Chapter 9

ORGANIZING AN INTERNATIONAL ARBITRATION: PRACTICE POINTERS*

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I. INTRODUCTION

During the past twenty-five years that I have been presiding over arbitral tribunals in international cases, I have not come across a book that tells you how to do it in practice. Gradually, I developed the idea of writing such a practice guide to share my experiences with others. The invitation to write a contribution to the present collection of essays has provided the impetus for me to develop an outline with a number of practice pointers.

The limitations of my contribution are obvious. They are based on the experience in cases in which I acted as chairperson and in cases where I was able to observe the chairpersons either as co-arbitrator or as counsel. Chairpersons have their own styles and approaches, which of course differ. Consequently, the practice pointers I give below are limited to my own experience, and other approaches naturally exist in practice. However, I notice an increasing convergence of approaches used by chairpersons in international arbitration. I believe this is a good thing, since it increases the predictability of the international arbitral process. Another limitation is that the practice pointers below are by no means exhaustive. I have attempted to identify the major ones within the limits of this contribution.

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It should also be borne in mind that international arbitration is a flexible process that is to be tailored to the needs of each case. Hence, the practice pointers below are generalizations that do not necessarily apply to each and every case.

II. GUIDING PRINCIPLES FOR THE CONDUCT OF AN ARBITRATION

There are a number of principles that any chairperson should observe in the arbitral process.

The first principle is that of assuring the observance of the rules of due process (for some unexplained reason English lawyers refer to this notion as "principles of natural justice"). The principles of due process mean that the parties are to be treated equally, and that each party has an opportunity to present its case.

An example of treating the parties on an equal footing is giving them equal time (within reason) at the hearing. But this need not necessarily be a rigid chess clock rule. Take as an example the examination of witnesses. One party has five witnesses and the other party has ten. Should the examination of the first party's witnesses be twice as long? In principle, I do not think so. It very much depends on the subject matter of the testimony.

In connection with the principle of treating the parties on an equal footing, English arbitration practice is frequently to the effect that the *claimant* has the last word. That is a startling proposition for a continental lawyer. It may be that a chairperson has to adhere to the English practice in certain cases, but the message here is that this should be clarified in advance with the parties when one of the parties is represented by counsel unfamiliar with English practice.

The principle that each party "be given an opportunity to present its case" is qualified in the UNCITRAL Model Law by "each party shall be given a *full* opportunity of presenting his case" (article 18). The English Arbitration Act 1996, on the other hand, requires a "*reasonable* opportunity" (article 33(1)(a)). No such qualifier can be found in article V(1)(b) of the New York Convention of 1958.

As with any qualifier in a legal text, those just cited can give rise to differences of interpretation and a ground for challenging the award. The UNCITRAL Model Law can *in extremis* lead to a filibuster at the hearing. That is of course not the intent of the drafters of the Model Law. The English qualifier of "reasonable" may lead to lengthy discussions as to what is reasonable under the circumstances. My own solution is to offer the opportunity in accordance with the circumstances of the case and to inquire at the end of the hearing whether each party has had an opportunity to present its case (depending of the jurisdiction, I add the qualifier "full" or "reasonable"). If the answer is negative, I ask that party in what respects it perceives the need to present its case in further detail. In most cases, such situation can be resolved in consultation with the other party by practical measures (e.g., hearing of a further witness, recall of a witness, post hearing brief, etc.).

An example, where the principle of giving a party an opportunity to present its case can be jeopardized, is the submission of surprise documents at the hearing. Although measures can be taken to avoid this, it cannot be totally excluded either. Moreover, counsel may have valid reasons why he or she has found the document so late in the day. Indeed, as it turns out in practice, some new documents that surface at the hearing can be decisive.

The second principle that should be observed by a chairperson is that the arbitral proceedings take place with due dispatch. Speed is indeed still proclaimed to be one of the advantages of arbitration. When one hears complaints about the lack of speed in an international arbitration, counsel usually blame the arbitral tribunal. However, I submit that in many cases, the opposite is true: counsel appear to act on the basis of the principle "this time you, next time me" in consenting to requests for an extension of time. There is little that an arbitral tribunal can do against agreed extensions. Similarly, in certain cases, counsel agree to a schedule that makes the timeframes at the International Court of Justice look like expedited proceedings. I regularly wonder how counsel have convinced their clients about such a schedule. In any event, it is sometimes appropriate to hint to

counsel that one finds an agreed schedule rather "generous" (or, if it is too tight, "ambitious").

