Chapter 12

The Evidentiary Hearing

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§ 12:1 Evidentiary Hearings in Arbitration Compared to Trials

Although evidentiary hearings in large arbitrations increasingly bear many similarities to trials in courts of law, the two nevertheless are different in several important respects.

Understanding and appreciating the difference between the two types of hearings is a key requirement of effective advocacy in arbitration. While the remainder of this chapter discusses many specific differences between arbitration hearings and court trials, some general observations can be made here as well.

First, and rather obviously, there is no jury in an arbitration. As a result, the forms and styles of presentation sometimes directed toward the jury—such as folksiness, simple language, and (sometimes) bombast, among others—generally may be less useful.

Second, arbitrators often have specialized experience in the industry or subject matter of the dispute. Experienced arbitrators are not blank slates and will be informed by their considerable prior experience in the field; this means that counsel should study the arbitrators' prior work experience, cases, and qualifications well before the hearing, to better understand how the arbitrators may approach the dispute currently before them.

Third, counsel who are used to standing when addressing a court need to become comfortable addressing a tribunal while seated. Only a very small minority of tribunals allow addresses from a lectern.

Having said that, arbitral hearings and trials have one defining feature in common: It is vitally important to be effective during the hearing, which ordinarily is critical to the outcome of the dispute.

§ 12:2 Structure of the Evidentiary Hearing

§ 12:2.1 Typical Stages

The various stages and sequence of the evidentiary hearing are usually established during the prehearing conferences. In general terms, those stages are:

- Opening statements, in which the claimant generally goes first;
- Testimony from claimant's fact witnesses, followed by the respondent's fact witnesses;[1]

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1. As discussed below, in certain arbitrations, particularly international arbitrations, a witness's written statement serves as his or her testimony-in-chief, and the witness's live testimony therefore begins with his or her cross-examination. *See* section 12:4.2.

- Testimony from claimant's expert witnesses, followed by the respondent's expert witnesses;
- Closing arguments, in which the claimant generally goes first again.

In addition, at the beginning and close of each day of the hearing, the tribunal may address outstanding and new procedural issues that have arisen.

While this is a common structure for an arbitration hearing, it is not set in stone. In keeping with the flexible nature of arbitration, the parties and the tribunal can deviate from this structure when they consider it appropriate. For example, the tribunal may hear witnesses in the order it prefers, or even out of order (to accommodate witness availability). The tribunal may also choose to dispense with opening or closing statements or post-hearing briefing, although most tribunals will consult with the parties before doing so.

§ 12:2.2 Allocation of Time and the "Chess-Clock" Method

Arbitration hearings (especially in international arbitrations) may employ the "chess-clock" method, "under which each party . . . is allocated a specified amount of time, typically a pro rata share of the total hearing time reserved, to present its case."[2] Under a strict chess-clock method, "[a]ll time used by a party—for example, in examining or cross-examining witnesses, making or responding to objections, presenting arguments or statements, setting up audiovisual equipment, or locating witnesses wandering the halls—is charged against that party's allotted time," which is counted by the minute during the hearing.[3] In some cases, reasonable deviations should be made from the chess-clock method when it leads to onerous requirements. For example, parties should be granted a minimum amount of time, even if another party does not use all its allotted time. The chess-clock method guarantees each party an opportunity to take its full pro rata allocation of time; it does not permit a party to minimize the time it uses and then seek to limit the time allotted for the other side.

In lieu of the chess-clock method, the tribunal or the parties may establish a schedule for each opening and closing statement, and for each witness's direct and cross-examination (and redirect

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2. Henri C. Alvarez et al., *The Hearing on the Merits, in* THE COLLEGE OF COMMERCIAL ARBITRATORS GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION, 241, 265 (James M. Gaitis et al. eds., 4th ed. 2017).
3. *Id.*

examination), and require the parties to adhere to that schedule.[4] In such a case, reasonable allotments and adjustments may be made for time spent addressing tribunal questions and comments.

