

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

Dispute Settlement

International Commercial Arbitration

5.4 The Arbitral Proceedings



NOTE

The Course on Dispute Settlement in International Trade, Investment and Intellectual Property consists of some forty modules.

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WHAT YOU WILL LEARN

An arbitration may be conducted in a variety of different ways. This Module provides an overview of the procedural aspects of arbitral proceedings. It begins by discussing in Sections 1 and 2 the matters that affect the arbitral process, including the freedom of the parties to dictate the procedure to be followed in an arbitration, the need to comply with certain mandatory rules and public policy requirements of the law of the place of the arbitration and, the provisions of international conventions on arbitration that aim to ensure that arbitral proceedings are conducted fairly.

Section 3 discusses the significance of the place or “seat” of the arbitration and the effect that the national laws of the country in which the arbitration has its seat may have on the arbitration, including the national court’s ability to supervise the arbitration.

The remaining sections examine in detail the various procedural steps in an international arbitration from commencing the arbitration to conducting the hearing, and up to the conclusion of the proceedings by the making of an award.

OBJECTIVES

After studying this Module, the reader should have an understanding and appreciation of:

- the concept of *party autonomy*;
- the relevance of the place of the arbitration;
- the impact of the *lex arbitri*;
- the effect of international conventions, such as the New York Convention, on certain procedural issues;
- ‘*ad hoc*’ arbitrations vs. institutional arbitrations;
- how an arbitration is commenced;
- how an arbitrator may be appointed;
- the jurisdiction and powers of the arbitrator and challenges to his jurisdiction;
- the arbitrator’s role in deciding procedural matters;
- the preliminary steps involved in taking the proceedings to a hearing;
- the presentation and consideration of evidence;
- the manner in which hearings may held;
- how the proceedings are concluded by the making of an award and post-hearing issues.

1. INTRODUCTION

An arbitration may be conducted in a variety of ways. One of the fundamental tenets of arbitration is that the parties are generally free to choose or dictate the procedure by which their disputes may be resolved (commonly known as the principle of party autonomy). This flexibility is one of the main advantages that arbitration has over court litigation, where the rules of the court are usually perceived as rigid and inflexible.

At the outset parties would usually be in a position to regulate the procedure of future disputes that may arise between them by entering into an arbitration agreement, which is usually contained within a commercial contract that the parties have entered into. If their contract does not contain such a clause, they may enter into a separate agreement to refer their disputes to arbitration (referred to as a submission agreement) after disputes have arisen. (Module 5.2 discusses in detail the effect and impact of an arbitration agreement.)

The parties may opt for either an “ad hoc” arbitration or an administered or “institutional” arbitration incorporating the rules of arbitral institutions. (These terms are explained elsewhere in this Module.) The parties’ freedom to choose their own procedure for the arbitration is not however totally unrestricted. The procedure they select must comply with any applicable mandatory rules and public policy requirements of the law of the place of arbitration. Provisions of international conventions on arbitration that aim to ensure that arbitral proceedings are conducted fairly should also be considered. Otherwise, the award that is subsequently made may be set aside or refused recognition and enforcement.

While the arbitration agreement will provide the basic framework for many important aspects of the arbitration, the arbitral tribunal that is appointed to have control over the arbitral proceedings will, within that framework and the framework of the applicable laws governing the arbitration, determine the procedure for the arbitration. Once the tribunal is appointed, it will assume certain functions, including exercising certain procedural powers in controlling the conduct of the arbitration by making orders and directions and, finally, determining the substantive dispute between the parties by making an award.

The various procedural steps are examined in detail in the following sections of the Module.

2. MATTERS THAT AFFECT THE ARBITRAL PROCEDURE

Party autonomy

Party autonomy is the fundamental principle in determining the procedure to be followed in an international commercial arbitration. This principle has been enshrined in many national laws and endorsed by international arbitral institutions and organisations.

The Model Law¹ reflects the principle of party autonomy as follows: "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. Art. 19(1)

The New York Convention recognizes the principle of party autonomy by providing that the 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". Art. V.1 (d)

Most rules of the well-known arbitral institutions, like the ICC, LCIA, AAA and WIPO and regional arbitration institutions like the SIAC, adopt a similar approach towards party autonomy.

ICC Rules: "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": Art 15(1)

LCIA Rules: "The parties may agree on the conduct of their arbitral proceedings, and they are encouraged to do so": Art 14(1)

ICSID Rules: "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. For this purpose, he may request the parties to meet him. He shall, in particular, seek their views on the following matters:

- (a) the number of members of the Tribunal required to constitute a quorum at its sittings;*
- (b) the language or languages to be used in the proceedings;*
- (c) the number and sequence of the pleadings and the time-limits within which they are to be filed*
- (d) the number of copies desired by each party of instruments filed by the other*

¹ "The UNCITRAL Model Law on International Commercial Arbitration was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985, at the close of the Commission's 18th annual session. The General Assembly, in its resolution 40/72 of 11 December 1985, recommended "that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral proceedings and the specific needs of international commercial arbitration practice." As at October 2002, at least 37 countries had adopted the Model Law as part of their national laws with or without modification.

(e) dispensing with the written or the oral procedure;
(f) the manner in which the cost of the proceeding is to be apportioned; and
(g) the manner in which the record of the hearings shall be kept. In the conduct of the proceedings the Tribunal shall apply any agreement between the parties on procedural matters, except as otherwise provided in the Convention or the Administrative and Financial Regulations.” Rule 20

As mentioned in Section 1, the parties are generally free to select the procedure they desire by which their disputes may be resolved. They may select an “ad hoc” arbitration or an “institutional” arbitration.

Ad hoc and institutional arbitrations

“Ad hoc” arbitrations are those arbitrations that are conducted by the parties alone without the assistance of an arbitral institution. In such arbitrations the parties must agree on the procedures necessary for the commencement and general conduct of the arbitration. They may be specifically drawn up by the parties themselves or may be in the form recommended by an organization such as UNCITRAL.

The UNCITRAL Arbitration Rules were adopted on April 28, 1976 by the United Nations Commission on International Trade Law and were the result of extensive consultation with arbitral institutions and centres around the world. The UNCITRAL Arbitration Rules are particularly suited for ad hoc arbitrations where the parties wish to have a set of rules in place to govern an arbitration but do not wish to submit to the jurisdiction of an arbitral institution which offers administered or semi-administered arbitration. Many arbitration centers have adopted these rules as the rules of the institution either wholly or partially.² The clause recommended by UNCITRAL reads:

“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.

Note – Parties may wish to consider adding:

- (a) the appointing authority shall be ... [name of institution or person];*
- (b) the number of arbitrators shall be ...[one or three];*
- (c) the place of arbitration shall be ...[town or country];*
- (d) the language(s) to be used in the arbitral proceedings shall be ... [specify].”*

An “institutional” arbitration is one that is administered by a specialist arbitral institution under rules of arbitration published by that institution. Examples of such institutions are the International Chamber of Commerce (ICC), the

² Eg. The SIAC (The Singapore International Arbitration Centre) Rules 2nd Edition 1997 are based on the UNCITRAL Rules with modifications; the HKIAC (Hong Kong International Arbitration Centre) model arbitration clause provides for disputes to be settled in accordance with the UNCITRAL Rules; the Rules for Arbitration of the Kuala Lumpur Regional Centre for Arbitration provide that disputes are to be settled in accordance with the UNCITRAL Rules subject to certain modifications.

London Court of International Arbitration (LCIA), the American Arbitration Association (AAA), the International Centre for the Settlement of Investment Disputes (ICSID) and the World Intellectual Property Organization (WIPO).

There are also many regional and national arbitral institutions and centres such as those in Singapore, Hong Kong, Beijing, Kuala Lumpur, Stockholm, Zurich and Vienna. Institutional rules generally provide a certain procedural framework for the conduct of an arbitration administered by the institution concerned. These rules are usually incorporated into the arbitration agreement by appropriate language. Most, if not all, arbitral institutions have their own recommended ‘model’ clauses.

The clause recommended by the ICC reads:

“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”

While party autonomy is a guiding principle in determining the arbitral procedure, equality of treatment of the parties, fundamental notions of fairness and public policy considerations are also important factors in determining the procedure in arbitration.

Equality of treatment and full opportunity to present one’s case

The principle of equality of treatment and fairness to the parties, sometimes also referred to as the rules of natural justice, is given express recognition in the New York Convention, which states in Article 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.”

The Model Law states: “The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.”

The concept of treating the parties equally and fairly is basic to most systems of justice. The UNCITRAL Rules express this concept in Art 15(1), which states:

“Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.”

Most institutional arbitration rules incorporate this principle.

The requirement that the parties must be treated equally may possibly operate

as a restriction on party autonomy. For example, a provision in an arbitration agreement that only one party should be heard by the arbitral tribunal might well be treated as contrary to public policy under the law of the country of enforcement even if both parties had agreed to it. The UNCITRAL Secretariat in its report leading to the Model Law noted:

“... It 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.”

Mandatory Rules
Public Policy

The parties may not agree on a procedure that would cause the arbitration to be conducted in a manner contrary to the mandatory rules or public policy of the country in which the arbitration is held.

Any agreement by the parties conferring a power on the arbitral tribunal to perform an act contrary to the law or, a mandatory rule or the public policy of the country in which the arbitration is taking place would be unenforceable in that country. For example, the national laws of certain countries may not allow the arbitrator hearing an arbitration in that country to award interest and, such an award may not be enforceable in that country.

An arbitration agreement may also not validly confer any powers on an arbitral tribunal that directly affect persons who are not parties to that agreement (unless allowed by the governing law).

An arbitral tribunal may direct one of the parties to produce documents, or 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 arbitrator.

Different approaches:
adversarial and
inquisitorial processes

The procedure adopted in international commercial arbitrations is sometimes largely influenced by the background and experience of the individual members of the arbitral tribunal and the parties' representatives themselves and what they are comfortable with.

Historically different approaches towards dispute resolution have been taken in the court systems of different countries. These different 'styles' sometimes influence the manner in which the parties to an arbitration, and indeed the arbitral tribunal itself, desire the arbitration to be conducted.

