

Taking of Evidence in International Arbitration

3 December 2025

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Timeline of an Arbitration

Claimant

Request for
Arbitration

Statement
of Claim

• C's 1st
Memorial

Disclosure

Statement
of Reply

• C's 2nd
Memorial

Oral
Hearing

Answer

Statement
of Defense

• R's 1st
Memorial

Disclosure

Statement
of
Rejoinder

• R's 2nd
Memorial

Oral
Hearing

Respondent

Roadmap

- **Facts of the Case**

- Where do we begin?
- What do we need to fill in the gaps?

- **Role of Disclosure**

- How do we get what we need?
- Issues of how evidence can be taken, presented, and challenged take place in an international context



Rules of Evidence

US court proceedings

1. ARTICLE I. GENERAL PROVISIONS

1. Rule 101. Scope; Definitions
2. Rule 102. Purpose
3. Rule 103. Rulings on Evidence
4. Rule 104. Preliminary Questions
5. Rule 105. Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes
6. Rule 106. Remainder of or Related Statements
7. Rule 107. Illustrative Aids

2. ARTICLE II. JUDICIAL NOTICE

1. Rule 201. Judicial Notice of Adjudicative Facts

3. ARTICLE III. PRESUMPTIONS IN CIVIL CASES

1. Rule 301. Presumptions in Civil Cases Generally
2. Rule 302. Applying State Law to Presumptions in Civil Cases

4. ARTICLE IV. RELEVANCE AND ITS LIMITS

1. Rule 401. Test for Relevant Evidence
2. Rule 402. General Admissibility of Relevant Evidence
3. Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Was of Time, or Other Reasons
4. Rule 404. Character Evidence; Other Crimes, Wrongs, or Acts
5. Rule 405. Methods of Proving Character
6. Rule 406. Habit; Routine Practice
7. Rule 407. Subsequent Remedial Measures
8. Rule 408. Compromise Offers and Negotiations
9. Rule 409. Offers to Pay Medical and Similar Expenses
10. Rule 410. Pleas, Plea Discussions, and Related Statements
11. Rule 411. Liability Insurance
12. Rule 412. Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition
13. Rule 413. Similar Crimes in Sexual-Assault Cases
14. Rule 414. Similar Crimes in Child Molestation Cases
15. Rule 415. Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation

5. ARTICLE V. PRIVILEGES

1. Rule 501. Privilege in General
2. Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

6. ARTICLE VI. WITNESSES

1. Rule 601. Competency to Testify in General
2. Rule 602. Need for Personal Knowledge
3. Rule 603. Oath or Affirmation to Testify Truthfully
4. Rule 604. Interpreter
5. Rule 605. Judge's Competency as a Witness
6. Rule 606. Juror's Competency as a Witness
7. Rule 607. Who May Impeach a Witness
8. Rule 608. A Witness's Character for Truthfulness or Untruthfulness
9. Rule 609. Impeachment by Evidence of a Criminal Conviction
10. Rule 610. Religious Beliefs or Opinions
11. Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence
12. Rule 612. Writing Used to Refresh a Witness's Memory
13. Rule 613. Witness's Prior Statement
14. Rule 614. Court's Calling or Examining a Witness
15. Rule 615. Excluding Witnesses from the Courtroom; Preventing Excluded Witness's Access to Trial Testimony

7. ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

1. Rule 701. Opinion Testimony by Lay Witnesses
2. Rule 702. Testimony by Expert Witnesses
3. Rule 703. Bases of an Expert's Opinion Testimony
4. Rule 704. Opinion on an Ultimate Issue
5. Rule 705. Disclosing the Facts or Data Underlying an Expert's O
6. Rule 706. Court-Appointed Expert Witnesses

8. ARTICLE VIII. HEARSAY

1. Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay
2. Rule 802. The Rule Against Hearsay
3. Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness
4. Rule 804. Hearsay Exceptions; Declarant Unavailable
5. Rule 805. Hearsay Within Hearsay
6. Rule 806. Attacking and Supporting the Declarant's Credibility
7. Rule 807. Residual Exception

9. ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

1. Rule 901. Authenticating or Identifying Evidence
2. Rule 902. Evidence That Is Self-Authenticating
3. Rule 903. Subscribing Witness's Testimony

10. ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

1. Rule 1001. Definitions That Apply to This Article
2. Rule 1002. Requirement of the Original
3. Rule 1003. Admissibility of Duplicates
4. Rule 1004. Admissibility of Other Evidence of Content
5. Rule 1005. Copies of Public Records to Prove Content
6. Rule 1006. Summaries to Prove Content
7. Rule 1007. Testimony or Statement of a Party to Prove Content
8. Rule 1008. Functions of the Court and Jury

11. ARTICLE XI. MISCELLANEOUS RULES

1. Rule 1101. Applicability of the Rules
2. Rule 1102. Amendments
3. Rule 1103. Title



Arbitration



Evidence: LAW

English Arbitration Act §34

“(1) It ***shall be for the tribunal to decide all procedural and evidential matters***, subject to the right of the parties to agree any matter.

(2) Procedural and evidential matters include — ...

(d) ***whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage; ...***

(f) ***whether to apply strict rules of evidence (or any other rules)*** as to the ***admissibility, relevance or weight*** of any material (oral, written or other) sought to be tendered on any matters of fact or opinion, and ***the time, manner and form in which such material should be exchanged and presented;***”

Evidence: LAW

Swedish Arbitration Act, Section 25

- ***“The parties shall supply the evidence.*** However, the arbitrators may appoint experts, unless both parties are opposed thereto.
- ***The arbitrators may refuse to admit evidence*** which is offered where such evidence is manifestly irrelevant to the case or where such refusal is justified having regard to the time at which the evidence is offered.
- ***The arbitrators may not administer oaths or truth affirmations.*** Nor may they impose conditional fines or otherwise use compulsory measures in order to obtain requested evidence.”

