior to being cross-examined. This presentation gives the expert an opportunity to explain in their own words their methodology, assumptions and conclusions. This can be helpful to bring to life expert reports already submitted and frame technical evidence that may be harder to follow through cross-examination.

*Legal experts:* where issues of law are disputed, discuss with parties at the beginning of the proceedings whether these issues will be pleaded or addressed through legal experts.

*Verifying the tribunal's quantum analysis:* it may be possible for the tribunal to issue its determination on issues of principle that will have an impact on the way in which quantum is calculated (either issues of liability or assumptions which ground the analysis of the experts). This determination could be made by way of a partial award on liability (if appropriate) or in the form of a draft award. It would then be for the parties' experts to produce valuations of the quantum. This may be done for the first time or by way of updating existing reports. At this stage, it may also be possible for the parties' experts to agree on the quantum of certain claims based on the tribunal's determination and identify any outstanding points of quantum that require determination. A variation on this is where, once the hearing and submissions have closed, the party-appointed experts become tribunal-appointed experts. Once the tribunal has made its determination on

the assumptions affecting the quantum analysis, the experts work together and with the tribunal to value the quantum.

Tribunals have been known to issue their core valuation in draft form for the review of each parties' experts on the condition that the parties agree to limit their comments to the accuracy of the tribunal's calculations and not seek to re-litigate any points of substance determined by the tribunal.

#### **6.4 Reference materials**

- CI Arb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration<sup>20</sup>
- Sachs Protocol on Expert Teaming<sup>21</sup>

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20 [www.ciarb.org/docs/default-source/ciarbdocuments/international-arbitration-protocols/partyappointedexpertsinternationalarbitration.pdf?sfvrsn=8](http://www.ciarb.org/docs/default-source/ciarbdocuments/international-arbitration-protocols/partyappointedexpertsinternationalarbitration.pdf?sfvrsn=8).

21 [www.lawlibrary.ie/rss/CPDArbitration09072011/15SachsProtocolOnExperts.pdf](http://www.lawlibrary.ie/rss/CPDArbitration09072011/15SachsProtocolOnExperts.pdf).

# Chapter 7: Hearing

## 7.1 Introduction

The focus of suggestions from practitioners related to two areas principally: (a) time management for hearings; and (b) giving advance guidance as to how witness evidence would be handled. The latter issue is perhaps a reflection of the emphasis at the substantive hearing on witness evidence rather than legal submissions.

## 7.2 Time management for hearings

*Pre-hearing procedural call:* many practitioners use this as an opportunity to agree the timetable for the hearing, using some of the time apportionment techniques described below. Generally, time is allocated for opening submissions, cross-examination of witnesses, any closing submissions, administration and tribunal's questions. However, there are other logistical issues that this call is useful to clarify, such as interpreters and stenographers. Parties might be invited to complete a spreadsheet prior to this call, setting out their own proposals for time allocation.

*Apportionment of time:* some practitioners apply a formula to the allocation of time between the parties that gives the parties the discretion to use an equal allocation of time as they see fit. For example, an eight-hour day multiplied by the number of days gives the total amount of hours available. From that overall amount, time is deducted for procedural discussions and questions from the tribunal; the remaining time is split between the parties for use at their own discretion.

*Chess clock:* practitioners were split on this issue. Some will not use it on the basis that the proper test is whether or not a party has had a reasonable opportunity to present their case. According to those practitioners, it is more important to consider how significant witnesses are to a case and allocate time accordingly.

*Running record of hearing time:* tribunals might ask the tribunal secretary or the parties to keep a running record of time taken during the course of the day and review allocation at the end of the day.

*Reasonable opportunity to present case:* a number of practitioners ask parties before the end of the hearing whether or not they have had a reasonable opportunity to present their case. In the event the parties answer in the affirmative, this confirmation is recorded in the award and may be relied on by an enforcing party in the event that due process concerns are raised. A negative answer would clearly allow the tribunal to address any issues of concern.



### 7.3 Witness handling

In appropriate cases, arbitrators may give instructions to counsel as to the procedure for testing witness evidence in advance of the hearing, especially where there are relevant cultural differences between counsel,<sup>22</sup> which might include that:

- parties work with the witness before the hearing on the proper role of cross-examination – not to repeat a parties' case but to answer questions;
- a witness should be cross-examined on all relevant documents pertaining to an issue, not just outliers or singled-out documents; and
- a redirect (counsel asking questions of his own witness following cross-examination) is not an opportunity to obtain evidence which should have been included in that witnesses' written statements or direct evidence given prior to cross-examination.