In the adversarial system, used primarily in England, the United States and certain common law countries, opposing versions of the facts and interpretations of the law are presented to the judge. Each party has the opportunity to test and respond to the material and evidence submitted by the other party, by cross-examination of the witnesses for example. The judge essentially takes a passive role. In the inquisitorial system, on the other hand,

the judge conducts his own enquiries into the factual and legal issues, with the assistance of the parties and their lawyers.

The principle of party autonomy allows the parties to an arbitration to choose either approach or a mixture of the two. The arbitration clause or submission agreement does not usually specify which particular procedure is to be followed and, where the arbitral tribunal has discretion to determine the procedure, the parties will usually be taken to have agreed that the arbitral tribunal might adopt either an adversarial or inquisitorial procedure, or a combination of both, as it thinks fit.

2.1 Test Your Understanding

- 1. What do you understand by the term “party autonomy”?**
- 2. Are there any matters that may restrict the parties’ ability to agree on them the procedure for an arbitration? What are those matters?**
- 3. What do you understand by the terms “ad hoc” and “institutional” arbitrations?**
- 4. What do you understand the expression “Model Law” to mean?**
- 5. What are the main differences between the “adversarial” system and the “inquisitorial” system of justice?**

3. THE PLACE OR SEAT OF THE ARBITRATION

The seat of the arbitration

Consistent with the principle of party autonomy, the parties to an international arbitration are generally free to choose for themselves the juridical seat of their arbitration (and indeed should specify the seat in their arbitration agreement). The “seat” or the place of the arbitration (or the “forum” or the “locus arbitri”) is highly relevant both to the conduct of the arbitration and to the enforceability of the award.

The seat or the place of the arbitration is the link between the arbitration and the law of the place in which that arbitration is legally situated.

“When one says that London, Paris or Geneva is the place of arbitration, one does not refer solely to a geographical location. One means that the arbitration is conducted within the framework of the law of arbitration of England, France or Switzerland or, to use an English expression, under the curial law of the relevant country. The geographical place of arbitration is the factual connecting factor between that arbitration law and the arbitration proper, considered as a nexus of contractual and procedural rights and obligations between the parties and the arbitrators.”³

This does not mean that all the proceedings of the arbitration have to take place there. It may often be convenient for the parties or the arbitral tribunal or the witnesses (who may all be from different countries) to hold meetings or even hearings in a country other than the designated seat. This does not mean that the seat of the arbitration changes with each change of location. The legal place of the arbitration remains the same even if the physical place changes from time to time.

The law governing the arbitration

In an international commercial arbitration, the arbitral proceedings are under the general supervision of the law of the seat or the place of the arbitration, i.e. the *lex arbitri* (except for arbitrations under the ICSID Rules, which are governed by international law and treaties).

The *lex arbitri* has been explained in the following terms:

The *lex arbitri* is likely to affect matters such as:

- whether a dispute is capable of being referred to arbitration, i.e. whether it is “arbitrable”;
- time-limits for commencing an arbitration;
- interim measures of protection;
- the conduct of the arbitration, including (possibly) rules concerning the disclosure of documents, the evidence of witnesses and so on;
- the powers of the arbitrator;

³ Reymond “Where is an Arbitral Award made?” [1992] 108 LQR 1 at 3.

- the form and validity of arbitration awards; and
- the finality of the award, including any right to challenge it in the courts of the place of arbitration.

The above matters are important procedural (and in some cases, substantive) aspects of international commercial arbitration. The effective conduct of the arbitration may well require assistance from the national courts in the place of the arbitration, e.g. to enforce the arbitrator's orders for interim measures of protection. A *lex arbitri* that has "arbitration friendly" laws would therefore be conducive to the effective and efficient conduct of an arbitration. Conversely, if a dispute or claim is not, under the *lex arbitri*, arbitrable or "capable of being resolved by arbitration" (within the meaning of the New York Convention), the resultant award made may be rendered unenforceable.

Choice of a foreign procedural law

In theory, it is open to the parties to specify a national law to govern the arbitration proceedings that is not the law of the place of the arbitration, provided that the law and public policy of the place of arbitration so permit. In practice however, this can cause difficulties as this may add another set of rules of law to those the parties (and the arbitral tribunal) must observe in addition to the law of the seat of the arbitration. If there is a conflict between the two sets of laws, any such conflict would also be difficult to reconcile for the parties and the arbitral tribunal.

For example, an arbitration may be held in Peru as the place of the arbitration but, by agreement between the parties, is said to be subject to the procedural law of England. In such a case, the parties and the arbitral tribunal would need to have regard to two procedural laws – that of England, as the chosen procedural law, and that of Peru, as the place of the arbitration. If it becomes necessary during the course of the arbitration to have recourse to the courts, there may be further problems in determining whether a particular court has jurisdiction.

In Naviera Amazonia Peruana SA v Compania Internacional de Seguros de Peru [1988] 1 Lloyd's Rep 116 CA, the English Court of Appeal considered a contract that had been held by the court of first instance to provide for an arbitration to be located in Peru but subject to English procedural law. The Court of Appeal noted that although a choice of foreign procedural law was theoretically possible, there were practical difficulties. "There is equally no reason in theory which precludes parties to agree that an arbitration shall be held at a place or in country X but subject to the procedural laws of Y. The limits and implications of any such Agreement has been much discussed in the literature, but apart from the decision in the instant case there appears to be no reported case where this has happened. This is not surprising when one considers the complexities and inconveniences, which such an agreement would involve. Thus, at any rate under the principles of English law, which rest upon the territorially limited jurisdiction of our courts, an agreement to arbitrate in X subject to English procedural law would not empower our courts to exercise jurisdiction over the arbitration in X."

3.1 Test Your Understanding

- 1. A contract provides that the law governing the contract shall be the law of England. It contains an arbitration clause that states that the place of arbitration shall be Singapore. What is the law governing the arbitration?**
- 2. What do you understand by the term “*lex arbitri*” and what procedural matters are governed by the “*lex arbitri*”?**
- 3. If the place of arbitration is agreed to be Paris, France, can hearings be held in some other country like, say, Kuala Lumpur, Malaysia? If one of the parties desires to apply to the court for assistance to enforce an order for interim measures of protection made by the arbitral tribunal, should it apply to the court in France or to the court in Malaysia?**

4. COMMENCING THE ARBITRATION

Mode of commencement

The method by which an arbitration may be commenced may depend on the arbitration agreement and whether any particular procedure is prescribed by that agreement. Where institutional arbitration rules are incorporated into the arbitration agreement, those rules may prescribe the procedure and any requisite formalities.

Article 4 of ICC Rules, for example, states:

1. *A party wishing to have recourse to arbitration under these Rules shall submit its Request for Arbitration (the "Request") to the Secretariat, which shall notify the Claimant and Respondent of the receipt of the Request and the date of such receipt.*
2. *The date on which the Request is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of the arbitral proceedings.*
3. *The Request shall, inter alia, contain the following information:*
 - a) *the name in full, description and address of each of the parties;*
 - b) *a description of the nature and circumstances of the dispute giving rise to the claims;*
 - c) *a statement of the relief sought, including, to the extent possible, an indication of any amount(s) claimed;*
 - d) *the relevant agreements and, in particular, the arbitration agreement;*
 - e) *all relevant particulars concerning the number of arbitrators and their choice in accordance with the provisions of Articles 8, 9 and 10, and any nomination of an arbitrator required thereby; and*
 - f) *any comments as to the place of arbitration, the applicable rules of law and the language of the arbitration*

Depending on the specific requirements of the arbitration agreement and the applicable laws, the arbitral proceedings may be commenced by:

- issuing a notice to the opposing party to appoint or concur in the appointment of an arbitrator; or
- issuing a notice to the appointing party to submit the dispute to the arbitral tribunal, if one is designated in the arbitration agreement; or
- commencing the procedure for appointment of the arbitral tribunal as provided in the arbitration agreement by, for example, writing to the appointing authority to make the appointment of the arbitral tribunal; or
- lodging the claim with the arbitral tribunal if it is designated in the arbitration agreement.

Time limits

It is important to ensure that the arbitration is properly commenced both under the agreed contractual procedure, if any, stipulated in the arbitration agreement

and under the applicable laws. Failure to do so may result in the claim being time-barred by not having been brought within the time (if any) imposed by the contract or by the applicable laws, or both.

As to what the applicable laws are in relation to limitation periods, it may be necessary to look at the proper law of the contract as well as the law of the place of the arbitration. Different national laws may have different time limits.

Some positive step or action is required to mark the commencement of arbitral proceedings. However, the form of action required may vary from country to country, depending on the requirements of that country's laws. For example, the Swiss 1987 Act provides that:

“The arbitral proceedings shall be pending from the time when one of the parties submits its request to the arbitrator or arbitrators designated in the arbitration agreement or, in the absence of such designation, from the time when one of the parties initiates the procedure for the constitution of the arbitral tribunal.”

The English Arbitration Act 1996, in contrast, allows the parties to agree when the proceedings are to be regarded as commenced for purposes of the statutory limitation period. If there is no agreement, time starts to run from the date one party gives a written notice to the other party or to the appointing authority seeking the establishment of the tribunal.

If there is a difference between the date arbitration proceedings would be regarded as having commenced under the applicable law, and the date such proceedings would be regarded as having commenced under the arbitration agreement, the applicable law will prevail. Under the ICSID Arbitration Rules, an ICSID arbitration would be regarded as having commenced when the Secretary-General notifies the parties that all the arbitrators have accepted their respective appointments. Under most national laws, an arbitration would be regarded as having commenced before the date of the Secretary-General's notification.