The third principle is that arbitration should be a cost effective procedure. It is no secret that international arbitration can be quite expensive. When people complain about this, it would be interesting to know why this is so. Is it because of the fees and disbursements of the arbitrators, because of the administration fee of the arbitral institution, or because of the lawyers' fees? In any event, it is advisable that the chairperson show to the parties that the tribunal is sensitive to costs in the conduct of the arbitration.

The fourth principle is that arbitrators are to render a service to the parties. Arbitration is not about academic hobby-horsing; rather, it is a service industry. This means in particular that the tribunal has to aim at a result where both parties have the feeling that (a) their case has been carefully considered, and (b) that they have been treated fairly.

The fifth principle is that the tribunal should always think about the end product: the arbitral award. Certain arbitrators start to think about the award only after the last submission has been made in the case. In my view, one should start thinking about the award much earlier, actually at the outset of the case.

It is good practice to draft the award in advance of the hearing by setting out the introductory parts (names of parties and arbitrators, procedural history and, to the extent available, the relevant facts). It is also rather useful to have a first draft of the parties' main contentions. This all may be enormously helpful at the hearing. First, the arbitrators will have a better view concerning which facts they would like to know more about. Second, it gives the arbitrators a better handle on the case in terms of what the parties actually argue. And, above all, the arbitrators can put more focused questions to the parties at the hearing. It regularly happens that during deliberations arbitrators regret that they had not asked questions about certain facts or certain contentions of the parties. It may then be too late in the day to go back to the parties. That awkward situation could have been avoided if they had started drafting the award before the hearing.

Moreover, drafting the award in advance of the hearing is time and cost efficient. If the award is not drafted prior to the hearing, the time between the hearing and the deliberations may be such that one has "forgotten" the case and has to read the file again prior to the deliberations.

A sixth principle is that *ex parte* contact with counsel of a party is, in principle, not allowed. However, that does not mean that the chairperson can never contact counsel for a party during the arbitration, *provided that the contents of the conversation are immediately disclosed to counsel for the other party*. It regularly proves to be useful to call counsel when one sees that something may go wrong or has gone wrong in the proceedings. A call can clarify more than a battle of letters. But, and I wish to emphasize this, the conversation must be relayed to counsel for the other side. Transparency is the name of the game.

In this context, when an application is made or some other urgency arises in the case, it is also useful to organize a quick conference call with counsel in order to sort the matter out. Here again, such a telephone conference is as a rule more effective than letting the matter grow, perhaps out of proportion, in exchanges of written communications.

When I am chairperson, I ask my co-arbitrators for their permission to deal with urgent procedural matters (they are virtually always more than happy to leave that to the chairperson). Of course, I contact them afterwards about what has happened and, if it is an important matter, delicate or otherwise, I seek their views beforehand.

III. RECEIPT OF THE FILE

Upon receipt of the file from the arbitral institution or the parties, the first thing to do is to check the file. Thus, the "packing list" of the arbitral institution needs to correspond with what one actually finds in the box. Experience shows that that is not always the case.

The next thing to do is to check the contract(s) in dispute in respect of the following. What have the parties agreed to in respect of the arbitration? What have the parties agreed on with respect to the applicable substantive law (i.e., the applicable law clause, if any, which is not necessarily limited to one place in a contract)? Have the parties agreed on matters of evidence (for example, the parole evidence rule)? One also may wish to check the notices clause in order to find out at which addresses notices can be validly made (unless counsel has indicated a different address for the purposes of the arbitral proceedings). And finally, it is useful to compare the names of the parties, as appearing in the contract, with those appearing in the Request for Arbitration and the Answer. One will be surprised to see how many times those names differ. Once the differences have been spotted, they can be clarified with the parties.

Obviously, one will have to read the Request for Arbitration and the Answer. Is it *prima facie* factually complete (to be developed in the arbitration procedure) and which are the main issues (which as a rule evolve in the arbitration)? Then, look to what the parties are asking for. The tribunal may have to act swiftly if there is a request for interim relief. That will usually appear in the relief section although that is not always so. There may also be a request for disclosure of documents (discovery requests). Such requests may be buried in the text or even in a footnote. There may also be a request for appointment of an expert, here again not always appearing in the section setting forth the relief. Finally, it is advisable to check whether the exhibits as referred to in the introductory submissions are indeed annexed to them and whether they are complete.