Consideration might be given to the way in which witness evidence is organised, for example, grouping witnesses by topic and not only by claimant/respondent, separating fact witnesses from experts, etc.

### 7.4 Reference materials

- The ICCA Reports No 2: ICCA Drafting Sourcebook for Logistical Matters in Procedural Orders<sup>23</sup>
- Albert Jan van den Berg, Note on Time and Costs: Issues and Initiatives from an Arbitrator's Perspective, *ICSID Review*, Vol 28, No 1 2013, pp 218-222.
- Practical Law Pre-hearing Checklist, Aníbal Sabater, Chaffetz Lindsey LLP<sup>24</sup>
- LexisNexis PSL Arbitration Checklist<sup>25</sup>

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22 See Guidelines 18–25 of the IBA Guidelines on Party Representation in International Arbitration which may be adopted as a common standard for handling of expert and fact witnesses.

23 [www.arbitration-icca.org/publications/ICCA\\_Sourcebook.html](http://www.arbitration-icca.org/publications/ICCA_Sourcebook.html)

24 [https://uk.practicallaw.thomsonreuters.com/w-000-5334?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/w-000-5334?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1)

25 [http://blogs.lexisnexis.co.uk/dr/wp-content/uploads/sites/2/2015/06/arbitrationprehearingchecklist\\_june2015.pdf](http://blogs.lexisnexis.co.uk/dr/wp-content/uploads/sites/2/2015/06/arbitrationprehearingchecklist_june2015.pdf)

## Chapter 8: Costs/interest

### 8.1 Introduction

Interest and costs have two things in common. First, they can add significantly to the amount that a party is directed to pay. Second, they are often issues that are considered at the end of the arbitration proceedings and receive comparatively little attention.

Unsurprisingly, suggestions for dealing with these topics frequently involved the tribunal giving greater guidance as to what was expected in respect of the information to be provided by the parties on these issues from an earlier stage in the proceedings.

### 8.2 Interest

This is often a neglected area. Tribunals may want to direct parties to make submissions on basis, rate and period of calculation if they have not done so in their second round of submissions. The issue of governing law may also be relevant to address.

If the calculation is likely to be complex, the tribunal may direct the parties to submit an agreed excel sheet to enable the tribunal to calculate the interest depending on the parameters it considers applicable. A party may independently take the initiative and do this.

### 8.3 Costs

*Costs shifting:* it is not unusual for parties to be warned in the Terms of Reference or the PO1 that behaviour will be taken into account when allocating costs (see Chapter 2 of this compendium). It is important to do this at the outset of the proceedings to ensure that the parties understand the potential consequences of their actions. However, most practitioners are reluctant to direct that a party be penalised on costs without egregious behaviour.

*Interim cost orders/partial awards:* some practitioners consider it sensible practice to make cost decisions as and when the need arises in the form of procedural orders, rather than deferring all costs decisions to the award stage. For example, where a party has lost an interim application it may be appropriate to direct that it pay the costs of that application, particularly if it was unmeritorious. Where issues have been determined on a bifurcated basis, costs of that phase of the proceedings may be dealt with in the partial award. However, it is still uncommon to find that parties are sanctioned for their conduct during the proceedings by way of an interim costs order.

*Cost submissions:* generally, arbitrators do not require detailed submissions and evidence from the parties in respect of the costs claimed. Some arbitrators give detailed guidance on what they expect by way of cost submissions because the approach of parties and counsel tends to vary dramatically. This guidance may be given in the PO1 or at the end of the substantive hearing. Approaches vary but typically include presentation of the following:

- *Factual evidence of costs claimed*: some practitioners request a short summary of the costs claimed in submissions. Some require this in the form of a witness statement/affidavit given by counsel. Most do not require the backup of invoices. In terms of details to be provided of the amounts, some practitioners require a breakdown of hearing cost, experts, attorney time, etc. Attorney time sheets are not required but expenses need to be broken down; and
- short submissions as to the legal basis on which a party claims its costs.