The Facts of the Case



What about the arbitral institutions? Will they tell us how to present the facts?



Evidence: RULES

ICC Rules, Art 25

“1) The arbitral tribunal **shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.**

2) After studying the written submissions of the parties and all documents relied upon, the arbitral tribunal **shall hear the parties together in person** if any of them so requests or, failing such a request, it may of its own motion decide to hear them.

3) The arbitral tribunal **may decide to hear witnesses, experts appointed by the parties or any other person**, in the presence of the parties, or in their absence provided they have been duly summoned.

Evidence: RULES

ICC Rules, Art 25 (continued)

4) The arbitral tribunal, after having consulted the parties, may appoint one or more experts, define their terms of reference and receive their reports. At the request of a party, the parties shall be given the opportunity to question at a hearing any such expert.

5) ***At any time during the proceedings, the arbitral tribunal may summon any party to provide additional evidence.***

6) The arbitral tribunal may decide the case solely on the documents submitted by the parties unless any of the parties requests a hearing."

Basic Principle Governing Proceedings



Principle of **equal treatment** and **fair opportunity**:

*“In all cases, **the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.**” (ICC Rules, Art. 22)*



Tribunals: produce enforceable awards and avoid challenge on the basis of procedural unfairness/denial of due process

Differences between common law and civil law traditions

- “Adversarial” v. “Inquisitorial” systems.



Common Law

VS



Civil Law



- *Germany No. 58, Manufacturer (Slovenia) v. Exclusive distributor (Germany)*, Oberlandesgericht [Court of Appeal], Schleswig, 16 SchH 01/99, 24 June 1999.
- Whose responsibility is it to procure evidence?

Procedure: at the Tribunal's discretion

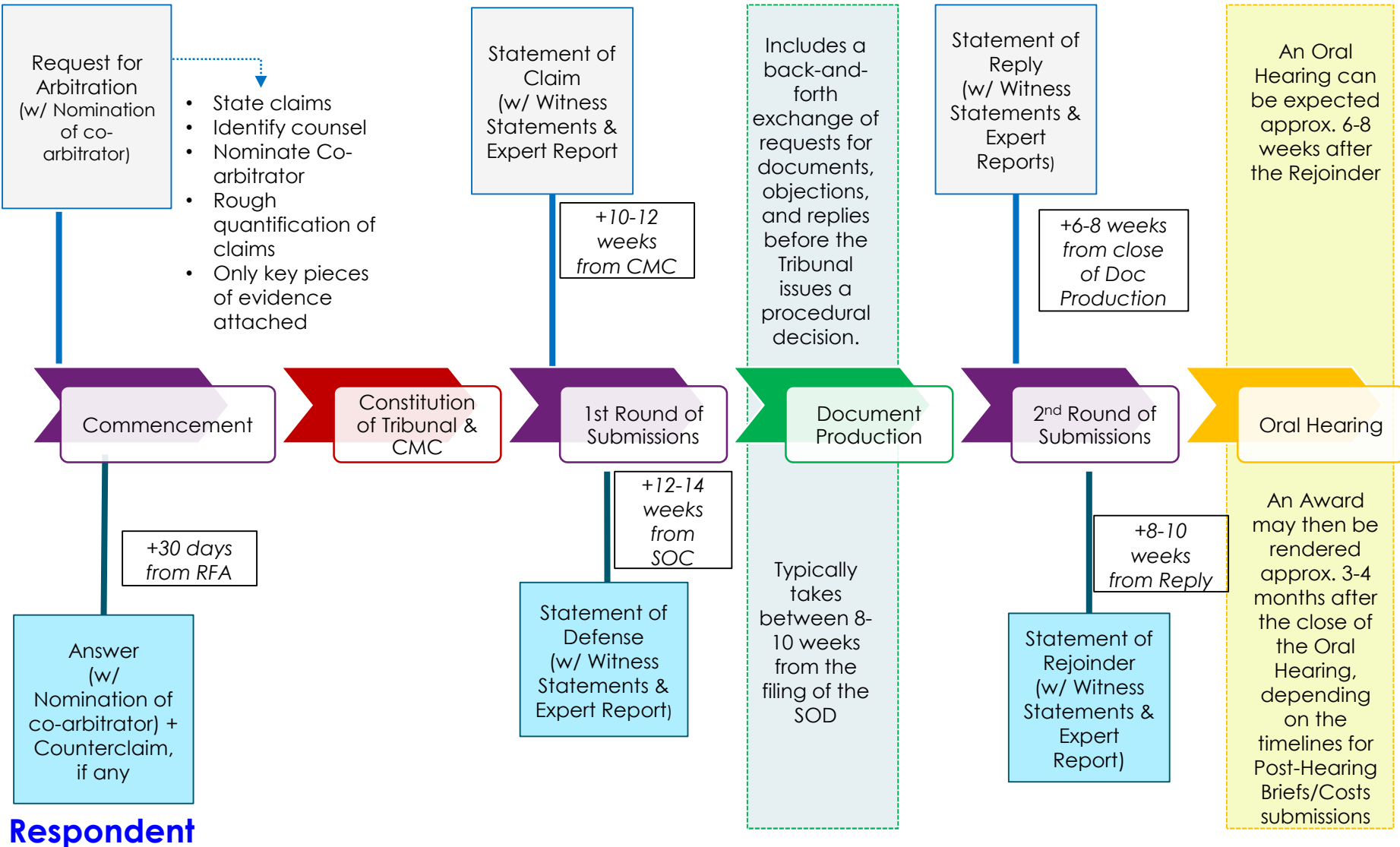
Forms of Evidence – and How Do We Get Them?

