

PRELIMINARY ARBITRATION CONFERENCES

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- I. There are two main issues in any arbitration, which are not necessarily mutually exclusive:
- A. **Substantive result**: The arbitrator's decision should be enforceable and resolve the parties' dispute.
 - B. **Procedural result**: The arbitration should be concluded in an expeditious manner that allows the parties to fairly present their dispute.
 - C. So what role does a preliminary conference play?
 - 1. It makes the process more efficient by reducing surprise.
 - 2. Since most preliminary conferences are done by telephone, they can be done in an hour or so. It is rare to hold an "in person" preliminary conference.
 - 3. While the "parties control the arbitration," there is always a tension with the arbitrator's duty to move the proceedings along. The preliminary conference can be a great help in moving the proceedings along.
- II. What could (or should) be covered in such a conference?
(The author wants to give credit to UNCITRAL² for its notes on organizing an arbitration³ for much of this material.)

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² The United Nations Commission on International Trade Law.

- A. The first thing is to always listen to the parties. They are likely to tell you where they need your help and guidance.
- B. What arbitration rules govern the arbitration?
 - 1. Do the rules correctly reflect the needs of the arbitration?
 - 2. Should the applicable rules be changed?
 - 3. There is nothing worse than finding out, in the middle of the arbitration evidentiary hearing, that both parties and the arbitrator each have a completely different idea of what the applicable rules are. Oops.
- C. Will dispositive motions be heard?
 - 1. How will the dispositive motions be scheduled?
 - 2. Will there be oral argument or will it be done entirely on the papers?
- D. Is there an issue about jurisdiction?
 - 1. Should the issue be bifurcated from the merits?
 - 2. Will evidence be necessary to resolve the issue?
- E. In what language will the proceedings be conducted? While this may be important in international arbitrations, it may be important in some consumer arbitrations too. Nothing puts a witness more at ease than being addressed in the language he is most comfortable in...and upsets counsel who has no idea what was just said.
 - 1. In what language are the documents? Will they need to be translated?

³ <http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf>

2. In what language will the proceedings be conducted?
 - a. Will very expensive simultaneous translation be necessary? Will consecutive translation be acceptable (which is less expensive)?
 - b. Perhaps a minor witness whose testimony needs to be translated can submit written testimony.

- F. Where is the arbitration going to be held?
 1. Does the arbitration agreement specify a particular location?
 2. Does that location make sense in light of the needs of clients, counsel, and the arbitrator? What about the availability of evidence?
 3. How expensive is the proposed venue?
 4. Does the tribunal "need to move around" so it can get the testimony of important out of town witnesses (third party or otherwise)?
 - a. Can the testimony be obtained by video conferencing?
 - b. Can the testimony be obtained by telephone teleconferencing?
 - c. Can the same testimony be presented by video deposition?
 - d. Can the same testimony be presented by deposition transcript?
 - e. Can the same testimony be presented by affidavit?
 5. Does the venue seem to create bias in favor of one side or the other?

- G. What administrative functions are necessary for the arbitral tribunal to carry out its functions?

1. Let's face it; most arbitrations aren't that complex.
2. Most arbitrations connected with an arbitral institution have a case manager. They can do a variety of functions, such as:
 - a. Scheduling.
 - b. Renting rooms.
 - c. Paying bills.
3. Some arbitrators want someone on staff who acts like a law clerk, which is possible in large cases.
4. An *ad hoc* arbitration can hire a registrar to handle all of these things. This is a bit more expensive than using an arbitral institution's shared case manager (who hopefully has some experience).

H. Deposits.

1. Most arbitral institutions have procedures for handling this issue. Make sure you understand how it works under the applicable rules so you don't commit a *faux faux*.
2. I think arbitrators should get paid to handle motion practice. The deposits (in both amount and timing) should reflect this.
3. Figure out how much you are going to need and when. Recognize one side isn't going to "pony up" with their share of the expenses after the case is done...because they will have lost. Get the deposits "up front."
4. If the deposits have run out, you need to order supplementary deposits.
5. If you want to work for free, that is your decision. Just make sure you understand the implications when you waive deposits. You are

likely to get paid fifty cents on the dollar...not a situation I like to be in.