Detailed cost assessments are not usually appropriate for arbitration proceedings. However, there could be cases where the legal costs claimed are so significant that the tribunal and/or the parties consider it would be appropriate for a more detailed review as to whether such sums are reasonable. In that case, the tribunal and/or the parties could consider appointing an expert to assess the reasonableness of the costs claimed and support for those amounts to make recommendations to the tribunal, although caution would be required when setting out what standard should be applied to that determination.

#### **8.4 Reference materials**

- CI Arb Guidance on Drafting Arbitral Awards Part II – Interests
- CI Arb Guidance on Drafting Arbitral Awards Part III – Costs

## Chapter 9: Default hearings

### 9.1 Introduction

Default proceedings, where the respondent does not participate in the arbitration, are not uncommon. Issues arise as to how a tribunal should handle default proceedings to ensure a speedy and efficient resolution and at the same time balance due process considerations.

This area may be of particular relevance for younger practitioners starting out as arbitrators, given the predominance of low value arbitrations where there is a non-participating party.

### 9.2 Suggested practices

First, ensuring that the respondent has received proper notice of the arbitration proceedings is critical. Regard should be had to any relevant: (a) contractual notice provisions; (b) institutional rules; (c) applicable national laws; and (d) what would constitute effective notice in the circumstances of the case. It may be better to err on the side of caution and direct that written communications and documents are served on the respondent(s) at more than one address.

Second, while it is for the respondent to ensure that it participates in the arbitration, and it takes the risk of not doing so, the tribunal may also have regard to its duty to render an enforceable award. Therefore, it may wish to test the claimant(s) case rather than accept it at face value. This may include:

- ascertaining, in so far as it is possible through correspondence or otherwise, the position of the respondent(s) and putting any relevant points to the claimant(s) to address; identifying any obvious gaps or issues with the evidence or legal submissions as presented. This may be done through correspondence or at a hearing, provided that the claimant(s) has sufficient notice; and
- the tribunal may also consider defining issues before the hearing and circulate to all, even non-participants, so that the party showing up cannot unfairly drive the process.

Third, the tribunal will need to consider whether a hearing is necessary, particularly for low-value cases, and to what extent it would be permissible under the procedural law, the law of the seat or any likely enforcement jurisdiction to issue an award without holding an oral hearing. For example, some institutional rules expressly permit a documents-only arbitration where the respondent has failed to participate in the arbitration proceedings.<sup>26</sup>

### 9.3 Reference materials

- CIArb Guidelines on Non-Party Participation

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<sup>26</sup> For example Article 15.8 of the LCIA Arbitration Rules.

# Chapter 10: Internal tribunal management

## 10.1 Introduction

Good management of the arbitration proceedings extends to good internal tribunal management. Unsurprisingly, therefore, this was a topic that garnered significant attention among those interviewed and who regularly sit as arbitrator.

It is also a topic that has been the subject of high-profile suggestions in recent years. In the 2012 Kaplan Lecture, Lucy Reed proposed the 'Reed Retreat'; namely, that in complex disputes, time be scheduled in the procedural timetable for the tribunal to meet in person to study the file, with the goal of arriving together at targeted directions to the parties for the hearing.<sup>27</sup> The idea was simple but important: the tribunal also needs to schedule time to prepare for hearings to allow it to be more proactive.

## 10.2 Suggested practices

Other suggested practices include:

- regular status conference calls: many practitioners have a regular practice to schedule time for the tribunal to speak before and after any procedural call and on dates when a specific filing is due. Some expressed concern about a tribunal regularly conferring on the merits early in the proceedings as it risks pre-judging the merits;
- ask tribunal members to keep a running list of questions to the parties to be addressed in any post-hearing brief submissions;
- some of those sitting as arbitrators prepare for the hearing by producing decision trees or issue charts (such as the one set out below). This can be updated as the hearing progresses to make notes. Decision trees can also be useful;

Legal claim	Elements	Claimant position	Respondent position	Evidence	Comments
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- it will often be prudent to schedule time immediately after the hearing to deliberate the issues and agree on a tentative outline for the award, or refine any decision trees or the issues for determination pending any post-hearing briefs; and
- where there is a three-person tribunal, while the presiding arbitrator will have default responsibility for drafting the award, in certain circumstances, where they

<sup>27</sup> Lucy Reed, "Arbitral Decision-making: Art, Science or Sport?", The Kaplan Lecture 2012, [www.arbitration-icca.org/media/4/42869508553463/media113581569903770reed\\_tribunal\\_decision-making.pdf](http://www.arbitration-icca.org/media/4/42869508553463/media113581569903770reed_tribunal_decision-making.pdf).

have particular expertise for example, it will be appropriate to ask co-arbitrators to draft certain sections of an award. Consideration should be given to the practicalities for sharing the draft award regardless of drafting arrangements. Sometimes it may assist for the presiding arbitrator to provide a draft outline, which could include an agreed and completed decision tree, before drafting begins in earnest. Sufficient time needs to be factored into the drafting process in order to take into account the comments of co-arbitrators and ensure that any differences in drafting style are harmonised.