- Documents (that your client has)
- Witness statements
- Expert reports
- Responses to document requests (made to the opposing party)
- Live fact witness testimony
- Live expert witness testimony



Sample Timeline of an Arbitration

Claimant



Respondent

Where Are the Rules About Evidence?

- Arbitration clause
- Side letter
- Procedural Order No. 1
- IBA Rules

IBA Rules on the Taking of Evidence in International Arbitration



Evidence in Arbitration – a balance between civil law and common law approaches



IBA Rules on the Taking of Evidence in International Arbitration seen as a way to bridge the gap



The IBA Rules focus on how to take and present evidence

IBA Rules of Evidence – Overview

- Standards for document requests (Art. 3)
- Form of witness statements (Art. 4) and party-appointed and tribunal-appointed experts (Arts. 5-6)
- Inspection of sites, goods, processes, etc. (Art. 7)
- Conduct of hearing including sequences of witnesses and tribunal role (Art. 8)
- Address privilege and confidentiality and other bases not to allow disclosure (Art. 9)

IBA Rules on the
Taking of Evidence
in International
Arbitration

Adopted by a resolution of
the IBA Council
17 December 2020
International Bar Association



IBA Rules – When to Apply?

- By agreement of the parties



- Through reference by tribunal in exercise of its discretion (e.g., in PO1)



IBA Rules on the
Taking of Evidence
in International
Arbitration

Adopted by a resolution of
the IBA Council
17 December 2009
International Bar Association



Taking of Evidence

IBA Rules – General Principles

- Taking of evidence should be conducted in an efficient, fair and economical manner
- Restricted to disputed facts which are material and relevant to the outcome of the case
- Parties must conduct taking of evidence in good faith
- Tribunal shall have complete control over the taking of evidence

IBA Rules on the
Taking of Evidence
in International
Arbitration

Adopted by a resolution of
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17 December 2009
International Bar Association



Taking of Evidence

IBA Rules – General Principles

- Tribunal should identify as soon as appropriate the issues that it may regard as relevant and material to outcome of case and appropriateness of preliminary determination (Art. 2 (3))
- Early consultation between parties and tribunal (Art.2 (1))
- Each party shall be **entitled to know reasonably in advance of any evidentiary hearing the evidence on which the other party intends to rely** (Preamble No. 3)

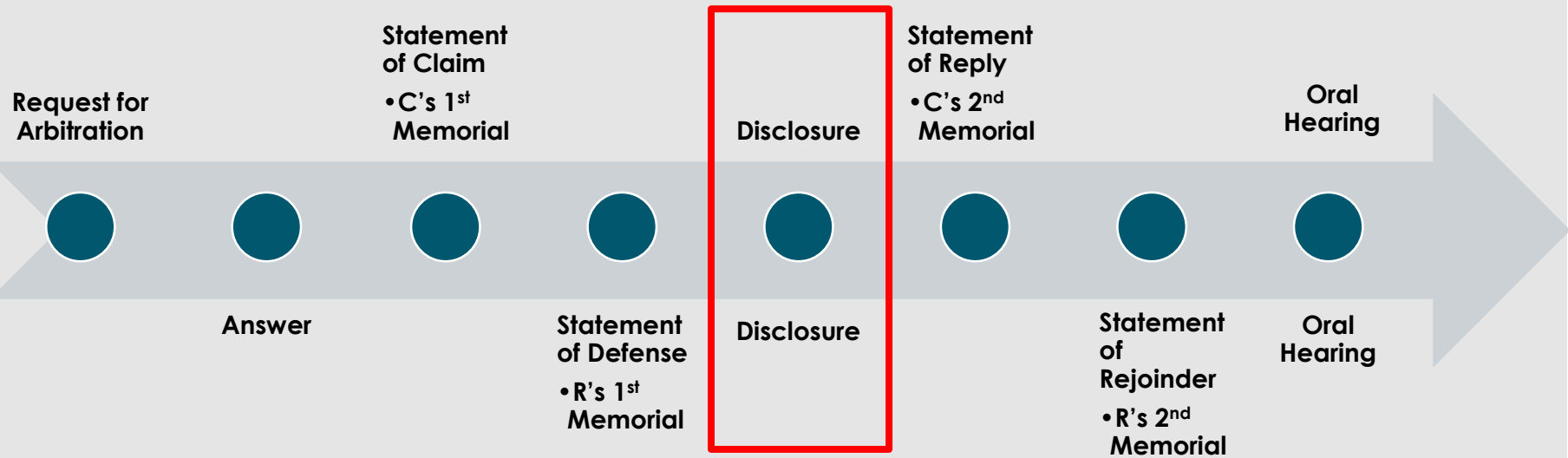
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Timeline of an Arbitration

Claimant



Respondent

Pre-Disclosure Document Collection – Building the Case

- Work with the client to start document collection as early as possible
- Electronic vs. manual document searches?
- Electronic collection and review of documents



Differences in Jurisdictions' Approaches to Disclosure



Common Law

VS



Civil Law

Common law

- Adversarial: parties play a vital role in investigating and presenting facts to the decision-maker (judge or jury)
- Not all common law approaches are the same