I usually make two charts for quick reference. The first chart is a relationship chart setting forth the parties and the contractual relationship(s). Such a chart is particularly useful if there are multiple parties and/or multiple contracts (very common these days). The second is a time-bar chart of the main events to the extent that they can be gleaned from the introductory submissions (to be updated during the arbitration).

A further matter that is not frequently practiced is to obtain information on counsel in the case. The type of counsel may have a

bearing on the manner the tribunal is going to conduct the case. The proposition here is simple: counsel probably has a lot of information on the arbitrators (often more than they think), so why should the arbitrators not be allowed to have information on counsel?

At this point in time, the chairperson may already wish to check upon the financial aspects of the case (fee structure and deposits, although fees should have been cleared at the time of appointment in most cases).

The chairperson then contacts the co-arbitrators in order to discuss how to get the ball rolling in the case.

In that context, one has also to consider whether a preparatory conference is necessary. If such a conference is to take place, the date has to be determined as quickly as possible after the consultation of the co-arbitrators and the parties.

In case of ICC arbitration, one also has to start drafting the Terms of Reference. Most arbitrators have a standard text (template) that can be adapted as the case may require. I suggest that one keeps the part relating to the facts at an absolute minimum. It merely needs to state that the parties have concluded a contract, that it contains an arbitration clause (quote text), and that a dispute has arisen for which arbitration has been requested. Anything more may attract criticism of one of the parties. As regards the summary of the parties' positions, a proven recipe for expedience is one where the tribunal gives the parties an opportunity to submit a summary (usually not exceeding four to five pages) and then the tribunal prefaces the summaries in the Terms of Reference with the language that neither party acquiesces in the statements made by the other party in the summary. With respect to the issues to be defined, the present version of the ICC Rules allows arbitrators to dispense with this requirement. If one still believes a description of the issues to be necessary, it is recommended in most cases to draft broad issues as they tend to evolve in the course of the proceedings. Finally, it is in most cases better not to deal with procedural matters in the Terms of Reference, but rather in the subsequent Procedural Orders (this applies in particular to scheduling, disclosure of documents, and

evidence by witnesses).[1] After having cleared the draft of the Terms of Reference with the co-arbitrators, it has to be submitted to the parties for comment in writing prior to the preparatory conference. This will render the discussion and signing of the Terms of Reference by arbitrators at the preparatory conference rather easy.

IV. PREPARATORY CONFERENCE

It is increasingly recognized that a preparatory conference held at the outset of the arbitral proceedings is useful. At such a conference, the conduct of the proceedings can be determined in consultation with the parties. If conducted appropriately, the parties will obtain full information as to how the procedure will develop. Additional advantages are that the parties can more quickly agree on procedural matters and that the arbitrators, the parties and their counsel can meet each other personally.

For a long time, how arbitral procedures were conducted in practice was not very accessible to outsiders. This changed when UNCITRAL embarked on the project to draft Notes on Organizing Arbitral Proceedings, which were adopted in 1996.[2] That exercise initially encountered resistance from a number of mostly French and Swiss arbitration practitioners, who asserted that it was an intrusion on the flexibility of the international arbitral process and that it was an import of the US style of litigation into international arbitration. While there is occasionally still some resentment about the Notes, a vast majority now views the Notes on Organizing Arbitral Proceedings as very useful. It can also be seen as a demystification of the international arbitral process in the sense that how international arbitration is conducted is no longer a trade secret of a happy few.

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[1] According to Article 18 (4) of the ICC Arbitration Rules, "When drawing up the Terms of Reference, or as soon as possible thereafter, the arbitral tribunal, after having consulted the parties, shall establish in a *separate* document a provisional timetable that it intends to follow for the conduct of the arbitration and shall communicate it to the Court and the parties." (italics supplied).

[2] To be found at website: www.uncitral.org.