§ 12:2.3 Logistics, Including Transcription and Translation Services

Another aspect of the evidentiary hearing is arranging for its logistics, such as organizing a physical site for the hearing; retaining a transcriptionist; hiring a simultaneous translator, if needed; and other logistical details. Where the arbitration is administered (such as by the American Arbitration Association (AAA), the International Institute for Conflict Prevention and Resolution (CPR), or JAMS), the administering institute may assist the arbitrators and parties in making some of these arrangements. Counsel should also be prepared, however, to make these arrangements as necessary. Many litigation service providers also have experience working in arbitration hearings. For example, in New York, the New York International Arbitration Center is a state-of-the-art facility designed for hearings in international arbitration.

§ 12:3 Opening Statements

§ 12:3.1 Content and Purpose

At the outset of the hearing, counsel for each of the parties generally makes an opening statement. For counsel, the opening statement provides an opportunity to (1) clarify what counsel considers to be the pivotal issues in the case; (2) summarize the evidence presented in a light most favorable to the client; (3) establish the legal concepts that support the client's position; and (4) rebut the opponent's most prominent arguments.

For the arbitrators, opening statements not only refresh their recollection of matters previously briefed and documentary evidence previously introduced, but also serve as a guide to what to expect during the hearing. As one commentator succinctly puts it, "[y]our opening statement is an opportunity for you to let the arbitrator know what to expect. It provides a structure and a theme for your case."[5]

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4. *See id.*
5. Emma Leheny, *Presenting Your First (Or 100th) Arbitration: The Day of Hearing* 4, AM. BAR ASS'N LAB. & EMP. L. SEC., 3D ANN. CLE CONF. (Nov. 4–7, 2009), http://apps.americanbar.org/labor/lel-annualcle/09/materials/data/papers/021.pdf.

§ 12:3.2 Compared to Opening Statements in Court

The form of an opening statement in most arbitrations will differ from the "classic" approach to an opening statement found in a court of law. As an example of one difference:

> Arbitrators need not be concerned with enforcing the rigid rule often applied in jury trials that counsel's opening must be a statement of the evidence expected during the hearing but not an argument. Experienced arbitrators can readily distinguish evidence from argument.[6]

Moreover, there may already have been significant prehearing briefing on points of fact and law, including written witness statements and expert reports. As such, the classical opening statement refrain that "the evidence *will* show that" or "Mr. X *will* testify that" is not usually deployed in arbitration.

Opening statements in arbitration can differ from those in a court of law, especially those addressed to a jury, in other ways as well. For example, explicit appeals to emotion and prejudice are less likely to be effective on sophisticated arbitrators, as is "table thumping." (This does not mean, however, that counsel should fail to advocate for its client in a vigorous manner.) With respect to the summary of expert evidence, counsel should investigate whether arbitrators have specific experience on the matters subject to expert testimony, and calibrate the presentation of that evidence accordingly.

§ 12:3.3 Responding to Arbitrator Questions

Counsel should not be surprised if the tribunal is familiar with the details of the case and asks questions during the opening statement. As with any oral argument, counsel should prepare the opening in a flexible manner, permitting it to address the tribunal's questions, if any, as they come. Reading from a script can be less effective. At least one commentator has suggested avoiding the phrases "I will come to that later," or "that will become clear later," in responding to tribunal questions: an arbitrator himself, that commentator explains:

> I am too often disappointed when it doesn't become clear later. There may be good reasons for occasionally finessing an arbitrator's attempts to find out where you are going or what you mean . . . . Unless you are an acknowledged master strategist,

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6. Alvarez et al., *supra* note 2, at 286–87.

> however, you should be concerned when this is your too-frequent response to the chair's questions.[7]

Do not underappreciate the strategic benefit of tribunal questions; they provide insight into the arbitrator's approach to your client's position. "Welcome tribunal questions. . . . Every question is a window into what the arbitrator is thinking, and a clue to whether he is receiving on the same frequency on which you are broadcasting."[8]

§ 12:3.4 Use of Demonstratives

Demonstratives are also frequently used during the opening statement. The ability to use demonstratives, and when they will be exchanged between the parties, is usually established before the hearing begins.