DISCLOSURE – COMMON LAW

US “discovery”
under the US
Federal Rules of
Civil Procedure

Rule 26 required disclosures; scope of discovery

Rule 27

Rule 28

Rule 29

Rule 30

Rule 31

Rule 32

depositions

Rule 33 interrogatories

Rule 34 requests for production

Rule 35 physical and mental examinations

Rule 36 admissions

- Depositions – sworn testimony outside of court, involving direct and cross-examination, usually transcribed by a court reporter
- Interrogatories – written questions to be answered truthfully in advance trial
- Requests for production – written requests for production of documents and other material (scope governed by federal or state civil procedure rules)

DISCLOSURE
– COMMON
LAW

US
“discovery”

Differences in Jurisdictions' Approaches to Disclosure



Common Law

VS



Civil Law

Civil law

- Inquisitorial
- Very limited disclosure
- Specific documents



“Article 138

If, during the proceeding, a party wishes to rely on a notarial deed or a deed under private signature to which he was not a party or a document held by a third party,

he may request the judge, to whom the matter is referred to, to order the delivery of a certified copy or the lodging in court of the deed or the document.

Article 139

The request may be made without any formality.

The judge, if he considers that the request is well-founded, will order the delivery or the production of the original, copy or extract of the deed, as the case may be, under the conditions and guarantees that he determines, if necessary, under a periodic penalty payment.

Article 142

Requests for the production of evidence held by the parties must be made, and their production takes place in accordance with Articles 138 and 139.”

Disclosure –
CIVIL LAW

French
Code of
Civil
Procedure

§ 142 :

“(1) The court may order that a party or a third party submit the documents and other documents in his or her possession to which a party has referred. The court may set a deadline for this and order that the documents submitted remain at the office for a period to be determined by the court.

(2) Third parties are not obligated to present, insofar as they are not reasonable or are entitled to refuse to give evidence in accordance with §§ 383 to 385. Sections 386 to 390 apply accordingly.”

Disclosure –
CIVIL LAW

German
ZPO

Document Production Phase

Important to consider whether a disclosure phase is necessary

Client sensitivities

Likelihood of obtaining helpful documents vs risk of disclosing harmful documents

Costs



If disclosure is required, Tribunal must establish framework for disclosure

What structure should the process have?

Drafting Requests to Produce

– IBA Rules Art 3(3)

- Requests to produce must:
 - Describe a specific document or a narrow and specific category of documents
 - Explain why the documents are relevant to the case and material to its outcome
 - Explain why the requested documents are not in the possession, custody and control of the requesting party and are reasonably believed to be in the possession, custody and control of the other party

IBA Rules on the
Taking of Evidence
in International
Arbitration

Adopted by a resolution of
the IBA Council
17 September 2003
International Bar Association



Request for Production – *Patel Engineering*

b. “R2”: Relevant and material⁵

38. The requesting Party must prove that the Documents are relevant to the case and material to its outcome and identify the specific paragraph in the submission for which evidentiary support by way of document production is requested.
39. Any request which does not comply with this requirement shall be rejected *in limine*.
40. Documents
 - referred to in other Documents that have already been submitted,
 - mentioned in witness statements or in expert reports, or
 - relied upon by experts to prepare their expert reports (but excluding working papers used by experts),will, as a general rule, be considered relevant.
41. It is not for a Party to disprove, by way of document requests directed to the counterparty, allegations for which the counterparty bears the burden of proof, since failure to discharge such burden will by itself lead to dismissal. Production with the purpose of disproving the counterparty's allegations will only be ordered in exceptional circumstances.

Drafting Requests for Production of Documents

No.	Document(s) Requested	Justification for Request	Other Party's Objections	Requesting Party's Replies to Objections	Tribunal's Decision
1	All documents related to the . . .	The requested documents are relevant to . . . and material.... The documents are not in Claimant's possession, custody or control. They are believed to be in the possession, custody, or control of Respondent because	The request is unduly burdensome because it . . .	The requests are narrow and specific . . . <i>.(two schools: some allow for reply, others don't)</i>	Respondent is ordered to produce to Claimant those documents relating to . . . because..... <i>(two schools: short or long explanation)</i>

Objections to Requests to Produce

Requests can be resisted on the following grounds (IBA Rules, Art. 9(2)):

- a) Lack of sufficient relevance to the case or materiality to its outcome
- b) Legal impediment or privilege
- c) Unreasonable burden to produce
- d) Loss or destruction of the document
- e) Commercial or technical confidentiality
- f) Special political or institutional sensitivity
- g) Considerations of procedural economy, proportionality, fairness or equality of the Parties

IBA Rules on the
Taking of Evidence
in International
Arbitration

Adopted by a resolution of
the IBA Council
17 December 2003
First published 2004, 2010



Situation:

- Claimant and Respondent began negotiating a telecoms joint venture agreement (“the Agreement”) in 2021.
- The parties had 15 meetings to negotiate terms and joint venture strategy from 1 January 2021 until 6 October 2021 when they signed the Agreement. Claimant's representatives at this meeting were Messrs. Callebaut, Delacroix, and Manet and Ms. Sebastien
- Claimant later brought an arbitration claim against Respondent to dissolve their joint venture.
- Claimant asserted that it relied on misrepresentations Respondent made in the 2021 pre-contractual negotiations and would not have entered the Agreement absent these misrepresentations.
- With its Statement of Claim, Claimant exhibited notes from two of its attendees from 3 of these 15 meetings and notes from one of its attendees from a 4th meeting.