The UNCITRAL Notes on Organizing Arbitral Proceedings provide the following list of matters for possible consideration in organizing arbitral proceedings:

1. Set of arbitration rules;
2. Language of proceedings;
3. Place of arbitration;
4. Administrative services that may be needed for the arbitral tribunal to carry out its functions;
5. Deposits in respect of costs;
6. Confidentiality of information relating to the arbitration; possible agreement thereon;
7. Routing of written communications among the parties and the arbitrators;
8. Telefax and other electronic means of sending documents;
9. Arrangements for the exchange of written submissions;
10. Practical details concerning written submissions and evidence (e.g., method of submissions, copies, numbering, references);
11. Defining points at issue; order of deciding issues; defining relief or remedy sought;
12. Possible settlement negotiations and their effect on scheduling proceedings;
13. Documentary evidence;
14. Physical evidence other than documents;
15. Witnesses;
16. Experts and expert witnesses;
17. Hearings;
18. Multi-party arbitration;
19. Possible requirements concerning filing or delivering the award.

The above matters are explained in the UNCITRAL Notes. However, two items that may be of importance, not included in the list, are: the overall time schedule of the proceedings (only

incidentally referred to in various items) and a possible bifurcation of the proceedings (see below).

It is clear that not all items are applicable in every arbitration. Rather, the UNCITRAL Notes serve the function of a checklist.

The way to prepare for a preparatory conference is first to invite counsel for each party to agree amongst themselves on the conduct of the arbitral proceedings with the UNCITRAL Notes as guideline. Then, they are to jointly advise the Tribunal in writing a number of days prior to the conference as to which items they have agreed, and to advise separately as to which items they have disagreed, each side setting forth its own views on the points of disagreement on the conduct of the proceedings. It is my experience that this renders the preparatory conference more expedient (in particular, one will avoid hearing from counsel: "I have to take instructions from my client on this matter").

At the preparatory conference, the UNCITRAL Notes can be taken as the agenda and outstanding matters can be discussed and agreed upon. Occasionally, the tribunal has to decide a matter where disagreement persists. After discussion at the preparatory conference, it is advisable to record the procedural matters in a draft of Order no. 1 and to circulate that Order amongst counsel for comment within a certain period of time. It regularly occurs that counsel agree to the draft of the Order (occasionally with some comments), which has the advantage that Order no. 1 can then be issued by consent.

In most cases, my Order no. 1 is rather detailed as I believe that it is useful to give counsel and the parties as much practical guidance as possible. This is borne out by the simple fact that counsel and the parties typically come from different legal and social backgrounds with each having their own approaches to procedure.

Although the various procedural items are well explained in the UNCITRAL Notes, I would like to make a number of observations regarding a few of them in the following sections.

V. EXCHANGE OF WRITTEN PLEADINGS

The common approach is to have two consecutive exchanges of pleadings (Statement of Claim, Statement of Defense, Statement of Reply, Statement of Rejoinder, plus a possible Statement of Rejoinder to the Counterclaim if there is one). In some cases this is limited to one exchange followed by a hearing and then another exchange.

The written submissions are to be accompanied by the written evidence. In a number of cases they are also accompanied by witness statements and, during the second exchange, rebuttal witness statements. Another system is one where the witness statements are filed either before or after the completion of the exchange of written submissions. I myself have a slight preference for the former system as it saves time and counsel can comment on the witness statements in the submissions (except for the rebuttal statement filed together with the last submission, which however can be remedied at the hearing and/or in the post hearing brief).

Another approach is that all relevant documents have to be produced first, after which the written exchanges take place. This approach can be seen especially in common law inspired proceedings. While there is some truth in the view that it is less meaningful to submit a Statement of Claim and Statement of Defense without having all documents, I do not believe that in most cases their consideration is decisive. It also causes a loss of time. I believe that it is more useful to incorporate the document disclosure into the schedule of an exchange of written submissions.

It is an accepted practice in adopting the schedule of the proceedings to provide for a final cut off date at which additional documents can be submitted by the parties. That date is usually a few weeks in advance of the hearing. It should be made clear to the parties that the opportunity is for additional documents only, while the bulk of the documents must have been submitted earlier during the proceedings as set forth in the schedule.

Upon receipt of a written submission one is advised to check it in order to find out whether it contains a request for interim measures, a request for production of documents or some other request that requires urgent attention from the tribunal. More generally, it is

useful to read the submission upon receipt and not to wait until just before the hearing.

VI. DOCUMENT DISCLOSURE

The matter of document disclosure is one of the hottest topics debated between lawyers from common law and civil law countries in international arbitration. To put it in probably overly generalized terms, common law lawyers cannot understand how an arbitral tribunal can decide a case without having all documents on the table, while civil law lawyers believe that they have the professional duty to submit only documents that support the case of their client.