Counsel should not underrate the effectiveness of demonstrative exhibits as a part of the presentation of a case. Tribunals often refer to well-constructed demonstratives as part of their deliberations. In this respect, counsel should spend the time necessary, before the hearing, to prepare slides that

- are attractive, are easy to read (in a reasonably large font), and use graphics and pictures in addition to text;[9]
- reflect and streamline the actual issues in dispute;
- not only summarize the factual issues, but also outline the legal arguments the tribunal will need to consider;
- advance the arguments and testimony that will arise (or did arise) during the hearing; and
- are supported by specific references to factual exhibits and written witness testimony, as well as quotations from relevant briefs, case law, statutes, regulations, and other sources of law.

At the same time, demonstrative exhibits should not distract the tribunal from counsel's oral submissions. This can often be achieved by providing an engaging presentation, while also turning off PowerPoint slides except when the slides are being referred to.

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7. Morley R. Gorsky, *Presentation Skills: A Quick Reference Guide for Advocates, in* AMERICAN ARBITRATION ASSOCIATION HANDBOOK ON COMMERCIAL ARBITRATION, 301, 303 (2d ed. 2010).
8. Franz T. Schwarz, *The Guide to Advocacy: Opening Submissions,* GLOBAL ARB. REV. (2016), http://globalarbitrationreview.com/chapter/1073013/opening-submissions#12 (statement of John Townsend).
9. Standardized PowerPoint templates prepared by law firm marketing departments are not always the best form for hearing demonstratives, whatever their versatility for business development.

§ 12:4 Fact Witnesses

§ 12:4.1 General Observations

After opening statements, the evidentiary hearing generally turns to the examination of each party's fact witnesses. The claimant's fact witnesses are usually examined first, followed by the respondent's fact witnesses.

The examination of witnesses in arbitration is similar to, but not exactly like, examining witnesses in litigation. There is no jury; as a result, it may be useful to adopt a neutral tone with the opposing party's witness, unless the witness gives you a good reason to change course.

Moreover, the time available for examination in an arbitration may be much more limited than in a litigation. So, counsel may find it necessary to be more direct and to the point, and to concentrate on the most essential areas.

§ 12:4.2 Written Statements As Direct Testimony

In some arbitrations, especially international arbitrations, witnesses have already provided witness statements as part of a party's prehearing pleadings. In those cases, the witness's written statement usually stands as his or her "direct testimony," so that little or no direct examination is required.[10] As a result, when the witness takes a seat at the arbitration, he or she is immediately subjected to cross-examination by opposing counsel. That cross-examination may or may not be limited to the matters identified in the witness statement. Redirect examination is then limited to the matters raised in cross-examination.

In all events, as with oral direct evidence, witness statements should present an "honest account of the relevant events in a manner that provides the strongest possible support for the case, [that]

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10. The practice of replacing direct testimony with a written affidavit has recently been gaining traction for bench trials in some courts. For example, the Rules of the Commercial Division of the Supreme Court of the State of New York were recently amended to provide that "[t]he court may require that direct testimony of a party's own witness in a non-jury trial or evidentiary hearing shall be submitted in affidavit form, provided, however, that the court may not require the submission of a direct testimony affidavit from a witness who is not under the control of the party offering the testimony. The submission of direct testimony in affidavit form shall not affect any right to conduct cross-examination or re-direct examination of the witness." N.Y. COMP. CODES R. & REGS. tit. 22, § 202.70, Rule 32-a.

at the same time minimizes the witness's vulnerability to attack on cross-examination."[11]

§ 12:4.3 Infrequent Use of Depositions

For many litigators, a striking aspect of arbitration is that deposition practice is less common than in litigation.[12] For example, the JAMS Comprehensive Arbitration Rules provides that a party may take only "*one deposition* of an opposing Party or of one individual under the control of the opposing party."[13] In many other arbitrations, there are no depositions at all (they are virtually unheard of in international arbitration). As a result, the hearing may be the first time that counsel actually meets the opposing party's witnesses, much less examines them.