Request for Disclosure

“All agendas, notes, reports, presentations, summaries, minutes, memoranda, or other documents prepared by any Respondent representative in connection with the meetings between Claimant and Respondent from 1 January to 6 October 2021. This includes but is not limited to:

- a) All agendas, notes, reports, presentations, summaries, minutes, memoranda or other documents prepared by any of Messrs. Callebaut, Delacroix, or Manet or Ms. Sebastien in connection with meetings between Claimant and Respondent between 1 January and 6 2021
- b) All documents drafted to prepare for, organize, summarize, record, memorialize, or report on the meetings held by the parties on: 10 January 2021, 28 January 2021, 16 February 2021, 6 March 2021, 22 April 2021, 29 April 2021, 16 May 2021, 19 May 2021, June 2021, 5 July 2021, 16 July 2021, 29 July 2021, 1 September 2021, 15 September 2021, 2-4 October 2021,
- c) All tape or electronic recordings or other records of the meetings identified in Request No. 1(b) above.”

Request for Disclosure – Respondent’s Request No. 1

1. “Relevance and Materiality: Claimant states that it relied on misrepresentations made by Respondent during negotiation of the Agreement and would not have entered into the Agreement absent those misrepresentations.
 - In connection with these assertions, Claimant relies on specific, selected notes and/or minutes of four pre-contractual meetings between the parties. Several of Claimants’ representatives attended each of the pre-contractual meetings. However, Claimant has placed into the record documents from multiple attendees in connection with three meetings and documents from one attendee in connection with one meeting. (See Exhibits 6, 8, and 14). Claimant has not put into the record any minutes, notes, reports, or summaries of its other personnel, despite the fact that all of Messrs. Callebaut, Delacroix, or Manet and Ms. Sebastien attended all 15 meetings.
 - The requested documents will show the full picture of Claimant’s contemporaneous understanding of the parties’ discussions and will test the accuracy of Claimant’s claim that it relied on misrepresentations in negotiations and would not have entered into the Agreement absent those misrepresentations.

Request for Disclosure – Respondent’s Request No.1

Respondent’s Justification

2. The requested documents are not in the possession, custody or control of Respondent but are reasonably likely to be in the possession, custody or control of Claimant, which would have created or received such documents."

Request for Disclosure – Respondent's Request No.1

Respondent's Justification

“Claimant objects to this Request on the grounds that it is disproportionate and unreasonably burdensome to satisfy. It is for Claimant to determine the evidence on which it chooses to rely and to support its claim. Respondent requests that in addition to the contemporaneous meeting minutes that Claimant has already supplied, Claimant be required to also produce multiple further copies of any notes taken at any meetings.

Evidence on many of these meetings have already been supplied through contemporaneous notes, minutes, or witness testimony.

Respondent also attended these meetings and has chosen not to put in any of its own internal notes of these meetings.

Finding documents responsive to this overly broad disclosure request will be unduly burdensome. It will require collecting, processing, and reviewing electronic and paper documents from multiple custodians, with a time range spanning nearly an entire year. Not only is this unduly burdensome, it is duplicative, particularly where there is already evidence in the record regarding the pre-contractual meetings of the parties.”

Request for Disclosure – Respondent’s Request No.1

Claimant’s Objection

What kinds of documents might be requested in a price review arbitration?

Objecting to Disclosure: **Privilege**



- What is Legal Advice Privilege?
- Most systems protect communications between client and lawyer.
- But concepts differ between different jurisdictions



Privilege

IBA Art. 9(4): “In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account:

- (a) any need to protect the confidentiality of a Document created or statement or oral **communication** made in connection with and for the purpose of **providing or obtaining legal advice**;
- (b) any need to protect the confidentiality of a Document created or statement or oral **communication** made in connection with and for the **purpose of settlement negotiations**;
- (c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen;
- (d) any possible **waiver** of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise; and
- (e) the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules.”

Privilege – *Patel Engineering*

- In *Patel Engineering Limited (India) v Republic of Mozambique (PCA Case No. 2020-21)*, the tribunal's Procedural Order No. 1 identified the following requirements to show a document was protected by legal privilege:

47. A requested Party may invoke legal privilege with regards to Documents prepared by or addressed to counsel, containing legal advice, and given or received with the expectation that such Documents would be kept confidential.
48. In general, a Document needs to meet the following requirements in order to be granted special protection under legal privilege:⁹
 - The Document has to be drafted by or addressed to a lawyer acting in his or her capacity as lawyer;
 - A relationship based on trust must exist as between the lawyer (in-house or external legal advisor) and the client;
 - The Document has to be elaborated for the purpose of requesting or giving legal advice;
 - The client and the lawyer, when requesting or giving legal advice, must have acted with the expectation that in a contentious situation the advice would be kept confidential.

Confidentiality and Sensitive Documents



Tribunal can make orders to enhance confidentiality protections

IBA Rules, Art. 9(4): “The Arbitral Tribunal may, where appropriate, make necessary arrangements or permit evidence to be presented or considered subject to suitable confidentiality protection.”



