MAKING THE CONSTRUCTION ARBITRATION HEARING MORE EFFICIENT:

Written witness statements, a chess clock, and other techniques can expedite the hearing.

To many construction practitioners "international arbitration" is quite foreign, even though it has become increasingly common due to the expansion of the global marketplace. It is the most common form of dispute resolution in cross-border contracts. There are

Lessons Learned from International Arbitration

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many reasons for this, including the ability to select a neutral forum and neutral arbitrators, the ability to avoid unfamiliar foreign courts and laws, and the ability to enforce arbitral awards in countries that are signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

There are techniques used in international arbitration that construction practitioners could use in purely domestic arbitrations to shorten hearing time and provide the parties with a prompt resolution of their disputes at less cost.

Discovery in International Arbitration

Most arbitral rules governing international arbitration proceedings are largely silent regarding discovery, leaving that issue to the discretion of the arbitral tribunal. Discovery tends to be much more limited in international arbitration than in U.S. domestic arbitration. Discovery in international arbitration generally follows the civil law approach in which the parties only exchange documents they intend to rely on in the arbitration. The parties do not exchange other "relevant documents" and do not take depositions, prepare and exchange interrogatories or conduct inspections. The reason is international arbitration is intended to provide an efficient, speedy and cost-effective means to resolve disputes; American-style discovery would likely impede this worthy objective. For this reason, U.S.-style discovery is not followed in most areas of the world and is frowned upon in many countries.

Another difference between international and domestic arbitration concerns the presentation of evidence at the hearing. In domestic arbitration, fact and expert witnesses testify live at the hearing (as in court) for purposes of direct and cross-examination. In international arbitration it is common to present the direct testimony of these witnesses in a written witness statement. Most international arbitration rules allow this type of evidence. For example, Article 20(5) of the International Arbitration Rules of the International Centre for Dispute Resolution, the international division of the American Arbitration Association, allows "evidence of witnesses [to be] presented in the form of written statements signed by them."

Fact-witness statements are typically drafted by counsel to the party proffering the direct witness, with the witness's input and "buy-in" since the witness must sign the statement under oath. Because of the oath, fact-witness statements are similar to affidavits used in American jurisprudence, although they tend to be written in a more conversational tone and more informal style than an affidavit.

A witness statement generally includes everything the proffering party would put into evidence if the witness were to testify live on direct examination. Thus, the statement should include the witness's educational history, employment background, history with the transaction and the contract or project at issue. In addition, it should contain the relevant facts, and refer to supporting documentary evidence. A witness statement is usually very detailed in order to ensure that the proffering party will be able to fully support its case, since there may be not be a second chance to offer direct testimony.

Although witness statements do not save time or cost, they significantly reduce hearing time because the longest part of the hearing is the presentation of direct testimony and this part of the proceeding is avoided completely.

Witness statements are prepared and submitted to the tribunal before the hearing. The timing for submission will be set by the tribunal and the parties, but usually the initial submissions occur at least a month (sometimes several months) prior to the start of the hearing. Typically, the claimant submits its witness statements first. It also provides copies to the tribunal and the respondent. The respondent has the right to submit rebuttal witness statements before the hearing, in order to challenge, cast doubt on and/or refute the facts raised in the claimant's witness statements and assert facts in support of the respondent's defenses. Rebuttal statements need not address every fact or defense, however, because direct witnesses will be cross-examined at the hearing.

The amount of time required to draft a witness statement is roughly equivalent to, and sometimes more, than what is required to prepare a live witness to testify at a trial or arbitration hearing. This leads to an obvious question—what is the purpose of using written witness statements if they do not save time or cost? The answer is that it significantly reduces hearing time because the longest part of the hearing is the presentation of direct testimony and this part of the proceeding is avoided completely. In some cases, written witness statements obviate the need for a live hear-

ing on some or all of the issues in dispute.