§ 12:4.4 Cross-Examination

The idea of cross-examining a witness whose demeanor and testimony you have not already evaluated in deposition, or assessed during the witness's direct testimony, may seem daunting. It need not be. Any prejudice created by the absence of a deposition can be overcome *if* you take the time to adequately prepare for cross-examination based on the record of the arbitration to date, including, in particular, any written witness statements.

The absence of a deposition or direct examination can have unintended benefits as well: For many fact witnesses in an arbitration, opposing counsel's cross-examination will be the first time that they have had to sit in front of a decision-maker, in a formal proceeding, and be exposed to rigorous testing of what they have to say. The witness's understandable nervousness may enable the cross-examiner to elicit more truthful and frank answers than appear on the face of the witness statements.

In addition, the formal objections to questions in examination found during trials ordinarily do not apply in an arbitration. As one commentator has noted, unlike in arbitration, cross-examination in court proceedings involves "operating within highly restrictive environments, where principles and practices have evolved over centuries into hard-and-fast rules setting out what advocates can and cannot

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11. John Fellas, *Preparing Witness Statements in International Arbitration*, N.Y.L.J., Oct. 18, 2017, www.law.com/newyorklawjournal/sites/newyorklawjournal/2017/10/18/1019fellas-p3-preparing-witness-statements-in-international-arbitration/.
12. *See* chapter 9.
13. JAMS COMPREHENSIVE ARBITRATION RULES AND PROCEDURES R. 17(b) (effective July 1, 2014) (emphasis added) [hereinafter JAMS RULES].

do, which explains the myriad objections available to opposing advocates and the endless stories of shame-faced counsel following spectacularly failed cross-examinations."[14]

Cross-examination in arbitration generally does not have to be performed with such formality. Nevertheless, a sophisticated tribunal will endeavor to control the conduct of examination if the examiner is indecorous. The tribunal's goal will be to ensure that examination stays on subjects relevant to the arbitration.

§ 12:4.5 The Tribunal's Involvement in Examination

In some arbitrations, the tribunal may take a more active role in examination than a judge conducting a jury trial or even one conducting a bench trial. In fact, counsel should not be surprised if the arbitrators ask questions during the examination. They may do this, for instance, to permit the witness to correct testimony, or to seek clarification or further information on a topic of interest to the arbitrators. Arbitrators may also interject when counsel's line of questioning does not seem relevant. While interrupting counsel's examination may not be the best practice for arbitrators, arbitrators still do it, and counsel should be prepared to handle such interruptions.

§ 12:5 Expert Witnesses

§ 12:5.1 Structure of Examination

Following the examination of fact witnesses, the parties' expert witnesses—or witnesses with specialized expertise who can opine on various aspects of the dispute, such as accounting, construction engineering, and damages issues (among many others)—will also be called for examination.

These expert witnesses will have previously submitted their reports, and perhaps rebuttals to the other side's expert reports, prior to the hearing. The tribunal and the parties may therefore agree to forgo the direct examination of experts. In some arbitrations, each expert may instead be provided time to provide a short presentation to the tribunal (often with demonstratives) that explains the position already set forth in his or her report.

Following the expert's direct testimony (or initial presentation, if any), the expert will then be cross-examined by opposing counsel, and subject to redirect examination. In certain arbitrations, time may

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14. Stephen Jagusch QC, *Cross-Examination of Fact Witnesses: The Common Law Perspective*, GLOBAL ARB. REV., http://globalarbitrationreview.com/chapter/1072869/cross-examination-of-fact-witnesses-the-common-law-perspective (last visited Sept. 28, 2017).

be set aside for the arbitrators to pose their own questions to the experts as well. As with fact witnesses, there may not have been any depositions of expert witnesses.[15] It is important for counsel to ensure that an expert witness is prepared to testify effectively, and is ready for cross-examination.