Appointment of arbitrators

Party autonomy allows the parties freedom to agree how their disputes are resolved. This includes the ability to agree on a number of matters relating to the appointment of the arbitral tribunal, including:

1. the number of arbitrators, and whether there is to be a chairman;
2. the qualifications of the arbitrator(s);
3. the procedure for appointing the arbitrator or arbitrators, including the procedure for appointing any chairman;
4. if each party is to appoint an arbitrator, whether it is open to one party, faced with the default of the other, to apply to the court to have his arbitrator declared the sole arbitrator;

5. what is to occur in the event of any failure in the appointment mechanism agreed by them;
6. the circumstances in which the appointment of an arbitrator may be challenged;
7. the circumstances in which the authority of an arbitrator may be revoked by one or both of the parties;
8. the circumstances in which an arbitrator may resign (and the consequences thereof);
9. whether the death of one of the parties affects the authority of an arbitrator appointed by him;
10. where a vacancy arises following the removal or resignation of an arbitrator, or the revocation of his authority, whether, and if so how, the vacancy is to be filled.

If the arbitration agreement does not address these points or they are covered by any relevant arbitration rules or by the *lex arbitri*, the parties will not, once a dispute has arisen, find reaching agreement between themselves easy.

In an international commercial arbitration, the choice is generally between one arbitrator and three arbitrators. The qualifications of the arbitrator may also be designated in the arbitration agreement. For example, it may be provided that he should be an engineer or a lawyer of “not less than five years standing” or a “commercial man”. This may cause delay in ascertaining whether or not a particular arbitrator possesses the relevant qualifications. In any event, it is often difficult to define the type of arbitrator required until disputes arise.

The parties may also agree that the arbitral tribunal will be selected by a third party, an appointing authority. This would often be the case where institutional arbitration rules are used. In this case, the parties’ choice will effectively be delegated to the appointing authority.

Sole arbitrators and multi-arbitrator tribunals

The establishment of an arbitral tribunal involves many considerations. An arbitral tribunal may consist of one or more arbitrators, depending on what the parties have agreed. (The laws of some countries however provide that the number of arbitrators must be uneven). An important consideration in the drafting of an arbitration clause or a submission agreement is the number of arbitrators to be appointed.

Sole arbitrator

Where the parties have not expressly agreed upon the number of arbitrators, most institutional rules would offer a solution.

The ICC Rules provide that where the parties have not agreed upon the number of arbitrators, a sole arbitrator will be appointed, unless “the dispute is such as to warrant the appointment of three arbitrators”: Art 8.2, ICC Rules.

The LCIA Rules provide that a sole arbitrator shall be appointed unless the parties have agreed otherwise in writing or the LCIA Court can determine that “in view of all the circumstances of the case a three-member tribunal is

appropriate”: Art 5.4, LCIA Rules

On the other hand, the UNCITRAL Rules provide that, if the parties have not previously agreed otherwise, three arbitrators will be appointed: Art 5, UNCITRAL Rules.

The Model Law contains a similar provision in Article 10(2).

If the dispute is to be determined by a sole arbitrator, and the parties cannot agree who this should be, an arbitrator will usually be appointed by a designated appointing authority, such as an arbitral institution if that institution’s rules form part of the arbitration agreement, or by the court in the place of the arbitration, if the national law of that place so permits.

Two arbitrators

In certain trades, the practice is to refer disputes to an arbitral tribunal of two arbitrators, with a subsequent reference to an umpire if the two party-nominated arbitrators cannot agree between themselves.

The reference to a two member tribunal is not commonplace in international commercial arbitrations. If there are only two arbitrators and they are required to agree on the appointment of a third person as an umpire, the two arbitrators may be unable to agree. In that case, problems may arise.

It is preferable to avoid problems by not stipulating a two arbitrator tribunal.

Three arbitrators

It is not unusual in international commercial arbitrations for the disputes to be referred to an arbitral tribunal of three arbitrators, unless the amount in dispute is small. Where the arbitral tribunal consists of three arbitrators, each of the parties will usually have the right to nominate one arbitrator, leaving the third arbitrator to be chosen in some other manner.

The advantage to a party of being able to nominate one of the arbitrators in a three-member panel is that it may give the parties concerned a greater sense of confidence in the arbitral tribunal. There will be at least one person of his choice to listen to his case. This may be important in an international arbitration where there may be differences of language, tradition and culture between the parties and, indeed, between the members of the arbitral tribunal themselves. An arbitrator nominated by a party may be perceived as being in a position to help in ensuring that his appointor’s case (if there are language or legal practice differences, for instance) is better understood by the arbitral tribunal.

While the concept of a non-neutral arbitrator may seem slightly inconsistent with general notions of impartiality, the party appointed arbitrator can fulfil a useful role without stepping outside the bounds of independence and impartiality.

As a general principle, an arbitrator, like a judge, must act impartially; and he may be removed from his appointment if he fails so to act. A party appointed arbitrator should not therefore appear as an advocate, agent or servant of the

party who appointed him. He may however ensure that the arguments and contentions of that party are properly understood by the other members of the arbitral tribunal, particularly when there are differences of background, culture or language that potentially give rise to a lack of understanding.

International commercial arbitrations are effective when an arbitral tribunal of three arbitrators is appointed except where the sums involved are small. They would naturally be more expensive than an arbitration conducted by a sole arbitrator and will generally take longer to conclude. However, an arbitral tribunal of three arbitrators is likely to prove more satisfactory to the parties, and the ultimate award is more likely to be acceptable to them.

Four or more arbitrators

It is possible for the tribunal to consist of more than three members. The practice of States in appointing arbitral tribunals of five, seven or more is usually dictated by political rather than by practical considerations. In the case of the Iran-United States Claims Tribunal, the tribunal consisted of nine members, three appointed by each party and three from third countries. However, that tribunal had several thousand individual disputes to handle and panels of three arbitrators considered individual cases.

In international commercial arbitrations however, there would generally be no valid reason for appointing an arbitral tribunal of more than three arbitrators given the expense and delay that may result.

Method of appointment

As noted above, the arbitration agreement may specify how the tribunal is to be appointed, as for example, by the parties themselves or an appointing authority.

By the parties themselves

Where the parties have provided in the arbitration agreement that there should be a single arbitrator and, that the arbitrator is to be appointed by agreement between the parties themselves, there is no fixed rule or practice as to how the parties should proceed to reach such an agreement. It is not uncommon for the parties to consult each other and perhaps for each party to exchange lists of a few possible persons with a description of the experience and qualifications of each of them. It sometimes happens that the same person is on both lists. The persons so proposed (and ultimately the person so chosen) must consent to the appointment. A written confirmation of that person's consent should be obtained. In some jurisdictions, it is a statutory requirement that the acceptance of the appointment should be in writing.⁴

The date of the appointment should also be documented, as that date may be important for the purpose of time-limits, as for example, where the date of the commencement of the arbitration is, under the relevant laws, regarded as the date of the appointment.

Where the arbitration agreement provides that the tribunal is to be composed of more than one arbitrator, it may be difficult in practice for the parties to

⁴ An example is the Netherlands: *Netherlands Arbitration Act 1986, Art 1029(1)*.

reach agreement on all the arbitrators. If three arbitrators are to be appointed, the arbitration agreement may provide each of the parties to appoint one arbitrator with the third being appointed either by agreement between the two-party appointed arbitrators or, by an appointing authority such as an arbitral institution.

By an appointing authority

Arbitration agreements frequently provide that a designated appointing authority should make the appointment of an arbitrator or arbitrators if the parties themselves are unable to reach agreement.

The appointing authority so designated may be the president of a professional institution,⁵ or an arbitral institution⁶ or some other authority.

Where the parties have adopted the UNCITRAL Rules, Articles 6 and 7 of those rules provide that the Secretary-General of the Permanent Court of Arbitration at The Hague may designate an appointing authority to appoint the arbitrator if no appointing authority has been agreed upon by the parties.

Article 6

1. *If a sole arbitrator is to be appointed, either party may propose to the other:*
 - (a) *The names of one or more persons, one of whom would serve as the sole arbitrator;*
 - (b) *If no appointing authority has been agreed upon by the parties, the name or names of one or more institutions or persons, one of whom would serve as appointing authority.*
2. *If within thirty days after receipt by a party of a proposal made in accordance with paragraph 1 the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority agreed upon by the parties. If no appointing authority has been agreed upon by the parties, or if the appointing authority agreed upon refuses to act or fails to appoint the arbitrator within sixty days of the receipt of a party's request therefore, either party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an appointing authority.*
3. *The appointing authority shall, at the request of one of the parties, appoint the sole arbitrator as promptly as possible. In making the appointment the appointing authority shall use the following list-procedure, unless both parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:*
 - (a) *At the request of one of the parties the appointing authority shall communicate to both parties an identical list containing at least three names;*

⁵ For example, the Chartered Institute of Arbitrators.

⁶ For example, the ICC.

- (b) *Within fifteen days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which he objects and numbered the remaining names on the list in the order of his preference;*
 - (c) *After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;*
 - (d) *If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.*
4. *In making the appointment, the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.*

Article 7

1. *If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the tribunal.*
2. *If within thirty days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator he has appointed:*
 - (a) *The first party may request the appointing authority previously designated by the parties to appoint the second arbitrator; or*
 - (b) *If no such authority has been previously designated by the parties, or if the appointing authority previously designated refuses to act or fails to appoint the arbitrator within thirty days after receipt of a party's request therefore, the first party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate the appointing authority. The first party may then request the appointing authority so designated to appoint the second arbitrator. In either case, the appointing authority may exercise its discretion in appointing the arbitrator.*
3. *If within thirty days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by an appointing authority in the same way as a sole arbitrator would be appointed under article 6.*

Arbitral institutions like the ICC, LCIA and AAA provide mechanisms for appointing arbitrators in accordance with their respective arbitration rules. For example, the ICC Rules provide that if the parties fail to nominate a sole arbitrator within 30 days from the date on which the Claimant's Request for Arbitration has been received by the other party, the ICC Court will appoint the sole arbitrator. If three arbitrators are to be appointed, the ICC Court will appoint the third arbitrator who will act as Chairman of the tribunal, the other

two being nominated by the parties themselves (and failing nomination, the ICC Court will make the appointment). Most institutions will require the arbitrator(s) to sign a statement that they are independent of the parties.

By the court

If the agreed mechanism for appointing an arbitrator breaks down, as for example, if the parties are unable to agree upon an arbitrator or have not agreed to an appointing authority making the appointment, reliance may have to be placed on the *lex arbitri* and an application made to the relevant national court for that court to make the appointment.