### 10.3 Reference materials

- IBA Arb40 Toolkit on Award Writing
- ICC Award Checklist
- ICC Note to the Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration
- The ICCA Reports No 2: ICCA Drafting Sourcebook for Logistical Matters in Procedural Orders<sup>28</sup>
- CIArb Guidance on Drafting Arbitral Awards Part I – General
- CIArb Guidance on Drafting Arbitral Awards Part II – Interests
- CIArb Guidance on Drafting Arbitral Awards Part III – Costs

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<sup>28</sup> [www.arbitration-icca.org/publications/ICCA\\_Sourcebook.html](http://www.arbitration-icca.org/publications/ICCA_Sourcebook.html).

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## Appendix B: The case review conference

This appendix contains suggested text for inclusion in the PO1 in order to make provisions for a case review conference. Alternatively, it may form a checklist for those matters to be addressed at a case review conference. For a precedent for the PO1 itself, please refer to International Council for Commercial Arbitration (ICCA) Reports No 2: ICCA Drafting Sourcebook for Logistical Matters in Procedural Orders.<sup>1</sup>

### Case review conference

A case review conference shall take place on [date/time]<sup>2</sup> at [venue]/by way of [video/telephone conference].<sup>3</sup>

### Preparation for the case review conference

The members of the arbitral tribunal shall agree to meet in person or speak by teleconference in advance of the case review conference in order to examine the case file. Following this pre-hearing meeting, the arbitral tribunal shall notify the parties of those issues that it would like the parties to address at the hearing.

The arbitral tribunal may order the parties to meet to discuss the issues in advance of the hearing, in order to identify points of agreement and narrow the dispute.

The arbitral tribunal may order the party-appointed experts to meet to discuss issues in advance of the hearing, in order to identify points of agreement and narrow the dispute.

The parties shall simultaneously exchange skeleton arguments by [time] on [date].<sup>4</sup>

### Issues to be addressed at the case review conference

The parties shall make opening statements. Such opening statements shall address any

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1 [http://www.arbitration-icca.org/publications/ICCA\\_Sourcebook.html](http://www.arbitration-icca.org/publications/ICCA_Sourcebook.html)

2 Commonly, the PO1 will include a procedural timetable for the arbitration. If so, it is likely to make more sense for the date of the case review conference to be provided for in the overall procedural timetable, and this provision will not be needed. It is suggested that a date be scheduled: (i) following the submission of the statement of defence by the respondent but prior to work being seriously commenced on the statement of reply; and (ii) following completion of exchange of document requests in the form of a Redfern Schedule or otherwise, if applicable. It is also assumed that the timetable will provide for a statement of reply and statement of rejoinder to be submitted subsequent to the scheduled case review comment, and that the parties are directed to file any further witness or expert evidence on which they rely together with those documents.

3 The case review conference may be scheduled to take place in person, or alternatively by telephone or video conference. For a complex document-intensive case, it is likely that a hearing person is to be preferred.

4 If a skeleton argument is used for the case review conference, when it comes to the final hearing the tribunal may direct that the same skeleton is updated. There should not in any event be the need for lengthy opening submissions at the final hearing (if any) if this procedure is adopted.

issues identified by the arbitral tribunal prior to the case review conference and, where applicable, identify any points of agreement.

The arbitral tribunal may order the party-appointed experts to present their expert evidence and, where applicable, identify any points of agreement.

The arbitral tribunal may order that the parties make submissions in relation to their document requests.

## **Time allocation**

Prior to the case review conference, the parties must attempt to agree a schedule for the hearing. In the absence of parties' agreement by [date], the arbitral tribunal will decide on the schedule.

