

# Arbitration Law

E: The Arbitration Hearing

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# 1. Approach

- Two approaches
  - Inquisitorial or Adversarial
  - What's the difference?

# 3. The Hearing

- 3.1 Oral Hearing
- Section 52 Article 25 UNCITRAL Model Law (Hearings and written proceedings)
  - (1) **Subject to any contrary agreement... 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...
  - (2) The parties shall be given sufficient **advance notice** of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.
  - (3) All statements, documents [, expert report or evidentiary document] or other information supplied to the arbitral tribunal by one party shall be **communicated to the other party...**

# 3. The Hearing

- 3.1 Oral Hearing
- Any factors that need to be considered before any hearing in respect of:
  - **Technology**
    - Video conferencing
    - Document management
    - Transcripts
  - **Language**
    - Interpretation
    - Translation

# 3. The Hearing

- 3.2 Documents only
  - What documents?
    - Discovery
    - Witness Statements
    - Experts' Reports
    - Written Submissions

# 4. Order of Proceedings

- **4.1 Order of proceedings**

- 4.1.1 Who has the burden of proving their case and what is the standard of proof?
- 4.1.2 Who should start?
- 4.1.6 What is the golden rule for Examination in Chief?
- 4.1.8 What is the golden rule for Cross Examination?
- 4.1.9 What are you trying to do in Re-examination?
- 4.1.12 Who should finish?

# 4.1 Order of Proceedings

- **4.1.1 Who has the burden of proving their case and what is the standard of proof?**
  - Burden – the Claimant
  - Standard – Balance of probabilities
- **4.1.2 Who should start?**
  - The Claimant
- **4.1.3 What should you start with?**
  - Claimant's Opening Speech
    - Often written submissions: **introduce case, and what is intended to prove** – i.e. a summary of the issues

# 4.1 Order of Proceedings

- **4.1.4 What is next?**
  - Claimant's case: the **evidence** – i.e. **witnesses and experts**
  - Examination in Chief – Claimant
  - Cross-Examination – Respondent
  - Re-Examination - Claimant
- **4.1.5 What is the purpose of Examination in Chief?**
  - To bring out your evidence
- **4.1.6 What is the golden rule for Examination in Chief?**
  - **Do not ask leading questions**
    - i.e. a question that suggests the answer
    - E.g. "You could not see him, could you?"
    - Avoid by asking: "who", "what", "when", "where", "how"



# 4.1 Order of Proceedings

- **4.1.7 What is the purpose of Cross-Examination?**
  - To limit or damage the opponent's case
  - To put your case forward
- **4.1.8 What is the golden rule for Cross-Examination?**
  - **Ask leading questions!** i.e. questions that suggest the answer.
  - E.g. “You had been drinking earlier that evening, hadn't you?”
  - Any more?
- **4.1.9 What are you trying to do in Re-Examination?**
  - Limit the Cross-Examination
    - Can only ask questions that **clarify points raised in Cross-Examination**
    - Do not ask leading questions

# 4.1 Order of Proceedings

- **4.1.10 What is after the Claimant's case?**
  - **Respondent's Case**
    - Could be a Respondent's Opening Speech (but rare)
    - The **evidence** – i.e. witnesses and experts
      - Examination in Chief – Respondent
      - Cross-Examination – Claimant
      - Re-Examination - Respondent
- **4.1.11 What is next?**
  - Closing Speeches
    - **Stating case and referring to evidence that has been adduced** at hearing to prove the arguments/issues raised.
    - Sometimes in writing – i.e. Written Submissions
- **4.1.12 Who should finish?**
  - Claimant
  - i.e. Order of Closing Speeches: **Respondent before Claimant**

# 4. Order of Proceedings

- 4.2 Hot Tubbing
  - What is it?
    - Slang for concurrent evidence
    - i.e. **multiple expert witnesses on the stand together**
  - Advantages?