The national court to which such an application is made must have the jurisdiction and the power to make the appointment.

Where the place of arbitration has been agreed and specified in the arbitration agreement, the national courts of that place should have jurisdiction. However, if the place of the arbitration has not been specified in the arbitration agreement or otherwise agreed upon by the parties, and the parties have not expressly agreed on which country's laws should govern the arbitration, problems could arise. There could be difficulty in identifying the national court that has, or is willing to assume, jurisdiction over the making of the appointment. If, in those circumstances, there is no court with jurisdiction to make the appointment, the arbitration agreement may be regarded as inoperable.

The national court having *prima facie* jurisdiction must also have the powers under its national laws to make the appointment. In jurisdictions with developed arbitration laws, this should not pose a problem. For example, in the countries that have adopted the Model Law as part of their national laws, the national courts (or some other competent authority designated by that country's laws) would be empowered to make the appointment of the arbitrator(s) where the parties have not agreed on their appointment⁷.

The national laws of the relevant country must however be checked carefully.

Challenge

An arbitrator may sometimes be challenged on a number of different grounds:

- where circumstances exist that give rise to justifiable doubts as to his impartiality or independence;
- he does not possess the qualifications, if any, required of him as required by the arbitration agreement;
- he is physically or mentally incapable of conducting the proceedings; or
- he has refused or failed to properly conduct the proceedings or to use all reasonable dispatch in conducting the proceedings or making an award.

The bases on which a challenge may be mounted may lie in the arbitration agreement itself or in the laws governing the arbitration.

⁷ Art 11 to be read in conjunction with Art 6.

For example, Article 10 of the UNCITRAL Rules provides:

- “1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.*
- 2. A party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made.”*

Article 12 of the Model Law contains a similar provision whilst Article 14 states that:

- “1. If an arbitrator becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.*
- 2. If, under this article or article 13(2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).”*

The English Arbitration Act 1996 contains a number of comprehensive grounds, including:

- “...(d) that he has refused or failed –*
- (i) properly to conduct the proceedings, or*
 - (ii) to use all reasonable dispatch in conducting the proceedings or making an award, and that substantial injustice has been or will be caused to the applicant.”*

Procedure for challenge

The procedure for challenge would usually be set out either in the arbitration rules that the parties may have agreed on or in the law of the place of the arbitration.

The UNCITRAL Rules and most institutional rules contain comprehensive provisions on the procedure for raising a challenge. Under the UNCITRAL Rules, a challenge must be notified to the other party and to the members of the arbitral tribunal, including the challenged arbitrator.⁸

The notice must be sent within 15 days after the appointment of the challenged arbitrator has been notified to the challenging party or, within 15 days after the circumstances giving rise to the challenge (as set out in Articles 9 and 10), became known to that party. If the opposing party does not agree to the challenge and, the challenged arbitrator does not withdraw, a decision will

then be made on the challenge by the appointing authority.

The Washington Convention which governs ICSID arbitrations, provides that:

“A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.”

Challenges under the ICSID Rules must be made “promptly, and in any event before the proceeding is declared closed”.

Under the Model Law, challenges relating to impartiality or independence must be made within 15 days of the party becoming aware of the circumstances giving rise to justifiable doubts as to those issues.⁹

Waiver

If a party makes a challenge late, that is, after a prescribed time limit has expired, his right to object may be regarded as waived so that he may not be able to challenge the award subsequently.

Article 4 of the Model Law, which deals with the waiver of the right to object, states:

“A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.”

4.1 Test Your Understanding

1. **If the UNCITRAL Rules have been agreed upon by the parties to govern the conduct of the arbitration, but the parties have not agreed on the number of arbitrators to be appointed to hear the case, how many arbitrators would be appointed?**
2. **What are the advantages and disadvantages in appointing a one member arbitral tribunal as opposed to a three-member tribunal?**
3. **What do you understand by the term “appointing authority”?**

⁸ Art. 11.

⁹ Art 13(2).

- 4. If the parties are unable to agree on a person to be appointed as the sole arbitrator (and the arbitration agreement does not incorporate any institutional rules or otherwise provide for an appointing authority to make the appointment), what can or should the parties do?**
- 5. How would an arbitration ordinarily be commenced?**
- 6. Under what circumstances can the appointment of an arbitrator be challenged?**

5. ORGANIZING THE PROCEEDING

Preliminary Steps

It is always useful in an international commercial arbitration to convene a preliminary meeting once the arbitral tribunal has been constituted. At that stage, control of the procedure relating to the arbitration proceedings passes, in practical terms, from the parties to the tribunal.

The tribunal would usually wish, at the outset, to establish a framework for the proceedings as soon as possible.

Where the parties and their representatives come from different cultural backgrounds or different legal systems, a meeting with the parties is useful to ensure that the arbitral tribunal and the parties have a common understanding of how the arbitration is to be conducted and to establish a carefully designed framework for the conduct of the arbitration. However, if for reasons of convenience or expedition, it is not practical to convene a meeting for the various parties to meet in person, a preliminary meeting can be conducted by video or telephone conference.

None of the major institutional arbitration rules impose an obligation to hold a preliminary meeting nor do they prohibit the holding of one. In practice, it is always useful for the tribunal to hold a preliminary meeting.

Preliminary meetings

The first preliminary meeting provides a useful opportunity for representatives of the parties to meet each other before actually meeting the arbitral tribunal. They can then reach a position on various matters, including the question of the amount of the arbitrators' fees and expenses and an agreed time-table for certain interlocutory steps, such as the exchange of pleadings and submissions.

Representation

Each party should be represented at the preliminary meeting by persons with authority and knowledge to take decisions, both in discussions with the other party's representatives and during the course of the meeting with the arbitral tribunal itself.

Matters to be determined at preliminary meetings

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 should try to suggest solutions but, where the parties are unable to agree, the arbitral tribunal has no alternative but to make a decision. This may be done immediately or the decision may be reserved and notified to the parties later. It is unusual for a preliminary meeting to extend beyond a day, and it may well be completed within a shorter period.

The specific matters that need to be determined at a preliminary meeting depend partly on the law governing the arbitration and partly on whether the parties have already subjected the arbitration to a set of 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 connexion with their fees. This would have been dealt with by the institution, which may have obtained from the parties an advance to cover the costs of the arbitration, including the tribunal's fees.

Tribunals frequently find it useful, prior to the preliminary meeting, to send to the parties an agenda or checklist of the matters to be discussed at the meeting. In ICC arbitrations, the arbitral tribunal is required to draw up a document defining the tribunal's Terms of Reference and a provisional time-table in consultation with the parties.¹⁰

**UNCITRAL Notes on
Organizing Arbitral
Proceedings**

In 1996, UNCITRAL adopted and produced the UNCITRAL Notes on Organizing Arbitral Proceedings. This is a highly useful document for parties and the tribunal in international arbitrations to take note of in planning the effective conduct of the proceedings. The purpose of these Notes is set out in paragraph 1 of the Notes as follows:

“The purpose of the Notes is to assist arbitration practitioners by listing and briefly describing questions on which appropriately timed decisions on organizing arbitral proceedings may be useful. The text, prepared with a particular view to international arbitrations, may be used whether or not the arbitration is administered by an arbitral institution”

The Notes provide a list of matters that the arbitral tribunal may need to consider when it organizes the proceedings. This list is not meant to be exhaustive or definitive, but provides a valuable checklist of the points the arbitral tribunal may wish to consider, including:

- the adoption of a set of procedural rules, in the event that the parties have not already done so;
- the language of the proceedings, the language that is to be used in the hearings; and the need (if any) for translation of oral presentations and documents, and the costs involved;
- the place of the arbitration and its implications, if the place has not already been decided upon by the parties;
- The possibility to hold hearings outside the place of the arbitration;
- administrative services: if the arbitration is not being administered by an institution, the arbitral tribunal may determine who will be responsible for the organization of the arbitration; the appointment by the tribunal of a secretary and his functions;
- deposits in respect of costs;
- confidentiality of information: the arbitral tribunal may need to make arrangements to ensure confidentiality;
- routing of information: the arbitral tribunal may consider arrangements for the means of communications between the parties;

¹⁰ Art 18, ICC Rules.

- the exchange of written submissions: the arbitral tribunal should establish the conditions for the submission of further written submissions including the number, content and time-table of any such submissions;
- points in issue: the arbitral tribunal may prepare a list of issues and the order in which they should be decided and determine precisely the relief that is sought;
- the possibility of settlement negotiations: the arbitral tribunal should consider the extent (if at all) to which it should offer to facilitate settlement negotiations;
- documentary evidence: the arbitral tribunal may set time-limits for the submission of documents and determine the consequences of late submission; it should also determine whether the parties are going to be compelled to produce documents;
- physical evidence: the arbitral tribunal may make arrangements for any physical evidence to be presented as well as any site inspections it may wish to undertake;
- witnesses: the arbitral tribunal may wish to determine:
 - (a) the advance notice required concerning witnesses and the nature of the statement of the witness;
 - (b) the possibility of pre-hearing witness depositions;
 - (c) the manner in which the hearing of witnesses will take place, and the degree of control the arbitral tribunal wishes to exercise;
- experts and expert witnesses: the arbitral tribunal may wish to consider appointing an expert to report to it; determine how such a person is to be chosen; determine the terms of reference for the expert and how the parties are to comment on such terms of reference;
- hearings: the arbitral tribunal may wish to decide on some or all of the following matters concerning hearings:
 - (a) should hearings be held; if they are to be held, how they are to be structured;
 - (b) should there be a limit on the time that each of the parties has to present arguments and the order in which the parties should present arguments;
 - (c) the length of the hearings; whether a record should be kept of the proceedings and how they are to be kept;
 - (d) whether the parties should be allowed to submit a summary of their oral arguments.
- multi-party arbitrations: the points in issue, their order and the manner in which parties will participate;
- filing of award: if an award needs to be filed with a national court or elsewhere, who will do it.