Confidentiality clubs

“Attorney’s Eyes Only”
Specific individuals subject to confidentiality undertakings
High level management

ICC Case No. 76592/AB

*Health Innovations S.A. (Sweden) v. Orly Family Trust
(Italy)*

Presenting the Case

- Procedural hearings
- ✓ **Written Submissions**
- Witness Statements
- Expert Reports
- Obtaining evidence and disclosure
- Evidentiary hearings
- Oral arguments
- Post-hearing arguments and submissions
- Tribunal findings on evidence



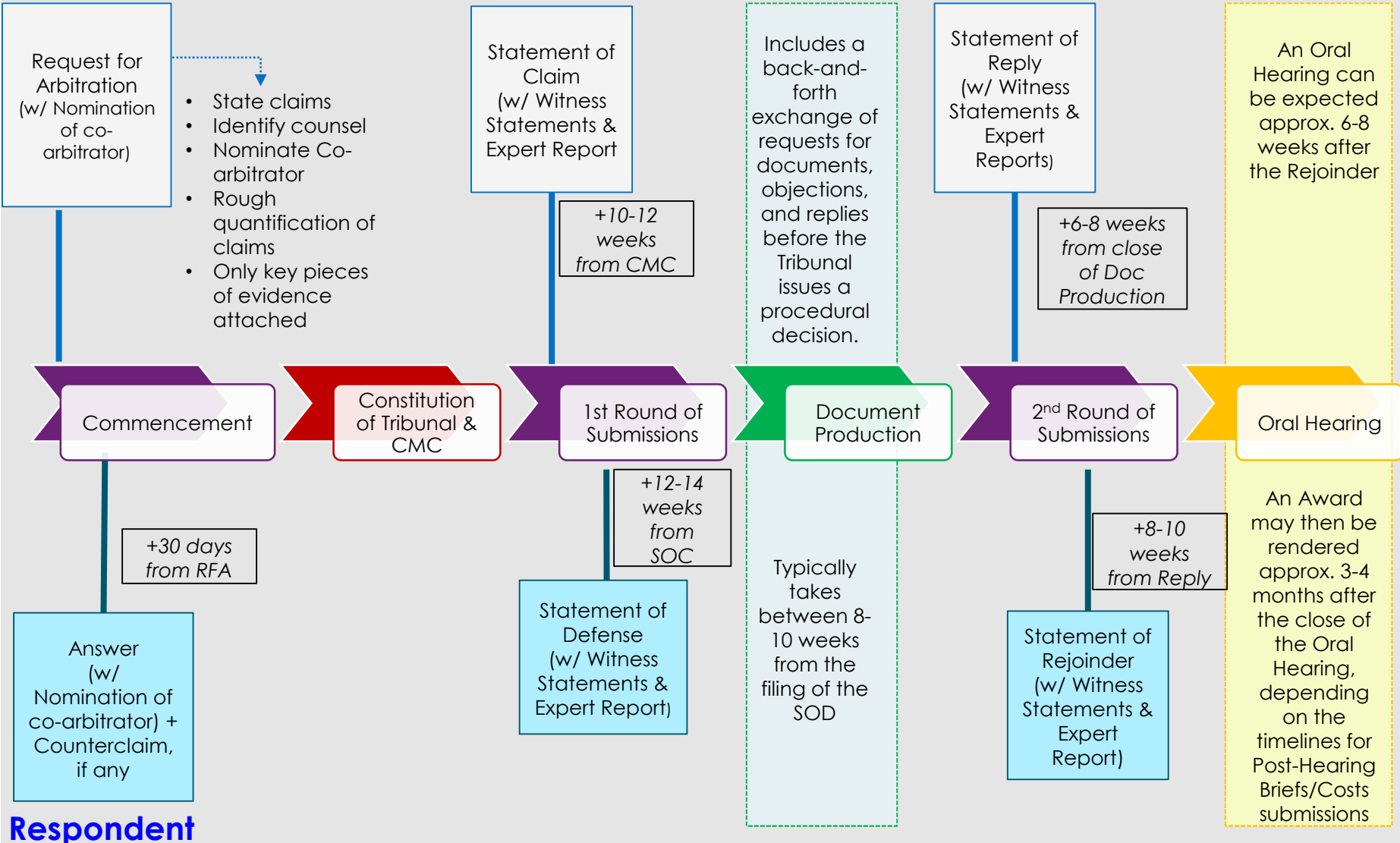
Presenting the Case: **Written Submissions**

- Advocacy through written submissions – often called memorials or briefs
- Number, timing and sequence vary
 - Request for Arbitration
 - Answer (and Counterclaim)
 - Statement of Case / Claim
 - Statement of Defense
 - Replies and Rejoinders – simultaneous or consecutive
 - (Pre-hearing submissions / skeletons)
 - (Post-hearing briefs)



Sample Timeline of an Arbitration

Claimant



Presenting the Case

- Procedural hearings
- Written Submissions
- ✓ **Witness Statements**
- Expert Reports
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Presenting the Case: **Witness Testimony**

- Who may be a witness in international arbitration?
 - **Any person, including the parties themselves and their legal representatives**
(see IBA Rules, Art. 4(2))
- Tribunal may or may not be allowed to administer oath (IBA Rules, Art. 8(4) requires an affirmation as to the truthfulness of the testimony for fact witnesses and genuine belief for experts)



Witness Testimony: Written Witness Statements

- Written witness statements
- IBA Rules, Art. 4 sets out guidelines on form
- May accompany submissions or be submitted separately
- May have rebuttal statements from witnesses (and new rebuttal witnesses)
- Preparation with counsel (See IBA Guidelines on Party Representation)

Witness Testimony: Written Witness Statements

PO1 in *Patel Engineering Limited (India) v Republic of Mozambique* (PCA Case No. 2020-21):

Witness statements

131. Any person may present evidence as a witness, including a Party or a Party's officer, employee, or other representative.
132. For each witness, a written and signed witness statement shall be submitted to the Tribunal. Where in exceptional circumstances a Party is unable to obtain such a statement from a witness, the evidence of that witness shall be admitted only with leave of the Tribunal and, if the Tribunal grants such leave, in accordance with its directions.
133. Any document to which a witness refers shall be exhibited (unless such document has already been submitted with the Parties' written submissions), form part of the documentary exhibits submitted by the Party calling that witness and be numbered in accordance with para. 13 of communication A-1 (and identified accordingly in the witness statement).