# 4. Order of Proceedings

- 4.3 Rules
- **IBA Rules of Evidence Article 8 Evidentiary Hearing**
  - 2. The **Arbitral Tribunal** shall at all times have complete **control over the Evidentiary Hearing**. The Arbitral Tribunal **may limit or exclude any question to, answer by or appearance of a witness...** Questions to a witness during direct and re-direct testimony **may not be unreasonably leading**.
  - 3. With respect to oral testimony at an Evidentiary Hearing:
    - (a) the Claimant shall ordinarily first present the testimony of its witnesses, followed by the Respondent
    - (b) following direct testimony, **any other Party may question such witness**, in an order to be determined by the Arbitral Tribunal. The Party who initially presented the witness shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties' questioning;

# 4. Order of Proceedings

- 4.3 Rules
- **IBA Rules of Evidence Article 8 Evidentiary Hearing**
  - 3. With respect to **oral testimony** at an Evidentiary Hearing:
    - (c) thereafter, the **Claimant shall ordinarily first present the testimony of its Party-Appointed Experts**, followed by the Respondent presenting the testimony of its Party-Appointed Experts. The Party who initially presented the Party-Appointed Expert shall subsequently have the opportunity to **ask additional questions** on the matters raised in the other Parties' questioning;
    - (d) the **Arbitral Tribunal may question a Tribunal-Appointed Expert**, and he or she may be questioned by the Parties or by any Party-Appointed Expert, on issues raised in the Tribunal-Appointed Expert Report, in the Parties' submissions or in the Expert Reports made by the Party-Appointed Experts;

# 4. Order of Proceedings

- 4.3 Rules
- **IBA Rules of Evidence Article 8 Evidentiary Hearing**
  - 3. With respect to oral testimony at an Evidentiary Hearing:
    - (e) if the arbitration is **organised into separate issues** or phases (such as jurisdiction, preliminary determinations, liability and damages), **the Parties may agree or the Arbitral Tribunal may order the scheduling of testimony separately for each issue or phase;**
    - (f) the Arbitral Tribunal, upon request of a Party or on its own motion, may **vary this order** of proceeding, including the arrangement of testimony by particular issues or in such a manner that **witnesses be questioned at the same time and in confrontation with each other** (witness conferencing);
    - (g) the Arbitral **Tribunal may ask questions** to a witness at any time.

# 4. Order of Proceedings

- 4.3 Rules
- **IBA Rules of Evidence Article 8 Evidentiary Hearing**
  - 4. A **witness** of fact providing testimony shall **first affirm**, in a manner determined appropriate by the Arbitral Tribunal, that he or she **commits to tell the truth or, in the case of an expert witness, his or her genuine belief in the opinions** to be expressed at the Evidentiary Hearing. If the witness has submitted a Witness Statement or an Expert Report, the witness shall confirm it. The Parties may agree or the Arbitral Tribunal may order that the Witness Statement or Expert Report shall serve as that witness's direct testimony.
  - 5. Subject to the provisions of Article 9.2, the **Arbitral Tribunal may request any person to give oral or written evidence** on any issue that the Arbitral Tribunal considers to be relevant to the case and material to its outcome. Any witness called and questioned by the Arbitral Tribunal may also be questioned by the Parties.

# 5. Control of Proceedings

- **Problem with oral hearings** – expensive and time consuming
- **5.1 Chess clock procedure**
  - Parties **allocated set amount of time** (usually half each)
  - Divide up as they want
    - Opening statement, Questioning own witnesses, Cross-examination, Closing
  - Time keeping –
- **5.2 The Guillotine procedure**
  - Tribunal allocate a set amount of time for each part
    - E.g. Respondent's Cross Examination
    - Claimant's Submissions



# 6. Emergency Arbitrator Procedures

- The 2012 ICC Rules of Arbitration, Article 29:
  - Offers procedure to parties to seek urgent interim relief that cannot await the constitution of an arbitral tribunal
  - The emergency arbitrator's decision shall take the form of an order, by which the parties undertake to comply with
  - The emergency arbitrator shall not bind the arbitral tribunal, which can in turn annul or modify the order.
  - Emergency Arbitrator Provisions shall not apply if:
    - The parties agreed to opt out of them
    - The parties have agreed to another interim arbitral procedure

# 6. Emergency Arbitrator Procedures

- The 2012 ICC Rules of Arbitration, Appendix V:
  - Parties must apply to the Secretariat with a standardized application
  - Emergency arbitrator will be appointed within 2 days by The President
  - Any challenge of an emergency arbitrator must be made within 3 days of appointment notification
  - The Emergency Arbitrator shall establish a procedural timetable for the proceedings within 2 days, and shall conduct the proceedings in a matter in which he considers appropriate and fair

# Questions