Other preliminary issues

There may be some fundamental issues that the arbitral tribunal may need to address at an early stage of the arbitration, to avoid disputes arising later that might unnecessarily complicate matters:

- issues relating to jurisdiction;
- the determination of the law governing the arbitration;
- the determination of the law applicable to the substantive issues between the parties.

Liability and quantum issues

The arbitral tribunal may also need to consider whether or not liability and quantum should be dealt with separately. It may be convenient in complex or highly specialized disputes, for example, international trade, construction projects, intellectual property disputes, that certain issues on liability be tried before the issue of quantum is decided.

The quantification of claims and damages may be a major exercise. It may involve both the parties and the arbitral tribunal in the consideration of 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 often be convenient for the arbitral tribunal to determine 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.

In a complex construction dispute, for example, the respondent may raise a number of different defences, of which one might perhaps provide a complete defence to the claim. That defence may involve a question of law relating for example, to the interpretation of a term in the contract, for instance, whether a certain certificate that is missing is a condition precedent to the recovery of liquidated damages for delay in completion. If the answer is in the affirmative, the respondent succeeds and the claimant's claim for liquidated damages fails entirely. The determination of certain factual issues relating, for example, to whether the respondent should have been granted an extension of time such that there would be in fact no delay and hence, no liquidated damages payable, would then become irrelevant. In a case where the determination of an issue (especially one that would not take too long to hear and determine) would substantially dispose of the entire case, the tribunal would be quite justified in hearing that issue as a preliminary issue.

If, on the other hand, the issue did not, say, merely involve a question of law but also certain other factual issues that would result in the tribunal having to hear all the evidence in any event, the tribunal might well decline to hear the issue as a preliminary issue since it would not result in any substantial saving in time or costs. If, in the above example, the claimant claimed general damages for delay in the alternative to a claim for liquidated damages under the contract, then the same or similar evidence that would have been adduced in relation to the extension of time issue might still have to be heard by the tribunal. In that situation, the determination of the issue of interpretation may not be enough to dispose of the entire case, and the tribunal might be justified in declining to

hear the issue as a preliminary issue.

The tribunal should in any case encourage the parties to agree on the issues to be heard. If the arbitration is likely to be a complex and long drawn affair, the tribunal might also give directions on which issues are to be heard first, the order in which the issues are to be heard and whether they should be heard in separate tranches. An effective “case management” approach by the tribunal would make the arbitration run more smoothly and cost-efficiently.

Fast track arbitrations

Whilst it may be in the claimant’s interest to want the arbitration to be concluded speedily so that he can recover quickly his claims against the respondent, the respondent might be quite content to let matters drag. The speed at which an arbitration progresses depends very much on the cooperation of the parties. However, before disputes arise and at the time the arbitration agreement is being negotiated, it would be possible for the parties to agree upon procedures that would accelerate the pace of an arbitration. In 1994, WIPO introduced the WIPO Expedited Arbitration Rules which aimed to introduce a “fast track” procedure. Under these rules, certain statements would have to accompany the Request for Arbitration and Answer, time limits were shortened, hearings could not exceed three days and the case would always be before a sole arbitrator. Other arbitral institutions have a similar procedure available.

Issuance of Directions

The tribunal should, as soon as practicable after the preliminary meeting, issue written directions in respect of the matters that it has directed the parties to comply with, in order for the arbitration to progress to a hearing. The tribunal would have endeavored to guide the parties towards agreement on the procedural steps to be taken as well as a timetable. Where the parties have not been able to agree on certain matters, the tribunal would have to take control and issue appropriate directions or orders.

Depending on the nature and subject matter of the dispute and its complexity, the directions would likely include some or all of the matters referred to in the UNCITRAL Notes on Organizing Arbitral Proceedings, referred to above.

Written Submissions

Usually the first step that would be taken once the arbitral tribunal has been appointed and the procedure established would be an exchange between the parties of some form of written submissions. In an exceptional case, an arbitration may proceed without any such documents; but this is only practicable where both parties and the arbitrators are fully aware of the issues in dispute and are able to evaluate the parties’ respective contentions either by going straight to an oral hearing or, by inspection of the subject matter of the dispute. Such cases may be limited to “quality arbitrations” or “look-sniff” arbitrations which arise from trading in commodities and, which may allow the arbitrator to make a relatively quick determination as to whether certain goods are of a certain quality.

Article 23 of The Model Law provides 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.

Function of written submissions

Different expressions are used to describe the written submissions (as they are sometimes called), or written pleadings that the parties may be directed to exchange. Examples of the written submissions that the claimant would submit are “statement of claim”, “statement of case”, “memorial”, “points of claim”. The respondent’s written submissions may be called “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. Each side may wish to reply to fresh material produced by its opponent in subsequent written pleadings.

The different expressions used to describe written submissions may not mean exactly the same thing. In general, the terms “statement of claim” and “points of claim” are usually used to indicate a relatively concise document, the primary purpose of which is to define the issues and state the facts upon which the claimant’s claims are founded. In contrast, the expressions “statement of case” and “memorial” are sometimes used to describe a more comprehensive documentary submission, intended to include arguments on the legal issues as well as incorporating (in annexes or appendices) the documentary evidence relied upon, and sometimes, the written testimony of witnesses, together with any experts’ reports on matters of opinion.

The arbitral tribunal should make 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, conversely, time and money may be wasted in making an unnecessarily voluminous and exhaustive written presentation, when it is really intended to hold a full oral enquiry into the evidence at later hearings.

Unless the parties have already drawn up a detailed submission agreement, containing a list of the issues to be determined, the immediate function of the initial exchange of written submissions is to identify the scope of the arbitral tribunal’s mandate as to the issues it will have to decide.

It is also important for the arbitral tribunal to be cognizant of the issues to be determined for it to devise an appropriate procedural framework.

Another function of written submissions is to identify the facts and arguments in support of the parties’ positions and to effectively restrict them to those positions, so that there will be no unfair surprises later. However, as the arbitration progresses and the evidence emerges, it is not unusual for the parties to change the way in which their arguments are presented. Some contentions may be abandoned and new ones may be put forward on the basis of, for example, documents or evidence produced by the other party. This is a legitimate and indeed necessary process, provided that the issues before the arbitral tribunal do not become, in substance, completely different issues from those earlier defined.

It may be appropriate in some cases for written submissions to be a mere prelude 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 function of the written submissions is effectively limited to that of adequately 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.

Written pleadings in institutional arbitration

Under the ICC Rules, the claimant has to submit a "description of the nature and circumstances of the dispute giving rise to the claims" with his Request for Arbitration, and the respondent has to submit his "comments as to the nature and circumstances the dispute giving rise to the claims" in his Answer. The next stage is for the arbitral tribunal to draw up its "Terms of Reference" for signature by the arbitrators and the parties.

At this stage, any issues of the scope of the arbitration are likely to surface, since the respondent will no doubt object if the Terms of Reference contain a definition of the issues to be determined that includes matters that he considers are not covered by the arbitration agreement.

In some institutional arbitrations, the immediate purpose of the parties' initial statements is to facilitate the appointment of the arbitral tribunal, enable the arbitral tribunal to identify the issues, to make appropriate procedural orders and, (in ICC cases) to draw up its terms of reference. In virtually all cases of any substance, the arbitral tribunal will order the exchange of further written pleadings as well as the production of documentary evidence before the oral stage of proceedings is reached.

The UNCITRAL Rules envisage that the initial written pleadings submitted by the parties are not to be considered as final and definitive statements 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 give the following guidelines:

*"The periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defense) should not exceed forty-five days. However, the arbitral tribunal may extend the time limits if it concludes that an extension is justified."*¹¹

The LCIA Rules provide that after the parties have delivered the Request for Arbitration and Answer, written pleadings consisting of a "Statement of Case", "Statement of Defense", and "Statement of Reply" (and further equivalent written pleadings in the event of a counterclaim) follow each other within certain time limits. It appears from these Rules that (subject to any directions to the contrary from the arbitral tribunal) the written statements are intended to be the only written submissions in the arbitration, and are to be accompanied by copies of "all essential documents on which the party concerned relies".

¹¹ Art. 23.

The WIPO Rules¹² provide that:

- “ (b) *The Statement of Claim shall contain a comprehensive statement of the facts and legal arguments supporting the claim, including a statement of the relief sought.*
- (c) *The Statement of Claim shall, to as large an extent as possible, be accompanied by the documentary evidence upon which the Claimant relies, together with a schedule of such documents. Where the documentary evidence is especially voluminous, the Claimant may add a reference to further documents it is prepared to submit.*”

The ICSID Rules describe 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. The Rules allow for simultaneous exchange of pleadings, if the request for arbitration was made jointly. 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. 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.”

Timing of the exchange

Written submissions are normally exchanged sequentially, so that the claimant sets out its position first and the respondent then answers. If there is a counterclaim, the respondent should submit his counterclaim at the same time as his answer to the claimant’s claim and his document is often known as an “answer and counterclaim”, or “defence and counterclaim”. The claimant then submits his defence to the respondent’s counterclaim; he may also be allowed to submit a reply or rejoinder to the respondent’s answer.

In exceptional circumstances, the arbitral tribunal may order that the parties submit their written pleadings simultaneously. Each party will exchange a written submission of its claims with the other on a given 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 wishing to be put in the position of being respondent. (This is most likely to occur where a government is a party, and considers that it does not wish to be depicted in the role of a respondent.)

¹² Art. 41(b) and (c).

Communication of written pleadings to arbitral tribunal

At the time the written submissions are served by a party on the other, a copy is usually served on the arbitral tribunal at the same time. An alternative is that the arbitral tribunal receives a complete set of documents after the written stage of the arbitration is completed. The first is more frequently adopted. It enables the arbitral tribunal to study the case as soon as it receives the documents and avoids the need to devote a substantial period of time to reading many volumes of documents in a short period of time after the written stage is completed. Many arbitrators prefer therefore, to receive the written pleadings at the same time as one party submits them to the other. It is also useful for the arbitral tribunal to have copies of a particular pleading in order to be able to evaluate quickly the merits of any application that may be made (for example for an extension of time for a reply, or an application for interim measures of protection).