Whatever may be the relative merits of these diverging views, the fact remains that today requests for the production of documents have become routine in almost every international arbitration. Nowadays, the general trend is to accept a more or less limited disclosure obligation. Guidance can be taken from the IBA Rules on the Taking of Evidence in International Commercial Arbitration of 1999 (although they are rarely agreed upon by the parties to arbitration as being fully applicable). Articles 3(3) gives the details required for requests to produce documents, which are not limited to one specifically identified document but can also cover "a narrow and specifically requested category of documents that are reasonably believed to exist." It is important to make clear to the parties that they must show in the request the relevance and materiality of the documents to the outcome of the case. Article 9(2) is equally important as it sets forth the reasons for objection to a request for production of documents (these grounds also apply to witness testimony).

A useful tool for deciding on requests for production of documents is the so-called "Redfern Schedule." The Schedule contains the following columns: Request No.; Document or Category of Documents Requested; Relevance and Materiality According to the Requesting Party (subdivided in Reference to Submission, and Comment); Identification of Documents Produced and/or Objections to Document Request; Reply to Objections to Document

Request; and Tribunal's Decision. Except for the last columns, the parties successively fill out the columns. Having the positions of the parties presented in that manner, it is relatively easy for the tribunal to decide on the requests.

However, nowadays documents are no longer paper but the underlying data (sometimes called the "native form" of documents). Electronic document production poses problems of its own: it voluminous (one pick-up truck is 1 GB of hard copy documents; it is no longer a matter of GigaBytes, but rather TeraBytes); it is not organized as paper (e.g., email jumbled on a server; the need of having adequate "search terms"); and it is volatile (paper has a long shelf life; data is subject to different data retention/destruction policies and create software legacy problems). It raises questions such as: what has to be preserved; how has it to be searched; who is to pay; and what are the sanctions. This tsunami in US litigation is now also reaching international arbitration. Guidance can be taken from the US Federal Rules of Civil Procedure as amended in December 2006, which amendment inspired by the Sedona Principles.[3]

Much more can be said about the matter of disclosure of documents, but I will content myself to observe that this matter needs very careful consideration at the outset of the arbitration (preparatory conference) in order to lay down clear ground rules for the parties. The absence of a common understanding on this point is likely to cause mischief and, in some cases, could result in prejudice toward the parties.

On the topic of documents, it is helpful to ask the parties to prepare a chronological list of the exhibits once the documents have been submitted (although they sometimes quibble about the description of the documents on the list). In this connection, one of the most useful things I learnt from English arbitration practice is the so-called common bundle. This is a bundle in which all exhibits, or the key exhibits, are reproduced in chronological order (with their own numbering). I know a number of arbitrators who actually first

[3] Available at website: http://www.thesedonaconference.org.

read the common bundle before reading the submissions of the parties. And indeed, reading a common bundle in chronological order can be quite revealing as to what the case is actually about. Moreover, having one set of exhibits with its own numbering can considerably speed up the examination of witnesses at the hearing (no need to search for the submission in connection with which a particular document was produced).

It is now quite common for international arbitrators to ask parties to produce the documents not only in hard copy but also in an imaged version (searchable pdf or tif) on a CD Rom. The same applies incidentally also written submissions, witness statements and expert reports. The use of modern technology makes large files easier to work with and readily transportable.

VII. WITNESSES

This is another hot topic between lawyers from common law and civil law countries in international arbitration. In essence, again overly generalizing, lawyers from common law countries wish to examine witnesses themselves, while lawyers from civil law countries believe the arbitral tribunal should ask questions to the witness, at least in the first instance. Actually, lawyers from civil law countries attach lesser weight to the testimony of witnesses. I am myself a believer of cross-examination in most cases, and that by counsel and not the tribunal. Counsel usually knows better which questions to ask the witness. Moreover, if there is a good examination, the case really comes alive to the tribunal. I have seen cases in which the testimony of witnesses did make the difference.

The tribunal can, and in my opinion should if needed, ask questions to the witnesses. It should however do so only at the end of the examination of the witnesses by counsel (after which each party should be allowed to ask follow-up questions to the witness related to the questions asked by the tribunal). The tribunal, and more in particular the chairperson, can interject during examination of witnesses if there is a discrete point that can be easily dealt with or if the witness is less than forthcoming.