The parties may agree, or the arbitral tribunal may direct, in advance of the case review conference the maximum time to be allocated for the opening statements, presentation of the expert evidence and/or submissions in respect of the document requests.

## **Directions**

At or following the case review conference, the arbitral tribunal shall be competent to make such further orders, directions or take such further steps it considers appropriate, including in relation to any one of the following matters:

### *Issue identification*

- that certain identified issues should be addressed in the statement of reply or the statement of rejoinder, further witness or expert evidence;
- that the parties are not required to submit further written statements, witness or expert evidence in relation certain identified issues; and
- identify any issues which may be appropriate for expedited determination and determine, in consultation with the parties, the procedural timetable for their determination.

### *Length and format of documentation*

- the length and format of any of the remaining documents to be submitted in the arbitration

### *Expert reports*

- appoint one or several experts, in consultation with the parties, should it consider that it would be assisted by the opinion of such experts in assessing questions of fact [or law];

- order a further meeting of the party-appointed experts to meet to discuss issues in advance of the hearing, in order to identify points of agreement and narrow the dispute; and
- order the parties to proceed, through expeditious cooperation, to agree a structure identifying points of agreement and disagreement for use in the parties' subsequent expert reports, to be submitted with the statement of reply and statement of rejoinder. Such expert reports shall accurately set out the respective positions of the parties at the time of submission.<sup>5</sup>

### *Documentary evidence*

- document requests made by any party, and any consequential issues relation to the documents such as the manner in which the documents shall be provided.

### *Procedural timetable*

- after having consulted the parties, confirm or vary the date and/or duration of the hearing,<sup>6</sup> schedule any other hearing dates or make any other adjustments to the procedural timetable which the arbitral tribunal considers to be appropriate.

### *Costs*

- order the payment of costs with respect to any of the matters considered at the case review conference.

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5 This is one process that may be adopted in order to seek to narrow the areas of dispute between experts and identify points of difference. If it is adopted, sufficient time should be built into the timetable to ensure the parties' experts have the time to meet and agree the structure without compromising the time available to the claimant for the preparation of its expert's report. There are other ways of facilitating greater interaction between experts. Another variation is to direct the following steps: (i) the parties agree on a structure of issues; (ii) the parties prepare expert reports following that structure; (iii) the parties exchange those reports (without copying the tribunal) to identify points of agreement and disagreement with their experts; and (iv) the parties submit their expert reports specifying such points.

6 Given that the frequent difficulties in scheduling time for a final hearing, it is suggested that time is set aside for the hearing at the outset of the arbitration, and the case review conference is used as an opportunity to confirm the dates or find new convenient dates and confirm the duration of the hearing.

## Appendix C: Remote hearings<sup>1</sup>

The Covid-19 pandemic has resulted in a sudden increase in the number of arbitration hearings taking place remotely.<sup>2</sup> The IBA Arb40 group drafted this appendix to Chapter 7 of the *Compendium of arbitration practice* to aid practitioners in dealing with the peculiarities of remote hearings.<sup>3</sup>

This appendix collects the views and recommendations set forth in multiple materials available online, as well as the input of members of the Arb40 Steering Committee. Many arbitral institutions and associations have created electronic case management protocols and procedures for the conduct of remote hearings;<sup>4</sup> this appendix must be

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1 The IBA40 Arbitration Subcommittee would like to thank Francisco Amallo, Krystle Baptista and Maria Angelica Burgos, the members of our Steering Committee who drafted this Annex.

2 David Bateson, 'Virtual Arbitrations: The Impact of COVID-19' (2021), 9 (1), *Indian Journal of Arbitration Law*. 159

3 For the purposes of this Annex, 'remote hearings' follows the definition of the 2020 IBA Rules on the Taking of Evidence in International Arbitration ([www.ibanet.org/resources](http://www.ibanet.org/resources)): "'Remote Hearing' means a hearing conducted, for the entire hearing or parts thereof, or only with respect to certain participants, using teleconference, videoconference, or other communication technology by which persons in more than one location simultaneously participate'.