Amendments to the claim or defence

It is not uncommon that during the course of the arbitration, a party may find new evidence or locate a new witness, or finds it necessary to add a new claim or put his case in a different way. In these circumstances, he may want to amend or supplement his pleaded case. The arbitral tribunal will usually allow such amendments unless either the amended claim falls outside the scope of the arbitration agreement (and hence, outside the arbitrator's jurisdiction), or the application to amend is made so late that it would cause such prejudice to the other party (if the amendment was allowed) that an award of costs would not provide adequate compensation.

The UNCITRAL Rules provide:

“During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitrator clause or separate arbitration agreement.”
Article 20

Default of a party

It is not unusual for one party to default in complying with an order or direction by the arbitral tribunal to serve a pleading. (In the case of a respondent, this would be the statement of defence or answer to the claimant's statement of claim.) This may happen where the respondent, at the outset, does not wish to participate in the arbitration. In this situation, the arbitral tribunal should still continue with the proceedings. Most institutional rules require the tribunal to continue with the proceedings, but without treating the respondent's failure as an admission of the claimant's allegations. The tribunal would ordinarily not have the power to issue a “default” award in favour of the claimant by reason of the respondent's failure to comply with a procedural order. It must still make a determination on the claims presented in the arbitration hearing having regard to the submissions and evidence presented to it.

On the other hand, if the claimant fails to submit a statement of claim in accordance with the arbitral tribunal's order or direction, the arbitral tribunal may be justified in terminating the proceedings.

The UNCITRAL Rules contain provisions relating to a party's default in communicating his statement:

“If, within the period of time fixed by the arbitral tribunal, the claimant has failed to communicate his claim without showing sufficient cause for such failure, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings. If, within the period of time fixed by the arbitral tribunal, the respondent has failed to communicate his statement of defence without showing cause for such failure, the arbitral tribunal shall order that the proceedings continue.” Article 28(1)

The Model Law provides:

“Unless otherwise agreed by the parties, if, without showing sufficient cause

- (a) the claimant fails to communicate his statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;*
- (b) the respondent fails to communicate his statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;*
- (c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.” Article 25*

5.1 Test Your Understanding

- 1. What do you understand by the term “preliminary meeting”?**
- 2. Identify five matters that may be discussed or raised at a preliminary meeting.**
- 3. What statements would the parties ordinarily exchange in the course of an arbitration prior to the hearing?**
- 4. What is the function of written statements like a statement of claim or statement of defence?**
- 5. What recourse, if any, would a claimant have if a respondent fails to serve a statement of defence in accordance with a direction or order from the arbitral tribunal?**

6. EVIDENCE

General

There are many ways in which evidence can be presented to the arbitral tribunal. Evidence can also take different forms such as documentary evidence, testimony of witnesses of fact and expert evidence. The object of presenting evidence to the arbitral tribunal is to allow the arbitral tribunal to reach its findings on disputed issues of fact and disputed issues of *opinion*.

Disputes of fact are of course commonplace in arbitrations. For example, the claimant may contend that the respondent committed a breach of a supply contract by failing to supply goods in accordance with the specification agreed in the contract. If the respondent's defence was that the goods that were delivered were of the correct contractual specification, and hence, there was no breach of contract on the respondent's part, the tribunal may have to determine whether the goods match the agreed specification. This would involve an issue of fact (as to what goods were actually supplied). The parties may not however be in agreement as to the true interpretation of the contractual specifications. In that case, if technical issues were involved, expert opinion may also be relevant as to how the specification ought to be construed and whether the goods complied with the technical specifications.

The dividing line between "fact" and "opinion" may not always be clear. In some legal systems, issues relating to "foreign" law may be treated as issues of fact.¹³ In most international arbitrations however, questions of law, whether they are regarded as "foreign" to the members of the arbitral tribunal are treated as arguments of law to be presented to the tribunal.¹⁴

Common and civil law procedure

As noted above, there are certain differences in the approaches taken in common law countries, which adopt what is generally called an adversarial system, and in civil law countries, which favour what is generally called an inquisitorial system. In the former, the judge leaves it to the parties to present their arguments and the evidence, and he then rules on the basis of what the parties present before him. He may question witnesses but adopts largely a passive role in the process. In the inquisitorial system, the judge takes a far more active role in the conduct of the proceedings and the presentation of evidence, including the examination of witnesses. The judge is generally not bound by the same technical rules of evidence as exist in the adversarial forum. The cross-examination of witnesses, the usual device employed to test a witness's credibility in the adversarial system, would be rare in the inquisitorial system of justice.

Admissibility

In international arbitrations, the tribunal's task, whether it is composed of arbitrators from common law or civil law countries, is to establish the facts

¹³ In common law countries, foreign law is usually proved by calling an expert witness to give evidence on the foreign law. In other countries, foreign law may be regarded as just a question of law.

¹⁴ The question whether a particular issue is a question of fact or question of law may have relevance to appeals in some countries where appeals only on grounds of error in law, but not fact, may be made.

necessary for the determination of the issues between the parties. It will be reluctant to allow any strict rules of evidence to prevent the tribunal from achieving this goal. There would accordingly be less reliance upon strict technical rules concerning, for example, the admissibility of evidence during the course of the proceedings.

Such arbitral tribunals, particularly if they consist of experienced members from different systems (who may then be less rigid in following the traditional court systems of their own countries), would be more prepared to adopt a flexible approach to procedure, particularly with regard to the presentation of evidence. It is unlikely that a party will be prevented from submitting evidence that may assist the arbitral tribunal in establishing the truth in relation to disputed issues of fact. For example, the Iran-United States Claims Tribunal developed an interesting practice¹⁵ concerning the admissibility of testimony of individuals concerned with the outcome of the case, including employees of a corporation. Under the civil law system, such testimony would not be admissible, whilst in the common law system it can be received and weighed taking due account of the source. The Iran-United States Tribunal treated “interested persons” not as witnesses but as representatives of the parties providing “information” to the Tribunal.

The International Bar Association has published the IBA Rules on the Taking of Evidence in International Commercial Arbitration, (2nd Edition, 1999) which sets out a regime for the presentation of evidence in international commercial arbitrations. These rules may be used as a guide for parties to develop their own procedures on the presentation and reception of evidence “particularly those from different legal transactions”.¹⁶

Burden of proof

The practice of international arbitral tribunals is to require each party to prove the facts upon which it relies in support of its case. The burden of proof is said to be on that party. This practice is recognized in the UNCITRAL Rules:

“Article 24(1) Each party shall have the burden of proving the facts relied on to support his claim or defence.”

The degree or standard of proof that must be achieved in practice before an international arbitral tribunal is not capable of exact definition, but may be said to be close to a “balance of probability”. This standard is to be distinguished from the concept of “beyond all reasonable doubt” required in criminal cases in certain countries, which represents a higher standard.¹⁷

Methods of presenting evidence

There are different methods by which evidence may be received by the arbitral tribunal, depending on the nature of the evidence. The usual ones are:

¹⁵ See *Law and Practice of International Commercial Arbitration (3rd Edition): Redfern and Hunter*, 314.

¹⁶ Preamble to the IBA Rules on the Taking of Evidence in International Commercial Arbitration.

¹⁷ eg. *England and the United States*.

- the production of contemporary documents;
- the testimony of witnesses of fact;
- the opinions of expert witnesses; and
- the inspection of the subject-matter of the dispute.

The purpose of presenting evidence to the tribunal is to discharge the burden of proof of a certain fact to the satisfaction of an arbitral tribunal. It is important to recognize that not only are there different methods available to present evidence, but the tribunal is also entitled to give different *weight* to the evidence presented, as befits the nature and quality of the evidence presented.

Production of documents

In international commercial arbitrations, the arbitral tribunal may consider the best evidence that may be presented to be documents which came into existence at the time of the events giving rise to the dispute (sometimes called contemporaneous documentary evidence). This may be contrasted with the common law system, where most facts are proved by direct oral testimony, and documentary evidence is usually introduced by a witness in oral evidence. However, documentary evidence is favoured by international arbitral tribunals and the evidentiary weight of contemporaneous documentary evidence may be regarded as more compelling than oral evidence that is unsupported or not tested by an effective challenge.

The authenticity of documents must however be capable of being proved 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, such as if it is thought that the document was forged or fabricated.

In some common law countries, an automatic “discovery” procedure is practised in litigation in their national courts. This “discovery” procedure requires the parties to disclose the existence of all relevant documents, even though they may be unfavourable to that party’s contentions as long as they are relevant to the issues in the case. Confidential internal memoranda may also be required to be disclosed. This automatic discovery procedure is not usually applied in arbitrations, and the extent of document disclosure is left to the parties to agree. If they choose to have no document disclosure or limited document disclosure, the tribunal would not interfere with this. Where the parties have not agreed upon such rules for document disclosure, the tribunal may be called upon to decide the extent it will be permitted, if at all.

The LCIA Rules provide for the arbitrators to order the parties to produce those documents in their possession or power.¹⁸

Article 24(3) of the UNCITRAL Rules provides:

“At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine.”

¹⁸ LCIA Arbitration Rules, Art. 22(1)(e).

If a party fails to comply with an arbitral tribunal's order for production of documents and no reasonable excuse is given, the arbitral tribunal is entitled to draw an appropriate adverse inference from that party's failure in relation to the particular issue in respect of which the production of documents was ordered. Some institutional rules provide expressly for an inference to be drawn. For example, the ICSID Rules state:

“Article 34(3): The parties shall co-operate with the Tribunal in the production of the evidence and in the other measures provided for in paragraph (2). The Tribunal shall take formal note of the failure of the party to comply with its obligations under this paragraph and of any reasons given for such failure.”