Witness Testimony: Written Witness Statements

PO1 in *Patel Engineering Limited (India) v Republic of Mozambique* (PCA Case No. 2020-21):

A. Witnesses

98. Any person who has produced a witness statement, expert opinion or report [**“Witness”**] may be called to the Hearing for cross-examination at the dates established in Annex I. The witness statement, expert opinion and/or report produced by any Witness shall be considered that person’s direct evidence and there shall be no additional need for the Party submitting said Witness to engage in direct examination of the Witness at the Hearing (other than a brief introductory examination as provided herein and/or to address any new points that have arisen). Notwithstanding this, the Parties recognize it may be helpful for the Parties’ respective quantum experts to provide a short presentation prior to engaging in cross-examination and, accordingly, this may be permitted.

Presenting the Case

- Procedural hearings
- Written Submissions
- Witness Statements
- ✓ **Expert Reports**
 - Obtaining evidence and Disclosure
 - Evidentiary hearings
 - Oral arguments
 - Post-hearing arguments and submissions
 - Tribunal findings on evidence



Presenting the Case: **Expert Testimony**



- **An “Expert” is “a person or organisation** appearing before an Arbitral Tribunal to **provide expert analysis and opinion** on specific issues determined by a Party or by the Arbitral Tribunal.” IBA Guidelines on Party Representation
- An “expert” is a person who has been instructed to give or prepare expert evidence for the purpose of proceedings. In practice this is a person with **either professional or technical knowledge and experience, whose opinion will be of value to the court on matters which are or may be outside its expertise.** (English CPR 35)

Expert Testimony



“... *the possibilities are endless*” ICC Centre for Expertise

- Experts calculate – e.g., appraisers, economists, accountants, actuaries, statisticians
- Experts test / measure / reconstruct – e.g., engineers, chemists, physicists, arson investigators, demographers, document examiners
- Experts describe / opine on specialized fields of knowledge – e.g., academics, lawyers, scientists, etc
- Experts challenge how other people did things

Expert Testimony: Procedural Issues

- How is “expert” evidence introduced?
- IBA Rules on the Taking of Evidence provide guidelines on form of expert statement :
 - Art. 5 (party-appointed expert)
 - Art. 6 (tribunal-appointed expert)

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Adopted by a resolution of
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17 November 2009
International Bar Association



Expert Testimony

PO1 in *Patel Engineering Limited (India) v Republic of Mozambique* (PCA Case No. 2020-21):

Expert reports

134. Each Party may retain and submit the evidence of one or more experts to the Tribunal.
135. Expert reports shall be accompanied by any documents or information upon which they rely, unless such documents or information have already been submitted with the Parties' written submissions. Any new document to which an expert refers shall be exhibited, form part of the documentary exhibits submitted by the Party calling that expert and shall be numbered in accordance with para. 13 of communication A-1 (and identified accordingly in the expert report).
136. The Tribunal may, on its own initiative or at the request of a Party, appoint one or more experts. The Tribunal shall consult with the Parties on the selection, terms of reference (including expert fees), and conclusions of any such expert.

Expert Testimony



- Is an expert's "primary duty" to help the tribunal?
- Or does the expert have a client?
- Codes of Practice, ethics and independence
- Opinion vs fact
- Does expert testimony always come from an "expert"?

Expert Testimony: Whose Expert?



- Party-appointed experts and/or Tribunal-appointed experts
- Common law vs civil law approaches
- Jointly-appointed experts (Sachs Protocol)
- Parties still may play a role with regard to a tribunal-appointed expert

Presenting the Case

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Presenting the Case: Preparing for the Evidentiary Hearing

- Common to have a pre-hearing procedural conference to organize details and resolve any remaining disagreements.
- May also agree rules regarding materials to be used, including demonstratives and new exhibits – typically this is already provided for in PO1, but, if not, now is the time.
- May include a cut-off for further evidence.
- Common to require parties to identify witnesses they want to cross-examine before the hearing.
- Parties typically agree on a hearing timetable with estimated times for openings, direct and cross examinations.



Preparing for the Evidentiary Hearing

- Approaches to dealing with witnesses can vary greatly across jurisdictions
- Can a lawyer prepare a witness before a hearing – i.e., meet with the witness to discuss the hearing?
 - If so, what can be discussed?
- IBA Guidelines on Party Representation in International Arbitration (2013) – “best practice guidelines”
- Recognize that many lawyers meet with witnesses / experts to prepare before a hearing, and preparation is often not limited to “familiarization”:

“**may**, consistent with the principle that the evidence given should reflect the Witness’s own account of relevant facts, events or circumstances, or the Expert’s own analysis or opinion, **meet or interact with Witnesses and Experts in order to discuss and prepare their prospective testimony.**”

IBA Guideline, Art. 24

IBA Guidelines
on Party
Representation in
International
Arbitration

Adopted by a resolution of
the IBA Council
25 May 2013
International Bar Association