4 Eleanor C Erney, (2021) '*Considerations for the use of COVID-era technological innovation in the future of international arbitration*', in Carlos González Bueno (ed.), *40 under 40 International Arbitration* (Editorial Dykinson SL, 2021)

read together with the recommendations issued by the arbitral institution selected by the parties, as applicable.<sup>5</sup>

## Specific procedures for remote hearings

### *Selection of platform*

Before the remote hearing, parties and tribunals may agree on the platform or service used to conduct the hearing. Many arbitral institutions have agreements or accounts with specific platforms that the parties can use, if considered appropriate.<sup>6</sup> Usually, institutions

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5 Some of the protocols and guidelines provided by the arbitration institutions and associations are:

- International Chamber of Commerce (ICC): 'A Checklist for a Protocol on Virtual Hearings' (Annex I of the ICC 'Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic: a Checklist for a Protocol on Virtual Hearing');
- Africa Arbitration Academy: 'Protocol on Virtual Hearings in Africa 2020';
- International Institute for Conflict Prevention & Resolution: 'Annotated Model Procedural Order for Remote Video Arbitration Proceedings';
- Vienna International Arbitration Centre: 'The Vienna Protocol: Practical Checklist for Remote Hearings';
- KCAB International: 'Seoul Protocol on Video Conferencing in International Arbitration';
- IBA: 'Cybersecurity Guidelines; Technology Resources for Arbitration Practitioners – Virtual Arbitrations';
- International Council for Commercial Arbitration (ICCA) and IBA: Joint Task Force on Data Protection in International Arbitration Proceedings;
- ICCA–NYC Bar–CPR: 'Protocol on Cybersecurity in International Arbitration';
- United Nations Commission on International Trade Law (UNCITRAL): 'Technical Notes on Online Dispute Resolution';
- American Arbitration Association, International Centre for Dispute Resolution: 'Virtual Hearing Guide for Arbitrators and Parties';
- American Bar Association International Law Section (ABA-SIL)'s Arbitration Subcommittee: 'COVID-19 Quick Reference Guide';
- Chartered Institute of Arbitrators: 'Guidance Note on Remote Dispute Resolution Proceedings';
- Delos: 'Checklist on holding arbitration and mediation hearings in times of COVID-19';
- Hague Conference on Private International Law: 'Draft Guide to Good Practice on the Use of Video-Link under the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters';
- Hong Kong International Arbitration Centre: 'Guidelines for Virtual Hearings';
- IBA: 'Technology Resources for Arbitration Practitioners - Audio and videoconferencing';
- International Council for Online Dispute Resolution: 'Video Arbitration Guidelines';
- International Centre for Settlement of Investment Disputes: 'A Brief Guide to Online Hearings at ICSID';
- Judicial Arbitration and Mediation Services: 'Virtual Mediation and Arbitration – Frequently Asked Questions (FAQ)';
- National Academy of Arbitrators: 'Videoconference Procedures—A Primer';
- Quadrant Chambers: 'Arbitration Hearings... and the Corona 'New Normal' Ten Golden Rules: or the easy path to your Virtual Hearing';
- Asociación Latinoamericana de Arbitraje (ALARB): 'Observatorio Permanente sobre el estado del arbitraje en América Latina: Protocolo para la celebración de audiencias arbitrales en forma remota o virtual'.

6 'Nota sobre organización de audiencias virtuales' (Corte de Arbitraje de Madrid, 2020). Aprobada por el Pleno de la Corte en sesión de 21 de abril de 2020.

provide no warranties as to such services. Therefore, it is for the parties to exercise due diligence as to the suitability of such platforms.<sup>7</sup>

### *Technical assistance*

Parties and tribunals may assess whether technical assistance is required for a specific hearing. Aside from traditional services and support for hearings (such as translators and court reporters), remote hearings may call for the need for hearing hosts and administrators, file sharing and presenting platforms, and preparation of e-bundles. In certain cases, the tribunal's secretary may handle some of these tasks.

### *Pre-hearing procedural call*

When scheduling a remote hearing, parties and tribunals may take into consideration the following:

- The hearing schedule may be affected by the time zones of the participants. This often requires schedules with shorter hearing days so that the timeframe is convenient for all participants and equal treatment is ensured. The implementation of shorter hearing days often results in an increase of the number of days required for the hearing.
- The implications of operating outside regular business hours, such as limited availability of support staff.
- Reduced attention span. Since people's attention span is shorter in remote hearings than in in-person hearings, parties and tribunals may be inclined to have shorter days and more breaks to avoid 'virtual fatigue'.
- The impact that simultaneous or deferred interpretations may have on remote hearings.