In institutional arbitrations, the production of documents is usually governed by the rules of that institution. In ICC arbitrations, the parties are required to produce the documents on which they rely with their initial statements, delivered with the Request for Arbitration and the Answer.¹⁹ In practice, contemporary documents are invariably produced by the parties in the subsequent written pleadings or delivered pursuant to a procedural order made by the arbitral tribunal.²⁰

The UNCITRAL Rules provide that:

*“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”.*²¹

The LCIA Rules provide that:

*“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 concerned relies and which have not previously been submitted by any party, and (where appropriate) by any samples and exhibits.”*²²

An arbitral tribunal would not have the power to order a third party, i.e. a person or party who was not a party to the arbitration, to produce documents in the possession of the third party. However, the arbitration laws of many countries allow a third party to be subpoenaed to attend the hearings to give evidence and to produce documents and, the courts can assist the arbitral tribunal in enforcing the attendance of witnesses.

On a practical level, the arbitral tribunal may issue directions as to precisely how documents are to be presented (if they have not already been presented together with the statement of case or statement of defence). The tribunal may direct the parties to collate the documentary evidence in the form of one or more volumes of documents, in chronological order with each page numbered (or paginated) for use at the hearing. The arbitral tribunal and the

¹⁹ ICC Arbitration Rules, Arts 4 and 5.

²⁰ ICC Arbitration Rules, Art 20(5).

²¹ Art 18.

²² Art. 15.6.

parties would have identical sets of documents for ease of reference. If there are a huge number of documents, it may be a good practice to identify the most important documents and include them in a separate bundle, sometimes called a core bundle. It is sometimes also helpful for the parties to agree whether the documents are “agreed” in the sense that they are accurate copies of existing documents and their authenticity is not being challenged. If one party disputes a document’s authenticity, then the party relying on that document will know this in advance so he can take appropriate steps to prove this fact.

Translations

The parties would usually have agreed in advance the language in which the arbitration will be conducted. If the documents are not in that language, translations of documents would have to be provided. The original document together with the translated version should be submitted.

Testimony of witnesses of facts

The method by which the testimony of witnesses is presented depends on the preference of the parties and the arbitral tribunal and, may be shaped and influenced by their background – whether they are used to common law or civil law traditions. Frequently, a mixture of the two systems is adopted. The primary objective of the arbitral tribunal, in relation to the procedural aspects of the taking of evidence of witnesses should be to shorten the oral stage of the proceedings so far as practicable. The common law system usually calls for the witnesses to be subject to an “examination-in-chief” (“direct examination”) by the lawyer of the party calling that witness, followed by cross-examination by the opposing party’s lawyer and re-examination (“re-direct”) by the first party.

In international commercial arbitration, it is not considered an essential practice that witnesses should be heard orally in all cases.

Indeed, in a case that went before the English courts (in which the usual practice is that the oral testimony of witnesses should be heard), the English courts took the view that it was not an infringement of any rule of English public policy for an arbitrator to decline to hear oral testimony. The court, in its judgment stated:

“Article 20 of the ICC Rules merely provides that the arbitrator ‘shall have the power to hear witnesses’. It gives him a discretion but imposes no obligation ... Indeed, the procedure followed by the arbitrator in this case is in my experience the usual procedure in ICC and other Continental arbitrations. There can, therefore, be no question of any infringement of any rule of English public policy.”²³

In that case, the dispute was said to be essentially of a “legal” nature.

However, where any investigation into the factual background of the dispute is necessary and it is important for the tribunal to be in a position to properly

²³ *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyd’s Rep 223 at 270.

evaluate the factual issues, an arbitral tribunal should hear the evidence of witnesses at a formal hearing of the case (unless it has been agreed that the case should proceed on the basis of documents only).

Written witness evidence

A common method of presenting the evidence of witnesses is by means of submitting written statements of the witnesses. These written statements may be submitted on oath (in the form of affidavits) or sometimes, simply signed by the witnesses as witness statements. Each party then indicates to the arbitral tribunal which of the other party's witnesses should be required to attend the hearing for the purpose of being cross-examined. The arbitral tribunal may also indicate to the parties which, if any, of the witnesses it wishes to hear in person. However, the arbitral tribunal would seldom require a witness to be present if neither party requires his attendance.

Most institutional rules do not usually contain any specific or detailed provisions governing the procedure for witness evidence to be presented to the arbitral tribunal.²⁴ Accordingly, the procedure to be followed under such rules is dealt with by agreement of the parties or, failing agreement, at the discretion of the arbitral tribunal. Either party may request that the witness attend, subject to the discretion of the arbitral tribunal. If the witness fails to attend to give oral testimony or be subject to cross-examination, his failure may affect the weight to be given to his evidence or, result in it being excluded in appropriate circumstances.

The evidentiary weight to be given to witness evidence rests with the arbitral tribunal. The UNCITRAL Rules provide:

“The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.” Article 25(6)

Arbitral tribunals generally give less weight to uncorroborated witness testimony than to evidence contained in contemporaneous documents. Greater weight would also be given to the evidence of a witness who has been tested by cross-examination, or by an examination by the arbitral tribunal. The untested evidence of a witness who has a vested interest in the outcome of a case may be given less weight than the evidence of an independent witness.

Expert evidence

The evidence that may be presented to an arbitral tribunal may, where that is required by the issues in the case, take the form of expert opinion. Some issues of fact involve essentially matters of opinion, particularly in technical matters or matters involving foreign law. The determination of such an issue may sometimes only be made by the arbitral tribunal with the assistance of experts, unless it possesses the relevant expertise itself. In such circumstances, the arbitral tribunal may appoint its own expert or experts or, more commonly, the parties will present expert evidence to the tribunal for the arbitral tribunal

²⁴ Article 20.3 of the LCIA Rules however, provides for the testimony of a witness to be presented in the form of a signed statement or a sworn affidavit.

to evaluate, after a process of cross-examination or by some other methods such as the appointment by the arbitral tribunal of its own expert.

The arbitral tribunal may for reasons of expediency and cost, limit the number of experts each side may present.

Experts appointed by the arbitral tribunal

Where matters of a specialist or technical nature are involved, an arbitral tribunal may need expert assistance to help it understand the technical aspects better and may need to engage experts with suitable experience. For example, civil engineering experience may be required in an engineering dispute, or quantity surveying experience may be required in a construction dispute involving measurement of quantities, or accounting experience may be needed in a dispute involving a company's accounts.

The arbitration agreement or institutional rules incorporated in the agreement may give the arbitral tribunal express power to appoint experts. The UNCITRAL Rules provide for the appointment of an expert by the tribunal in the following terms:

- “ 1. The arbitral tribunal may appoint one or more experts to report to it, in writing, on specific issues to be determined by the tribunal. A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.
2. The parties shall give the expert any relevant information or produce for his inspection any relevant documents or goods that he may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision.
3. Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties who shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his report.
4. At the request of either party the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing either party may present expert witnesses in order to testify on the points at issue. The provisions of article 25 shall be applicable to such proceedings.” Article 27

In the absence of any 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.

Most systems of law recognize the principle that, unless authorized 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. But, as long as the arbitral

tribunal is merely taking advice from an expert – and not attempting to delegate to him the task of determining or deciding the very same issue that the tribunal has to decide – there should not be any objection to the appointment of an expert by an arbitral tribunal. An arbitral tribunal may need expert technical assistance to understand complex technical matters in order to arrive at a proper decision. Accordingly, even in the absence of an empowering provision of the governing law, an international arbitral tribunal has the power to call upon expert assistance if needed. However, the arbitral tribunal should however give the parties an opportunity to comment on any expertise upon which the arbitrators have relied, including their own, if any. The tribunal may also wish to consult the parties on the selection of the expert and the terms of reference of the expert's appointment.

The presentation of expert evidence

Expert evidence is usually presented in the form of written reports which may be submitted at the same time as the written statements of witnesses of fact, but in any event well in advance of the hearing. If each party presents conflicting evidence of technical opinion, the expert witnesses must be prepared to appear before the arbitral tribunal for examination.

At the hearing, the expert for each party may be heard immediately after the factual evidence has been submitted by that party or both parties may be heard simultaneously after both sides have presented the factual evidence. In the latter case, the experts may be seated together in front of the arbitral tribunal and each asked to comment and respond to the opinions of the other. This enables the arbitral tribunal to hear the opinions of the experts on specific issues together and at the same time, so that any differences in opinion may be more immediately and readily identified and the experts can be asked to clarify issues, as it were, on the spot.

It would also be possible, although expensive, for the arbitral tribunal to appoint one or more experts of its own, in order to assess the expert evidence produced by the parties. This might be used where the technical issues involved are highly complex, or where the amounts at stake are very large to justify the expense. The final decision however should still rest with the tribunal and not the tribunal's expert, whose role is still to assist the tribunal.

Inspection of the subject matter of the dispute

Another method of obtaining evidence is for the arbitral tribunal itself to inspect the subject matter of the case. This is usually by means of an inspection of the site (for example, in a construction dispute) or inspection of goods (for example in a commodity or quality dispute).

Depending on the circumstances, a site inspection may be very useful to better understand the background of the dispute and the parties' contentions and evidence. As an alternative, if the costs of arranging and conducting the inspection are not in proportion to the benefits that might be gained, the arbitral tribunal may ask for photographs, models or videotapes to be presented.

As regards the procedure for a physical site inspection, the arbitral tribunal should be careful to ensure that the principle of equality of treatment is strictly

observed. In particular, the arbitral tribunal should normally make a site inspection in the presence of representatives of both parties. It should also not put questions directly concerning the case to persons working on the site, unless the advocates for the parties are given the opportunity also to ask questions of those persons. The arbitral tribunal should also not inspect a site alone and without being accompanied by the parties.

The UNCITRAL Rules and the LCIA Rules do not confer any express power on the arbitral tribunal to inspect the subject matter of the dispute, although they do require the parties to make available any relevant information to any experts appointed by the arbitral tribunal.

However, the WIPO Rules require the parties to allow the tribunal to inspect the site and any relevant subject matter.²⁵

6.1 Test Your Understanding

- 1. What are the different methods by which a party may present evidence in an arbitration?**
- 2. What do you understand by the term “expert evidence”?**
- 3. What do you understand by the term “burden of proof”?**
- 4. What do you understand by the term “weight of evidence” and discuss how an arbitrator may accord different weight to different types of evidence, citing examples.**
- 5. An arbitrator believes it would be useful for him to conduct a site inspection. Does he have the power to order that a site inspection be conducted?**

²⁵ Art. 50.