Witness Preparation – UK v. US v. EU

- Different jurisdictions' codes of conduct have different thresholds for witness preparation—e.g. UK, Australia and New Zealand have a clear prohibition on witness “coaching”; whereas witness preparation on the substance of a case is common in the US.
- England & Wales:
 - R v Momodou [2005], EWCA 177 (255) *“There is no place for witness coaching in this country, we do not do it. It is unlawful.”*
- New York (similar across all US states):
 - New York Lawyer's Code of Professional Responsibility, Disciplinary Rules DR 7-102[A][6] *“a lawyer shall not participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false.”*
- EU:
 - Article 4.1 of the Code of Conduct for Lawyers in the European Union provides that *“a lawyer who appears, or takes part in a case before a court or tribunal in a Member State, must comply with the rules of conduct applied before that court or tribunal.”*

The Evidentiary Hearing

- Article 8 of the IBA Rules includes some guidance on hearings – particularly the sequence of witnesses and role of tribunal
- Establishes the general principle that ***“the Arbitral Tribunal shall at all times have complete control over the Evidentiary Hearing.”*** Art. 8(2) IBA Rules



Preparing for the Evidentiary Hearing: **Example of a PO1**

- 10.1 The Hearing will take place at the IDRC in London.
- 10.2 The parties will jointly arrange for securing an appropriate hearing room at the IDRC and will jointly arrange for the services of a court reporter to attend and transcribe the hearing in live, real-time format.
- 10.3 The Tribunal shall be in full charge of the hearings, including with respect to the procedure for examining witnesses. The Tribunal shall be entitled to limit a witness's examination or decline to hear a witness's examination where the Tribunal has determined that the matters to which the witness has testified are sufficiently proven by other evidence or the witness's testimony is not relevant.
- 10.4 Hearings are closed to the public.

Preparing for the Evidentiary Hearing: **Example of a PO1 (cont.)**

- 10.5 The use of demonstratives (such as charts, tabulations, graphs, etc.) is permissible where the underlying evidence is already in the record.
 - Demonstratives should be exchanged between the parties 24 hours before their use.
 - For the avoidance of doubt, any power point presentation that a party gives as part of its opening statement is not itself a demonstrative that needs to be exchanged beforehand, except that such presentation may contain a demonstrative as defined under this section, in which case that portion of the presentation must be exchanged 24 hours in
- 10.6 The Tribunal will issue additional rules and directions regarding the conduct of the hearing in due course, should they become necessary.

The Evidentiary Hearing



- There can be multiple evidentiary hearings in a case – for example, if a case is bifurcated
- Evidentiary hearings can vary in length – from a day to many weeks
- Can include oral arguments and witness examination
- The sequence of argument and testimony and the approach to each can vary
- Increasing willingness to allow witnesses to appear remotely, by video

The Evidentiary Hearing

- Hearing often starts with Opening Arguments / Statements – approach to content and purpose can vary
- Governing principle is to present a coherent theory of the case:

“It must contain a **simple, logical, provable account of facts** which, when **viewed in light of the controlling law, will lead to the conclusion that your client should win.**”
Lubet, Modern Trial Advocacy: Analysis and Practice (NITA 1997), 398
- Often accompanied by audio-visual material (PPT or similar)

The Evidentiary Hearing: **Witness Testimony**

- “Important means of evidence”?
- “Worst means of evidence”?
- All arbitration rules allow for the hearing of witnesses
- As discussed, witnesses may first testify through written witness statements (see Arts. 4(4)&(5) of IBA Rules)



The Evidentiary Hearing

Witness Testimony



- International practice has adopted an Anglo-American cross-examination procedure:
 - Questions from counsel of party presenting the witness
 - “Cross-examination” by opposing counsel
 - Additional questions from tribunal (see Art. 8(3)(g) of IBA Rules)

**Direct
Examination**

**Cross-
Examination**

**Re-Direct
Examination**

The Evidentiary Hearing

Witness Testimony



- “Sequestration” – can a witness be present during testimony of others?
- Different approaches, including where a witness may also be a party representative.
- General approach is that witnesses can at least attend after testimony. Even when sequestered, sometimes allowed to attend opening arguments.

The Evidentiary Hearing

Witness Testimony



Order of witnesses:

1. Claimant's witnesses
 2. Respondent's witnesses
- Other ways to sequence?
 - Party offering the witness usually indicates the order in which its witnesses will appear

The Evidentiary Hearing

Witness Testimony



Order of questions (see Art. 8(3) of IBA Rules):

1. Direct Examination (examination in chief) by counsel presenting the witness
2. Cross-Examination by opposing counsel
3. Re-direct Examination by counsel presenting the witness
4. Tribunal may ask questions at any time – and may not be limited by scope (see Art. 8)

What Is “Direct” and “Cross- Examination”?

- A witness begins his or her oral testimony at a hearing by being questioned in “**direct examination.**”
- Counsel representing the party for whom the testifying witness provides oral evidence asks open-ended questions in order to confirm, repeat or clarify that witness's evidence.
- Direct examination is usually limited to the issues discussed in the witness's written statement or to new matters which have arisen since the statement was submitted.
- “**Cross-examination**” is the examination of that same witness by the opposing party's counsel.

What Is “Re-Direct” and “Re-Cross-Examination”?

- “**Re-direct examination**” takes place after cross-examination; counsel for the party relying on the witness’s testimony asks additional questions in response to or in clarification of the testimony that the witness gave during cross-examination.
- “**Re-cross examination**” is possible, depending on the circumstances.
- The Tribunal can ask additional or clarifying questions at any time.

Taking of Evidence in International Arbitration

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