Where witness statements are used in international arbitration, hearing time is generally used for cross-examinations, re-direct, and perhaps questions by the tribunal. What this means is that, even though fact witnesses have submitted signed witness statements, they nevertheless must appear at the hearing because they are subject to cross-examination at the discretion of the opposing party.

If the arbitrators and all parties agree, the proffering party will be given a brief opportunity to introduce each witness, describe his or her background and connection to the dispute, and provide a brief overview of the witness' testimony prior to tendering the witness for cross-examination.

Cross-examination is not limited to the scope of the witness's statement. Thus, cross-examining counsel may freely venture into new areas and factual evidence not covered by the statement. Even so, cross-examination tends to be speedier and more streamlined because counsel has had time to study (typically several weeks or even months) the witness statement and knows the areas and documents he or she wants to delve into, and has prepared questions for the witness. Re-direct is permitted once cross-examination is completed, but it is limited by the scope of cross-examination.

Witness statements may also be utilized for presentation of expert witness testimony. These statements are drafted by the expert rather than by counsel and they are similar to a traditional expert report. The expert must appear at the hearing for cross-examination. In some cases, the expert may be permitted to briefly explain highly technical or complex findings and conclusions before being examined on cross by opposing counsel or possibly questioned by any arbitrators.

"Hot-Tubbing" Party Expert Witnesses

Experts in international arbitration are often ordered by the tribunal to confer prior to the hearing to ascertain areas of agreement and disagreement, and inform the tribunal of the results of their conference. This procedure can result in the identification of the real issues in dispute, and focus the tribunal on the evidence related to those issues, making its job much easier.

When the experts for both sides are unable to reach agreement on any points prior to the hearing, the tribunal and the parties may agree to what is colloquially referred to as "hot-tubbing"—that is, having the two opposing experts sit side by side to be simultaneously cross-examined and possibly questioned by one or more arbitrators. Hot-tubbing of experts can make it easier for the tribunal to understand the technical aspects of the dispute and each expert's opinion on the issues.

A similar approach is sometimes used with fact witnesses who have provided fact testimony on the same issue or issues. The parties or the tribunal may deem it more expedient to have the witnesses be subjected to cross-examination sitting side-by-side so that the countervailing positions and any points of agreement can be ascertained more easily.

Time-Limited Hearings

A technique used in international arbitration to control time and cost is the time-limited hearing using a chess clock to time each counsel's presentation. Under this procedure, the tribunal and the parties agree that each side will have an equal, fixed amount of time to present opening and closing statements, cross-examine witnesses and question them on redirect. For example, if the tribunal allocated two weeks (10 days) and no more for the hearing, each party would have five days to present its case. Each attorney decides how to use that time.

Time-limited hearings ensure that the hearings will be completed on time because the parties' attorneys have an incentive to use their time judiciously.

Using International Arbitration Techniques in Domestic Construction Arbitration

All of the procedures and techniques discussed above can be used by practitioners in domestic construction arbitrations to help them achieve their objectives for a speedy resolution.

Written witness statements can easily be imported into construction arbitration. Instead of having witnesses testify on direct, their testimony can be put into a witness statement. For example, suppose that a construction dispute involves 50 or more disputed change orders. Presenting the parties' positions on each change order and identifying all the supporting documentation through live direct testimony could take weeks or months, which could be difficult for everyone involved in the arbitration, including the arbitrators. It would also make the evidence more difficult for the arbitrators to remember. A witness statement would be an efficient and organized way to present the same information. The written statement collects the evidence in a single document that could be analyzed by opposing counsel and the arbitrators.

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Court has heightened the Federal pleading standards. See, e.g., *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (both requiring that a complaint present enough facts to state a claim for relief that is plausible on its face). It appears that the result has been an increase in the frequency of complaints being dismissed prior to the commencement of discovery.

[5] See generally Alan Redfern, Martin Hunter & Nigel Blackaby, *Law and Practice of International Commercial Arbitration* 299 (4th ed. Sweet & Maxwell 2004).