While this is a usual structure for expert testimony in an arbitration, it is not the only structure. For example, as discussed below, the arbitrators may find it more useful to have all of the experts testify in a group.[16]

§ 12:5.2 Application of *Daubert* and *Frye* Standards

Some arbitrators will consider whether an expert is qualified to testify by applying the standards for admissibility under the Federal Rules of Evidence as set forth in *Daubert v. Merrell Dow Pharmaceuticals*[17] or, where relevant, state evidentiary rules based on the standards set out in *Frye v. United States*.[18] However, there is no requirement that they do so, and arbitrators often forgo the formality of deciding *Daubert* or *Frye* objections.[19]

Even though the formal strictures of *Daubert* and *Frye* may not apply in arbitration, it goes without saying that experts nevertheless should be qualified to present the expert testimony they are propounding. Counsel should carefully assess an expert's training and qualifications against the testimony they are offering. When the qualifications of the opposing party's expert do not appear sufficient to support the proffered testimony, that fact may be raised to the tribunal or during cross-examination—if not to exclude the evidence, at least to

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15. *See* section 12:4.2.
16. *See* section 12:5.4.
17. Daubert v. Merrell Dow Pharm., 509 U.S. 579 (1993). *See, e.g.*, Marketstar Corp. v. Prosper Bus. Dev. Corp., No. 2:07-CV-00132-DB, 2009 WL 2929390, at *4 (D. Utah Sept. 8, 2009) (noting that arbitrator had accepted damages expert's testimony based on standards set forth in Daubert).
18. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).
19. *See, e.g.*, MPJ v. Aero Sky, L.L.C., 673 F. Supp. 2d 475, 501 (W.D. Tex. 2009) ("[T]he AAA's Commercial Rules of Arbitration do not require a party sponsoring an expert witness necessarily to satisfy *Daubert*, as conformity to the rules of evidence is not always necessary."); *see also* Morrill v. G.A. Wright Mktg., Inc., No. 04-cv-01744-MSK-BNB, 2006 WL 2038419, at *4 (D. Colo. July 18, 2006) (denying application for vacatur of an arbitration award on the grounds that the arbitrator had permitted expert testimony that arguably violated *Daubert*'s standards because "the decision of whether to receive and consider [the expert's] testimony was one which was necessarily confined to the arbitrator's discretion").

go to its weight. In this respect, "[a]lthough arbitrators are not bound by *Daubert*, the principles in *Daubert* provide helpful guidance."[20]

§ 12:5.3 Independence and Impartiality

There is a developing norm in arbitration, especially international arbitration, that experts should be impartial and independent from the parties.[21] In addition, numerous professional organizations require experts to maintain their independence and impartiality when providing testimony.[22]

Challenging an expert's independence and impartiality can be an effective way of decreasing the weight the tribunal gives to the expert's testimony. Counsel should therefore investigate any potential links between an expert and the party (or counsel) that is proffering him

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20. JAY E. GRENIG & ROCCO M. SCANZA, CASE PREPARATION AND PRESENTATION: A GUIDE FOR ARBITRATION ADVOCATES AND ARBITRATORS § 10:10 (2013).

21. *See* IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION art. 5(2)(a) (2010) (requiring the expert to provide "a statement regarding his or her present and past relationship (if any) with any of the Parties"); CHARTERED INST. OF ARBITRATORS, PROTOCOL FOR THE USE OF PARTY-APPOINTED EXPERT WITNESSES IN INTERNATIONAL ARBITRATION, art. 4(1) (2007) ("An expert's opinion shall be impartial, objective, unbiased and uninfluenced by the pressures of the dispute resolution process or by any Party."); *id*. art. 4(4)(b) (expert must disclose "any past or present relationship with any of the Parties"); Giovanni de Berti, *Experts and Expert Witnesses in International Arbitration: Adviser, Advocate or Adjudicator*, 2011 AUSTRIAN Y.B. OF INT'L L. 53, 57 ("Actually, the trend that has been developing in international arbitration practice, and has been incorporated in successive editions of international arbitration rules, shows that a more stringent attitude has developed with regard to the use of party-appointed experts, requesting that even these experts comply with the requirements of independence and impartiality requested of the tribunal-appointed-experts."); 2 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1862 (2009) (stating that "[a]t a minimum . . . [an expert's] failure to demonstrate independent professional judgment will seriously impair their credibility"; expert must provide a "statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal").