### *Test run*

Parties and tribunals may use the pre-hearing conference call as an opportunity to: familiarise themselves with the chosen platform; assess the compatibility of all equipment and the quality of their audio and video streams; or make any necessary adjustments. A separate test run may be organised with witnesses and experts that will testify in the hearing. Test runs allow all participants to test all the platform's features, including the possibility of muting the microphone or sharing the screen.

If a pre-hearing call was not possible, parties and tribunals may run individual or collective platform tests. The test run should replicate, to the largest extent possible, the conditions in which each person will participate in the remote hearing (ie, same location, internet connection and equipment).

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<sup>7</sup> *ibid.*

## *Apportionment of time*

When applying formulas to time allocation between the parties, practitioners may foresee possible connection or other technical failures.

## *Chess clock*

Discussions about the convenience of the chess clock system remain the same, although may be aggravated by the shortening of the hearings.

## *Action protocol*

To overcome unprecedented situations<sup>8</sup> in remote hearings, many protocols have been drafted that incorporate best practices and serve as a guide for holding hearings remotely.<sup>9</sup> Protocols are often adapted based on the applicable law,<sup>10</sup> but should not be considered binding on the parties or the arbitrators (unless expressly agreed). These protocols can be included as an annex to the procedural order that regulates the hearing. Some examples are:

- the Practical Checklist for Remote Hearings issued by the Vienna International Arbitration Centre in June 2020;<sup>11</sup>
- the Seoul Protocol on Video Conferencing in International Arbitration;<sup>12</sup> or
- the Guidance Note on Remote Dispute Resolution Proceedings, released by the Chartered Institute of Arbitrators.<sup>13</sup>

## *Evidence handling*

An analysis of the validity of a remote cross-examination of witnesses and experts at the

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8 G Flecke-Giammarco & G Bücheler. 'Arbitration in Uncertain Times – Institutional Responses to COVID-19', 18 (3), German Arbitration Journal, 133.

9 Observatorio Permanente sobre el estado del arbitraje en América Latina. *Protocolo para la celebración de audiencias arbitrales en forma remota o virtual*; Corte de Arbitraje de Madrid (2020). *Nota sobre organización de audiencias virtuales*. Aprobada por el Pleno de la Corte en sesión de 21 de abril de 2020.

10 Observatorio Permanente sobre el estado del arbitraje en América Latina. *Protocolo para la celebración de audiencias arbitrales en forma remota o virtual*.

11 'The Vienna Protocol: Practical Checklist for Remote Hearings' (Vienna International Arbitration Centre, June 2020), [www.viac.eu/images/documents/The\\_Vienna\\_Protocol\\_-\\_A\\_Practical\\_Checklist\\_for\\_Remote\\_Hearings\\_FINAL.pdf](http://www.viac.eu/images/documents/The_Vienna_Protocol_-_A_Practical_Checklist_for_Remote_Hearings_FINAL.pdf)

12 'Seoul Protocol on Video Conference in International Arbitration is released' (KCAB International, 18 March 2020), [www.kcabinternational.or.kr/user/Board/comm\\_notice\\_view.do?BBS\\_NO=548&BD\\_NO=169&CURRENT\\_MENU\\_CODE=MENU0025&TOP\\_MENU\\_CODE=MENU0024](http://www.kcabinternational.or.kr/user/Board/comm_notice_view.do?BBS_NO=548&BD_NO=169&CURRENT_MENU_CODE=MENU0025&TOP_MENU_CODE=MENU0024).

13 'Guidance Note on Remote Dispute Resolution Proceedings' (Chartered Institute of Arbitrators, 2020), [www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf](http://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf)



seat of arbitration is recommendable.<sup>14</sup>

It has been observed that remote hearings are less popular in disputes involving numerous evidentiary contents where the presence of a witness or expert is required, as it is believed that remote hearings diminish the efficiency of a cross-examination.