7. CONDUCTING THE HEARING

Types of hearings

Hearings may be conducted on the basis of “documents only” or more commonly, an oral hearing will be held at which the representatives of the parties have an opportunity to make oral submissions to the arbitral tribunal, and the arbitral tribunal will ask for clarification of matters contained in the written submissions and hear the evidence of witnesses.

A “documents only” arbitration is one which, as the name suggests, is conducted only by reference to documents presented to the parties, as for example, under the rules of the London Maritime Arbitrators Association in connexion with disputes arising out of charter parties and related documents.

The major institutional rules provide for a hearing or hearings to take place at the request of either party, or on the motion of the arbitral tribunal itself. An arbitral tribunal may also proceed to make its award without a hearing if the parties have expressly so agreed. The Model Law provides:

“Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.” Article 24(1)

Organization of the hearings

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. In practice, hearing dates are fixed after consultation with the parties on the dates convenient to the parties, their respective lawyers and the arbitral tribunal. In any case, it is essential that adequate notice of the hearing is given to the parties. The UNCITRAL Rules provide:

“In the event of an oral hearing, the arbitral tribunal shall give the parties adequate advance notice of the date, time and place thereof.” Article 25(1)

The Model Law states:

“The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purpose of inspection of goods, other property or documents.” Article 24(2)

The administrative arrangements for the hearing may be made by one of the parties, normally the claimant, with the agreement of the other. They may

also be made by the arbitral tribunal or by the administrative secretary appointed by the arbitral tribunal if one is appointed. In some administered arbitrations, for example under the LCIA, the institution may make the arrangements.

The administrative matters could include:

- arrangements for interpreters and translators;
- mechanical audio recordings;
- transcription services;
- booking of the hearing room (at a hotel or an arbitration centre with the requisite support, such as photocopying, telecommunications and video conferencing facilities).

Representation

As arbitration is essentially a private process, hearings being held *in camera*, and outsiders only allowed to be present if the parties agree. Except in certain commodity arbitrations, an arbitral tribunal will always permit a party to be represented by a lawyer or its designated representative, in order to comply with the general principle that a party must be given a proper opportunity to present its case. The law of the place of the arbitration must also be respected and, in this connexion, the laws must be checked to see whether the parties are allowed to be represented by legal practitioners who may not have been admitted to practice as such under the national laws of that country.

An arbitral tribunal may not exclude a party to an arbitration from the hearing if he wishes to be present, unless perhaps that party disrupts the course of the hearing in a manner as to make it impossible for the arbitral tribunal to conduct the proceedings in an orderly manner. 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.

Pre-hearing conferences

A meeting or conference prior to the actual hearing may be desirable to deal with matters that may not have been dealt with earlier (for example, at the preliminary meeting referred to elsewhere in this Chapter). At a preliminary meeting held at a very early stage of the proceedings, for instance, before the written submissions or pleadings are served, it may be difficult to estimate the length of the hearing, particularly if the live testimony of witnesses is involved. The parties may not have at that stage determined the number of witnesses, factual or expert, they intend to call. The arbitral tribunal may not have enough information to make any useful decisions to effectively plan or structure the hearings. It is therefore prudent for the tribunal to take stock of matters at an appropriate stage and, if it is not practical to deal with such matters through telephone conferences or correspondence, convene a further meeting with the parties.

Most of the institutional rules do not mention a pre-hearing conference. The WIPO Rules however provide:

“The Tribunal may, in general following the submission of the Statement of Defence, conduct a preparatory conference with the parties for the purpose of organizing and scheduling the subsequent proceedings.” Article 47

Procedure at the hearing

The procedure at the hearing may be carried out in different ways. The objective should be to keep the duration of the hearing to a minimum so far as practicable but bearing in mind always the principle of equality of treatment of the parties and that the parties should be given a proper opportunity to present their case, in accordance with any relevant applicable laws and public policy considerations.

The general practice is to permit each party to present a brief opening statement, the assumption being that the arbitral tribunal has already read the documents that have been submitted. The oral testimony of the witnesses for each party will then be heard; the claimant’s witnesses to be heard first. There is usually no examination-in-chief (“direct” examination) as the witnesses’ testimony would have been submitted in writing. A witness may be given the opportunity to elaborate or clarify what is in his written statement, or add new points, so long as this does not take too much time or introduce new material that may substantially alter the issues already identified by the written pleadings.

Examination of witnesses

In proceedings before international arbitral tribunals, an opportunity for cross-examination of witnesses is almost invariably given if a party requests it. Lawyers used to the adversarial system in common law jurisdictions would usually expect to cross-examine the opposing side’s witnesses to attack their credibility and test the quality of their recollections and evidence. However, lawyers and arbitrators from civil law countries may not be accustomed to this procedure.

The arbitral tribunal itself may examine the witnesses. Usually, the questions would be directed at those issues regarded as being essential to clarify or expand the information needed to reach their determination. Although the tribunal would not embark on a long series of questions to challenge the credibility of a witness, there may be cases where specific questions may have to be asked to test whether or not a witness’s statements are reliable.

Witnesses are sometimes excluded from the hearing room before they have given their testimony, although this practice may be varied by agreement of the parties. The UNCITRAL Rules provide that the arbitral tribunal “may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are examined”²⁶

²⁶ Art. 25.

Where a transcript of the evidence is taken, the parties may agree that the witness should be given an opportunity to correct the record of his evidence to reflect what he actually said.

After all the evidence has been called, in common law systems, the plaintiff in a court case will generally be allowed to present his closing submission or arguments last. In arbitrations, this practice is not strictly followed and the parties are permitted an equal number of opportunities to make their final oral submissions.

The parties may be invited to make their final closing submissions in writing.

Ex parte hearings

If one of the parties refuses or fails to appear despite proper notice of the hearing being given to him, the arbitral tribunal should proceed with the hearing and issue its award.

The task of the arbitral tribunal is to make a determination of the disputes submitted to it. Accordingly, even if a party fails to present its case or to appear at the hearing, the arbitral tribunal should consider the merits based on the available material before it and make a determination. Where it is the respondent who does not take part, the arbitral tribunal should still ensure that the claimant has proved its case based on the written submissions and evidence presented by the claimant, drawing such inferences as may be appropriate in the circumstances from the respondent's failure to appear or take part in the hearing. The tribunal may hold a brief hearing, on a *ex parte* basis, to review the claims and raise questions to satisfy itself that the claims are well founded. It should then make a reasoned determination of the issues.

If the written stages have been very comprehensive, the hearing may be brief and purely formal. On the other hand, if the written pleadings have been simple, and no documentary or witness evidence has been submitted in writing, the arbitral tribunal may probably consider it necessary to hear oral evidence before being satisfied that the party concerned has discharged the burden of proof in relation to the relevant issues.

Post-hearing matters

After the hearing, the arbitral tribunal may declare the hearings closed. The usefulness of declaring the hearing closed is to discourage the parties from submitting new material after the hearing, which will then require further procedural orders to enable the other party to reply. The UNCITRAL Rules state:

- “ 1. *The arbitral tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed.*
2. *The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own motion or upon application of a party, to reopen the hearings at any time before the award is made.*” Article 29

After the closing of the hearings the arbitral tribunal will proceed to make its award.

If before making the award, fresh matters came to light, the arbitral tribunal has the discretion to hear the new evidence or arguments. In exercising its discretion, the tribunal should take into account the reasons for the delay and whether the attempt to introduce the same was merely to frustrate or delay the proceedings and could actually have been produced earlier. In general however, the arbitral tribunal would prefer to determine a dispute with the benefit of all the relevant evidence in its possession. If the arbitral tribunal allows the new material to be submitted, it should give the opposite party an opportunity to respond. It may also, depending on the circumstances, award costs against the party introducing the fresh material.

7.1 Test Your Understanding

- 1. What is a “documents only” arbitration?**
- 2. What do you understand by the term “cross-examination”?**
- 3. Why is it useful to have a pre-conference hearing? What matters would be discussed at such a conference?**
- 4. If one party fails to attend the hearing, what can the other party or the tribunals do?**
- 5. Describe the order of presentation of opening submissions, written testimony and closing submissions of each of the parties at the arbitration hearing.**

8. FURTHER READING

- **Ceccon, R.** “UNCITRAL notes on organizing arbitral proceedings and the conduct of evidence: a new approach to international arbitration.” *Journal of International Arbitration* 14, n° 2: 67-85
- **David, R.**, *Arbitration in International Trade*, 255 (1985)
- **Domke, M.**, *Domke on Commercial Arbitration*, 326-27 (rev. ed. 1984)
- **Mustill, M. and Boyd, S.**, *The Law and Practice of Commercial Arbitration in England*, 253-54 (2d ed. 1989)
- **Redfern and Hunter, M.**, *Law and Practice of International Commercial Arbitration*, 205 (1991)
- **Wetter, J.**, *The International Arbitral Process*, 368 (1979)

9. ABBREVIATIONS

- **AAA Rules** - International Center for Dispute Resolution: American Arbitration Association, International Arbitration Rules (2001)
- **FNCCP** - French New Code of Civil Procedure
- **ICC Rules** - International Chamber of Commerce Arbitration Rules (1998), International Chamber of Commerce, ICC Pub. No. 447
- **ICC Court** – International Court of Arbitration of the International Chamber of Commerce
- **ICSID** - Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.
- **ICSID Rules** – ICSID Rules of Procedure for Arbitration Proceedings (2003)
- **LCIA** - Rules of the London Court of International Arbitration (1998)
- **UNCITRAL Rules** - Rules of Arbitration of the United Nations Commission on International Trade Law (1976), U.N. GAOR, 31st Sess., Supp. No. 17, at 34-50, U.N. Doc A/31/17, U.N. Sales No. E77.V.6 (1976)
- **UNCITRAL ML** - UNCITRAL Model Law on International Commercial Arbitration (1985), adopted by UNCITRAL on June 21, 1985, U.N. GAOR, 40th Sess., Supp. No. 17, U.N. Doc. A/40/17.