22. *See, e.g.*, NAT'L SOC'Y OF PROF'L ENG'RS, CODE OF ETHICS OF ENGINEERS, R. 3(a) (2007), www.nspe.org/sites/default/files/resources/pdfs/Ethics/CodeofEthics/Code-2007-July.pdf ("Engineers shall be objective and truthful in professional reports, statements, or testimony."); AICPA, CODE OF PROFESSIONAL CONDUCT R. 1.200.001 (2014), http://pub.aicpa.org/codeofconduct/ethicsresources/et-cod.pdf (stating that "[a] member in public practice shall be independent in the performance of professional services as required by standards promulgated by bodies designated by Council"; such services include providing testimony as an expert witness). Numerous other professional organizations have similar rules.

or her, or any other factors that may affect an expert's independence and impartiality. The most obvious example is when a party to an arbitration relies on an in-house expert, such as its own engineer, to provide expert testimony. But it can also include experts who are consistently hired by a particular law firm, or consistently testify for a certain category of clients. In addition, counsel should investigate the expert's prior work, as well as any publicly available judicial and arbitral decisions that have discussed the expert's testimony.

§ 12:5.4 Witness Conferencing

Another feature of arbitration that is not used in courtroom settings is expert witness conferencing (or "hot-tubbing"), "a procedure for the joint presentation of expert testimony."[23] This procedure can take various forms, but generally involves "hav[ing] all experts on the same subject testify at the same time and answer seriatim the same questions put by counsel and then by the arbitrators."[24] In some cases, it may occur *after* the experts have been examined in a more traditional manner.

The purpose of expert witness conferencing is to allow the experts to respond to each other's testimony and, in doing so, to streamline the key issues in dispute between them. Expert witness conferencing has recently become more popular in both domestic and international arbitration.

Whether expert witness conferencing will be used should be decided before the hearing begins. Thereafter, counsel should carefully prepare the expert for this (somewhat) novel approach to expert testimony. Nevertheless, it has been correctly noted that "[w]ith experts who have a solid delivery and ability to react, discuss and argue, this procedure may be worthwhile."[25]

§ 12:5.5 Tribunal-Appointed Experts

Finally, in rare cases, an arbitral tribunal may exercise its power to appoint its own expert on a particular topic.[26] The parties are usually consulted when a tribunal exercises that power. The parties generally

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23. Gilbert Samberg, *Pros and Cons of Hot-Tubbing in International Arbitration*, LAW360 (Dec. 1, 2016), www.law360.com/articles/867611/pros-and-cons-of-hot-tubbing-in-international-arbitration.
24. Alvarez et al., *supra* note 2, at 257.
25. *Hot Topic: Expert Witnesses in Arbitration*, CORP. DISPS. MAG., Oct–Dec. 2012, at 9 (statement of Julie Bédard).
26. IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION art. 6(1) (2010) ("The Arbitral Tribunal . . . may appoint one or more independent Tribunal-Appointed Experts to report to it on specific issues designated by the Arbitral Tribunal.").

are permitted to comment on the final reports or determinations of those experts, sometimes by presenting their own expert testimony. Nonetheless, the opinion of a tribunal-appointed expert usually will be given significant weight by the tribunal.

§ 12:6 Some Evidentiary Matters

§ 12:6.1 Flexible Rules of Evidence

In an arbitration, questions as to admissibility, relevance, materiality, and privilege are reserved for the arbitrators' determination.[27] In practice, most arbitrations are not conducted under the formal rules of evidence found in a court of law, unless the parties have expressly stipulated otherwise. At least one commentator has suggested that "[a]rbitrators . . . are bemused by litigators who approach arbitration as a shadow judicial forum with the expectation that arbitrators are to be impressed by frequent and expert citations to court rules such as the Federal Rules of Evidence."[28]