Specific measures should be implemented (eg, checking spaces, installing observers, using witness invigilators and requiring that witnesses enter the examination room without any electronic devices) to ensure the quality of the evidence. Other measures may also be considered, such as:

- the use of platforms to place documents before a witness during cross-examination; and
- break-out rooms to secure the entrance of the witness and sequestration during breaks.<sup>15</sup>

### *Cybersecurity and data protection*

Arbitral participants have been paying greater attention to enhanced cybersecurity and data protection measures in the conduct of arbitration proceedings, especially during remote hearings.<sup>16</sup> By establishing precise procedures for handling and exchanging sensitive information at the outset of the arbitration, the parties and the tribunal are more likely to mitigate the risk of cybersecurity threats.<sup>17</sup>

Parties and tribunals shall take into consideration applicable provisions of data protection laws, and thus may consider deciding on the treatment of data protection as early as possible in the arbitration.<sup>18</sup>

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14 For a comparative analysis, see 'Does a Right to a Physical Hearing Exist in International Arbitration? (ICCA), [www.arbitration-icca.org/right-to-a-physical-hearing-international-arbitration](http://www.arbitration-icca.org/right-to-a-physical-hearing-international-arbitration). ICCA, in view of the need for reliable jurisdiction-specific information on the core legal questions posed by the increased use of remote arbitral hearings due to the Covid-19 pandemic, is working on the research project 'Does a Right to a Physical Hearing Exist in International Arbitration?'. To the date of writing, the majority of the reports on specific jurisdictions have found that the right to a physical hearing may be excluded from the jurisdictions' arbitration laws. The reports came to that conclusion based on provisions giving tribunals broad procedural discretion to decide how hearings are conducted, the possibility for tribunals to order documents-only arbitration, and provisions in the arbitration rules of the most relevant institutions in those jurisdictions expressly allowing remote hearings. A general report is being prepared and will be presented at the XXVth ICCA Congress to be held in Edinburgh in September 2022.

15 For a full list of technology resources for remote hearings, please consult the IBA Technology Resources for Arbitration Practitioners - Virtual Arbitrations ([www.ibanet.org/technology-resources-for-arbitration-practitioners](http://www.ibanet.org/technology-resources-for-arbitration-practitioners)).

16 'Protocol for Online Case Management in International Arbitration', (Working Group on LegalTechAdoption in International Arbitration), <https://protocol.techinarbitration.com/p/1>, accessed 23 August 2022.

17 Eleanor C Erney, (2021) 'Considerations for the use of COVID-era technological innovation in the future of international arbitration', in Carlos González Bueno (ed.), *40 under 40 International Arbitration* (Editorial Dykinson SL, 2021); Alison Ross, 'Covid-19: leading institutions speak with one voice' (Global Arbitration Review, 16 April 2020), <https://globalarbitrationreview.com/article/covid-19-leading-institutions-speak-one-voice>

18 'The ICCA-IBA Roadmap to Data Protection in International Arbitration, Public Consultation Draft February 2020' (Not for Citation), 38.

## Hybrid hearings

Hybrid hearings enable some participants to be present in the hearing room while others participate by video or telephone conferencing.<sup>19</sup> In certain contexts, they may be a good tool to ensure that all stakeholders overcome the inherent problems of in-person and remote hearings. Parties should make a proper cost-benefit analysis to choose the type of hearing that better suits their case.<sup>20</sup>

## Reference materials

- Technology Resources for Arbitration Practitioners – Virtual Arbitrations (IBA, March 2019), [www.ibanet.org/technology-resources-for-arbitration-practitioners](http://www.ibanet.org/technology-resources-for-arbitration-practitioners)
- David Bateson, 'Virtual Arbitrations: The Impact of COVID-19' (2021), 9 (1), *Indian Journal of Arbitration Law*. 159.
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- Erney, E.C. (2021) *Considerations for the use of COVID-era technological innovation in Eleanor C Erney, (2021) 'Considerations for the use of COVID-era technological innovation in the future of international arbitration'*, in Carlos González Bueno (ed.), *40 under 40 International Arbitration* (Editorial Dykinson SL, 2021)
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- IBA Guidelines on the Taking of Evidence in International Arbitration (2020).

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19 'The future of disputes: are virtual hearings here to stay?' (Baker McKenzie, 2021), [www.bakermckenzie.com/-/media/files/insight/publications/2021/02/are-virtual-hearings-here-to-stay--baker-mckenzie-and-kpmg-report\\_010221.pdf](http://www.bakermckenzie.com/-/media/files/insight/publications/2021/02/are-virtual-hearings-here-to-stay--baker-mckenzie-and-kpmg-report_010221.pdf)

20 Eleanor C Erney, (2021) '*Considerations for the use of COVID-era technological innovation in the future of international arbitration*', in Carlos González Bueno (ed.), *40 under 40 International Arbitration* (Editorial Dykinson SL, 2021)