6. Are you planning to hire an expert for the tribunal? Make sure the deposit covers that too!
 7. Are there traveling expenses? Make sure the deposit covers that too!
 8. Are there room rental expenses? Make sure the deposit covers that too!
 9. Is the tribunal going to hire staff, such as a registrar? Make sure the deposit covers that too!
 10. Make sure the deposit is up to date before you close the hearings. It is better to update the deposit to ensure you get paid rather than have you do the work and not get paid. If the deposit isn't paid, the proceedings may be suspended (but be sure to read the applicable rules, which just might govern this type of problem).
- I. Are the proceedings confidential?
1. Everyone is convinced they know what this means and yet their impression differs.
 2. Did you know some people think I cannot disclose the names of parties that have arbitrated before me? As a prospective user of my arbitration services, don't you think you would want to know:
 - a. How many cases I have done?
 - b. How many times this party has appeared before me?
 - c. What kinds of arbitration panels I am on...does it indicate a bias?
 3. Will non-parties be allowed to be in the proceedings, other than during their testimony?
 4. Can evidence adduced in the hearing be used in other proceedings?

5. I assume most people want to be able to enforce the award, which usually entails giving a copy to some court. This means there isn't much confidentiality in a reasoned award.
 6. Are there some trade secrets that need to be protected?
- J. How are communications between the parties and the arbitrator to be handled?
1. Everything can be routed through the case manager, who often requires sufficient extra copies to send out to the service list.
 2. Everything can be sent directly to the arbitrator as long as a copy is delivered to all other parties with equal dignity (you can't send the arbitrator's copy by email and send opposing counsel's copy by fourth class mail).
 3. Arbitral institutions often have rules governing these issues, including a "direct exchange" rule which the parties can opt into.
 4. You may want to adjust this procedure depending on the type of case and the parties.
 5. You may want to handle various documents differently. For example, issues involving scheduling might be treated differently from an answer.
- K. What about using more advanced technologies?
1. If a caseload is big enough, it may justify requiring an arbitrator to have certain computer or other technology.
 2. Depending upon the familiarity of the arbitrator with the technology, you may want to consider:
 - a. Faxes. Do you want to require confirming copies to be mailed? Most people don't do that anymore.

- b. Email (pretty much used by everyone now).
 - c. CD roms, DVDs or even memory sticks. No one uses punch cards or magnetic tape anymore.
 - d. Encryption (but most of us don't deal with stuff that is that secret).
3. Will the exhibits be presented in a particular format? Do you REALLY need binder upon binder of evidence?
4. How will this affect deadlines? Will compliance be determined by:
- a. The local time at the arbitrator's office?
 - b. When the package is sent?
 - c. When the package is received?
 - d. For example, filings in United States District Court are docketed in real time. An 11:00 pm filing is docketed the day of filing. In the Connecticut Superior Court, anything filed after 5:00 pm is docketed the next business day.
- L. How will written submissions be exchanged?
- 1. Do you need a further statement of the facts (a "more definite statement")?
 - 2. Are further pleadings necessary after the statement of claim and the defense?
 - 3. Is a statement of defense even necessary?
 - 4. Is the requested relief clear, or does it need to be clarified?
 - 5. The same questions about compliance with delivery deadlines apply to submissions. You may not want to get a 400-page fax though. Email will not transfer a file bigger than about 7 MB. If you start dealing with REALLY huge documents, you may

have to establish a web site and use FTP or a web interface.

6. Will concluding briefs be necessary?
 7. Will briefs in advance of the evidentiary hearing be necessary?
 8. Will exchanges be consecutive or simultaneous? How will that slow down the proceedings?
 9. I hate it when the parties give you 5 giant binders of "stuff" without a table of contents, without dividers (so I don't know where one document ends and another one begins) and then never put most of it into evidence.
 10. Can the parties agree on a single set of joint exhibits? If not, the arbitrator may get multiple copies of an exhibit and have to juggle two sets of binders.
 11. Will exhibits carry numbers or letters (I personally hate letters because it gets confusing when you have more than 26 exhibits).
 12. Will each page be numbered?
- M. The big bugaboo: discovery.
1. Will you allow it? What do the rules say?
 2. Keep repeating to yourself (and the parties) "arbitration isn't litigation" to the tune of "There is no place like home" from the Wizard of Oz.
 3. Requests for production (most rules require the advance exchange of documents).
 4. Interrogatories (most rules require the exchange of witness lists with a summary of the witnesses' anticipated testimony).
 5. I would say almost no one does requests for admission, but some people can agree to stipulated facts.