As a result, some forms of evidence that might be excluded from a trial in a court of law—such as hearsay—may be accepted as evidence in an arbitration. Rather than exclude such evidence entirely, arbitrators may instead assess its weight and credibility as part of their deliberations. "The fact that arbitrators may not be bound by the conventional rules of evidence in civil cases does not mean that those rules will not be followed or given significant consideration . . . . [E]ven in some civil court cases, certain evidence that is objected to will be heard subject to weight."[29]

In international arbitrations, tribunals (in many cases, with the parties' consent) may use the 2010 IBA Rules on the Taking of Evidence in International Arbitration as a guide to evidentiary issues.[30] Article 9 of the IBA Rules provides guidelines for the admissibility and assessment of evidence, while affirming that the tribunal retains

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27. *See* AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES R. 34 (effective Oc. 1, 2013) [hereinafter AAA RULES]; INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION AND RESOLUTION, 2013 ADMINISTERED ARBITRATION RULES R. 12.2 (effective July 1, 2013) [hereinafter CPR RULES].
28. Alfred G. Feliu, *Evidence in Arbitration: A Guide for Litigators, in* AMERICAN ARBITRATION ASSOCIATION HANDBOOK ON COMMERCIAL ARBITRATION 267, 267 (2d ed. 2010).
29. Morley R. Gorksy, *Presentation Skills: A Quick Reference Guide for Advocates, in* AMERICAN ARBITRATION ASSOCIATION HANDBOOK ON COMMERCIAL ARBITRATION 301, 309–10 (2d ed. 2010).
30. IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION (2010).

the power to "determine the admissibility, relevance, materiality and weight of" the evidence presented to it.[31]

That said, arbitrators are likely to apply some rules of evidence more rigorously than others, including the rules governing attorney-client and attorney work product privileges. Some arbitration rules, in fact, require the arbitral tribunal to give effect to these privileges.[32]

§ 12:6.2 Admission of Documents

In contrast to litigation, the formal rules of document authentication are not applied in arbitration. Instead, provided that documents have formed part of the prehearing pleadings or are part of the joint list of exhibits that is agreed to by the parties before the hearing occurs,[33] counsel may usually refer to the documents during the arbitration hearing without the need to establish provenance or otherwise authenticate them. This is because one of the hallmarks of arbitration is to streamline the presentation of evidence by avoiding the rigorous formalities found in litigation.

In certain arbitrations, opposing counsel may still dispute the authenticity of specific exhibits when they are presented. However, some prehearing procedural orders and arbitration rules provide that objections to the authenticity of a document should be made before a hearing, and this is usually good practice.[34]

§ 12:7 Closing Arguments

At the close of the hearing, each party is usually afforded an opportunity to give a closing argument (or closing statement, as it is commonly referred to in arbitration). In certain cases, closing arguments may occur after the post-hearing briefs are submitted.

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31. *Id.* art. 9(1).
32. *See, e.g.*, CPR RULES, *supra* note 27, R. 12.2 ("The Tribunal is not required to apply any rules of evidence used in judicial proceedings, *provided, however, that the Tribunal shall apply any lawyer-client privilege and work product immunity.*") (emphasis added); AAA RULES, *supra* note 27, R. 34 (effective July 1, 2013) ("*The arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer or client.*") (emphasis added); JAMS RULES, *supra* note 13, R. 22(d) ("Strict conformity to the rules of evidence is not required*, except that the Arbitrator shall apply applicable law relating to privileges and work product*.") (emphasis added).
33. *See* section 8:4.15.
34. *See, e.g.*, JAMS RULES, *supra* note 13, R. 16(g) (preliminary conference should address "the resolution of the admissibility of exhibits").

"The purpose of the closing statements is to draw conclusions from the witness evidence and to sum up each party's case."[35] A closing statement should therefore (1) streamline the legal and factual issues that remain in dispute; (2) seek to establish, from both the documentary evidence and witness testimony, the party's positions and rebut the position taken by the opponent; and (3) lay out the relief the party should be granted.

Closing statements should also be adapted to what happened during the hearing. A cogent summary of witness testimony will refresh the arbitrators' recollection of important testimony right before deliberations begin. In addition, counsel should consider and address any questions that the arbitrators raised during the proceeding. The arbitrators may also direct the parties to address specific issues in their closing arguments.