[6] The original IBA Rules on the Taking of Evidence in International Commercial Arbitration were adopted on June 1, 1999. A revised version was adopted on May 29, 2010. See IBA Rules on the Taking of Evidence in International Arbitration (hereafter 2010 IBA Rules), available at www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx. For a summary of the original 1999 IBA Rules and a comparison with other institutional rules governing discovery, see James H. Carter, John L. Hardiman & Joseph E. Neuhaus, "Discovery in Arbitration; Recent Developments," *Arb. Rev. of the Americas* 2009, available at www.globalarbitrationreview.com.

[7] 2010 IBA Rules, art. 9.2. Interestingly, it has been plausibly suggested that the increasing dominance of electronic storage of information coupled with recent advances in technology may actually make discovery pursuant to the standards of the IBA Rules more effective by reason of the ability to conduct searches of documents cheaply and quickly based upon words and dates. See Richard D. Hill, "The New Reality of Electronic Document Production in International Arbitration—A Catalyst for Convergence?" 25(1) *Arb. Int'l* 87 (2009). See also, David Howell, "Developments in Electronic Disclosure in International Arbitration," 3(2) *Disp. Resol. Int'l* 151 (2009). Article 3.3(a) of the 2010 IBA Rules now provides that the arbitral tribunal may order a party requesting electronic documents to identify "specific files, search terms, individuals or other means of searching for such documents in an efficient and economical manner." Based upon my litigation experience, the problem in practice, however, is likely to be that the apparently reasonable and probative request will yield thousands of documents that are not relevant or material and are very burdensome to review. Of course, with more experience, the search techniques may become more effective.

[8] 2010 IBA Rules, art. 9.2(g). "Proportionality" is not defined, but it generally implicates a consideration of the scope of the dispute, the potential relevance of particular evidence being sought and the cost and burden.

[9] ICC Commission on Arbitration, Techniques for Controlling Time and Costs in Arbitration, ICC Pub'n 843, available at www.iccwbo.org/uploadedFiles/TimeCost_E.pdf; ICDR Guidelines for Arbitrators Concerning Exchanges of Information, available at www.adr.org/si.asp?id=5288.

[10] Without doubt, U.S. discovery is very expensive, laborious and tedious. Efforts to reduce the problems through rule changes (see, e.g., Federal Rule of Civil Procedure 26(a), requiring early voluntary exchanges of all information and documents on which each party expects to rely to support its claims or defenses) have probably achieved some improvement, but in my view the world of electronic documents has introduced new challenges of a magnitude far beyond any amelioration of costs and burdens achieved through those reforms.

[11] A case can also be made for the use of depositions in commercial arbitrations on certain, perhaps rare, occasions. See Paul B. Klaas, "Depositions: An Apologia," 25(4) *Arb. Int'l* 553 (2009). But the question here is not the treatment of special cases at the discretion of the arbitrators; it is what should be the presumption and the general rule.

Making the Construction Arbitration Hearing More Efficient

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Hot-tubbing witnesses (sometimes referred to as a witness panel) on cross-examination is another practical technique that can make the case easier for the arbitrators to understand and the evidence easier to remember, while accelerating the hearing. Certainly it is more efficient than sequential examinations, which may need to be scheduled days, weeks or even months apart.


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The chess clock, when used to limit the party presentations, can cut hearing time. Of course, the arbitrators and the parties' attorneys must weigh the use of that system against each party's right to present its case. Still, when the overall time set for the hearings is reasonable and the attorneys agree to use the check clock, an even split of time is not likely to seem unfair or unjust.

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It can be difficult to convince construction practitioners that techniques with which they are unfamiliar are in their clients' best interests. With education and awareness comes acceptance, however.

A construction party or arbitrator wishing to employ any techniques discussed here must be prepared to explain them and their benefits to the other parties, their attorneys and the arbitrators. Arbitrators who are already familiar with them are likely to be more receptive to their use.

While these techniques can be used in most cases, they may be exceptions (e.g., an employment dispute involving construction workers). Thus, the parties will need to decide whether these techniques are suitable for their case. ■