6. Depositions. How many? Of whom? How long can they last?
- N. Should a list of issues be developed? If so, by whom?
1. Should the issues be decided in any particular order?
 2. Does it make sense to rule on jurisdiction first?
 3. Does it make sense to bifurcate liability and damages?
 4. Does the remedy need to be better defined or clarified?
- O. How should documentary evidence be handled?
1. Who submits first (or is it simultaneous)?
 2. How long does the other side have to respond?
 3. Should originals be produced, or will photocopies be adequate? Don't forget, the best evidence rule does not apply in arbitrations (in fact, no rules of evidence apply in arbitrations⁴).
 4. The objective is to avoid wasting time because the same exhibit is offered more than once. You also want to prevent the introduction of unnecessary exhibits.
 5. Are summaries useful? There is often no reason for the arbitrator to look at source documents that can be conveniently portrayed in a single summary.
 - a. For example, a chart of factory orders is preferable to having the orders themselves (although the parties certainly have the right to review the underlying data).

⁴ While everyone says this, it is not strictly true. The witness exclusionary rule can still be applied in arbitration cases.

- b. Is a representative sampling of a large population an easy way to manage the case?

P. Physical evidence.

1. Special arrangements are often necessary.
2. Bringing in the jet engine may be overkill if you can have a transparency made which shows all of the moving parts.
3. Never underestimate the power of a model or a photograph.
4. Never underestimate the value of a site visit.

Q. Witnesses.

1. There should be a difference between witnesses under a party's control and third party witnesses.
 - a. Party witnesses should generally come to the tribunal.
 - b. It may be hard to make a third party witness come to the tribunal from outside the jurisdiction.
2. This means the tribunal may have to go the witness.
 - a. This can be done virtually by video conferencing.
 - b. This can be done with a telephone teleconference call.
3. Always keep in mind the scope of the subpoena power for:
 - a. The arbitrator.
 - b. Counsel for the parties.
 - c. A local court.

4. Will cross-examination be allowed?
5. While most common law lawyers hate it, I have sometimes ordered direct examination take place via an affidavit submitted in advance. If cross-examination is requested in advance, that is where we start when the witness takes the stand. Otherwise, the witness does not testify in person. This has a number of advantages:
 - a. The witness need not be present if no cross-examination is necessary.
 - b. The witnesses' testimony is delivered without the time and expense of a deposition.
 - c. Everyone knows about the essentials of the witnesses' testimony in advance, so there are no surprises.
 - d. This is often difficult to do for a third party witness.
6. May nonparty witnesses be present during other witnesses' testimony?
7. In what order will the witnesses be called?
8. Who will administer the oath to the witness?

R. Experts.

1. Depending on the applicable rules, arbitrator(s) may appoint their own expert.
2. What are the terms of reference for the arbitrator's expert? It is important to get the parties' input on this. The arbitrator cannot abdicate his responsibility to his expert.
3. Are the experts expected to prepare a written report?

S. Hearings. As lawyers, we have a fondness for hearings and an unstated expectation on how they will proceed.

1. Do the applicable rules require a hearing?
 2. Do the parties want a hearing?
 3. Where will the hearing take place (and how will the logistics for the hearing be handled)?
 4. Setting dates for the hearing.
 - a. How many days will be necessary?
 - b. Are you going to restrict the number of days for the hearing or for any side's presentation at the hearing?
 - c. What do you do with counsel who just won't be available for two years?
 5. Should there be a court reporter present?
 - a. What do the applicable rules provide?
 - b. If the transcript is the official record, the arbitrator should get a copy.
 6. Should there be post hearing briefs?
 - a. How long should they be?
 - b. Shall they be submitted simultaneously or consecutively?
 - c. Hearings are not normally closed until the post hearing briefs have been submitted so the time period to render an award does not start until the briefs are received.
 - d. Make sure your deposit is paid in full before closing the hearings.
- T. Are there any special requirements for the award?
1. Does any party need more than one original?
 2. Can you submit an e-award? That usually ruffles some feathers...

3. Make sure you have signed your oath in Connecticut. Failure to do so can invalidate your award.
 4. Does the award have to be notarized? This may make enforcement easier under the 1958 New York Convention and the Hague Convention on Legalization.
- U. Are there any local customs you need to know about?
- V. Circle back and ask the parties if you haven't covered something they would like covered. Most likely you have covered all of the issues. However, some of the discussion may have reminded a party of their own special issues.