By the end of the hearing, some arbitrators may feel sufficiently comfortable with the record to request that the parties forgo closing argument. Where possible, counsel should consider resisting such a request. "Final argument is sometimes the last and some say the most important opportunity for advocacy by counsel contending for different outcomes in a matter that may have great consequences, financial or otherwise, for their clients."[36] Through closing argument, counsel can be sure to tie up all the loose strands that emerged during the hearing, including the tribunal's concerns and questions.

Finally, at the close of the hearing, the arbitrators may ask the parties if they have any objections to the way the hearing was conducted. "Failure to raise an issue in an arbitration proceeding waives the issue in a confirmation or enforcement proceeding [in court]," or on a vacatur application.[37] To preserve an objection to the conduct of

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35. Steven P. Walker & Iain K. Clark, Pleading in Arbitration: A Practitioner's Guide § 12-18 (2012).
36. Alvarez et al., *supra* note 2, at 287.
37. Am. Nursing Home v. Local 144 Hotel, Hosp., Nursing Home & Allied Servs. Union, No. 89 Civ. 1704 (DNE), 1992 WL 47553, at *4 (S.D.N.Y. Mar. 4, 1992); *see also* Oracle Corp. v. Wilson, 276 F. Supp. 3d 22, 31–32 (S.D.N.Y. 2017) ("[D]uring the Conference Call, Oracle expressly turned down an opportunity to object to the procedure the Arbitrator proposed to follow, the same procedure which Oracle now decries as improper. The notes of the Conference Call reflect that the Arbitrator specifically asked 'each side to raise any objections to issue a decision based on [Wilson]'s in person testimony at the August 30th in-person hearing and the papers submitted to the Arbitrator.' The notes do not show that Oracle made any objections, but rather, state that Oracle's counsel waived the opportunity to cross-examine Wilson.") (footnote and citations omitted), *appeal withdrawn*, 2017 WL 8289590 (2d Cir. Dec. 27, 2017).

the hearing, counsel likely should make that objection formally (and always respectfully) during the hearing or at its close.

§ 12:8 Post-Hearing Briefs and the Close of Proceedings

At the close of the hearing, the tribunal may request post-hearing briefs and replies from the parties. The tribunal and the parties will establish a schedule for those submissions and, in certain cases, page limits.

It has been correctly noted that

> [t]he key to drafting an effective closing submission is being able to persuasively tie up all of the strands of the case and make it easy for the arbitral tribunal to see the logic of your case and to assist them in writing their award. These briefs will contain detailed references to the transcript which are the notes of the witness testimony, exhibits and pleadings, etc. which support their factual and legal pleaded cases, and which entitle the parties to the relief sought; and submissions as to why the arbitral tribunal should find in favour of a party.[38]

In essence, the post-hearing briefs should provide a template for the tribunal as it writes an award in your client's favor.

In many cases, the arbitrators provide the parties with a list of questions or topics that they would like addressed in those post-hearing briefs. The post-hearing briefs then address those questions and topics, in addition to any other items counsel wants to bring to the arbitrators' attention.

After the post-hearing briefs (if any) are submitted, the arbitrators may then formally close the arbitration proceedings altogether. The closure of the arbitration proceeding marks the moment after which (absent compelling circumstances) the arbitrators no longer hear new evidence or argument, and instead deliberate and draft the award. Before formally closing the arbitration proceeding, the arbitrators will likely carefully consider if they need to hear anything further from the parties.

§ 12:9 Conclusion

The evidentiary hearing in arbitration can differ from a trial in sometimes significant ways. Acknowledging and adapting to these differences leads to more effective advocacy. Nevertheless, counsel should not forget the core and common purpose of both a trial and an arbitration hearing: to clarify and expand on evidence and expert

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38. WALKER & CLARK, *supra* note 35, at 335.

opinions, present frank and trustworthy lay witness testimony, provide cogent explanations of the law, rebut opposing counsel's case, and, in the end, convince the tribunal to give your client the relief it is seeking.