The chairperson should be careful that the co-arbitrators do not start asking questions out of the blue. The witness should not be before a firing squad. The preferred course is that a co-arbitrator asks the chairperson whether it is an opportune moment to ask a question. It happens from time to time that a co-arbitrator does not understand where counsel is going with a line of questioning. Just before the real question is put to the witness, such an arbitrator interjects, with the result that the build-up of the questioning by counsel is lost. As a chairperson, I try to follow where counsel may be going with his or her questions, and give them latitude in that respect. On the other hand, if the examination does not fulfill any meaningful purpose, I ask counsel "would it be appropriate to move on to the next subject?" or a similar question to that effect.

During cross-examination by opposing counsel, counsel of the party who has brought forward the witness may attempt to coach the witness when he or she is in trouble. This is usually done in the form of objections. I try to cut down this type of behaviour by ruling fast on these objections, simply stating "overruled." This also has the advantage that the pace of cross-examination is not interrupted, which is an important aspect of cross-examination. Having been overruled two or three times, one will see in most cases that counsel stops using this technique. If one lets every objection be the subject of argument between counsel and subsequent deliberation of the tribunal, one may well loose control over the evidentiary hearing. Of course, the chairperson also has to clear this method with his or her co-arbitrators beforehand.

This is not to say that an objection by counsel is never justified (see article 9(2) of the IBA Rules on Evidence). My point is that objections should not be abused and should be raised within reasonable limits.

Direct examination (or "examination in chief" as the English like to call it) can be limited to a large extent by the submission of written witness statements in advance of the arbitration. I am in favour of this procedure in most cases, but I still think that it is useful that counsel for the party bringing forward the witness should have some ten to fifteen minutes to "warm-up" the witness and ask some

further questions at the hearing. The latter may also relate to witness statements of other witnesses. Civil law lawyers are generally not aware of the rule that no leading questions should be asked during direct examination. Even if they are aware of the rule, they regularly have difficulty in applying it. In practice, I let them go ahead, noting myself whether the question was leading or not. When it becomes excessive, I try to explain to counsel that he or she better rephrase the question. Unfortunately, in a fair number of cases, success is limited to the next two or three questions.

Re-direct examination (or "re-examination") should really be limited to matters that have arisen in cross-examination. Some counsel believe in the technique that the "best" questions should be kept until re-direct. That is unfair to counsel for the other side and should be avoided. If it happens and has not been stopped in time, counsel for the other side should be afforded the possibility to re-cross the witness.

Counsel trained in a legal environment where cross-examination is their daily bread and butter may have an advantage over lawyers coming from jurisdictions in which cross-examination is not current practice. As chairperson one can restore the balance somewhat by guiding the inexperienced counsel through the process. However, this should not amount to acting in lieu of such counsel as otherwise one could be seen as pre-disposed in a case.

It has for a long time been believed that during the examination of a fact witness, other fact witnesses should not be present in the hearing room (the so-called sequestration of witnesses). In most cases, I do not find the exclusion of other witnesses to be useful or even human. Witnesses have usually been active players in the dispute and there is no good reason why they should not be present when the other players are testifying, and instead be forced to wait for hours or even days outside the hearing room. I do not think that testimony of one witness can significantly be influenced by the testimony of other witnesses in many cases, in particular if the witnesses are examined properly by counsel.

A tricky question is the number of witnesses that can be allowed to be called at the hearing. How can one make clear to a party that

10 witnesses will do while it has listed 50? The problem can be, for example, that a tribunal cannot rule that a party has not proven a contention while the proof for that contention was one of the 40 witnesses whom the tribunal believed to be redundant. The excessive number of witnesses issue may be solved by asking a party to identify the points it wishes to prove with each witness. If it turns out that for a point a party has advanced more than 2 to 3 witnesses, the tribunal can indicate that the other witnesses for the same point are not necessary. There is no one single solution to this problem and the best thing to do is to engage in a cautious dialogue with counsel.

VIII. EXPERTS

Expert witnesses brought forward by a party can be useful, although some of my colleagues believe that money can buy any proposition. I myself find experts helpful in many cases, in particular when technical matters have to be explained. Studying expert reports by accountants may be seen as boring, but for me it is not. Numbers come alive when one has found out the assumptions on which the report is based.

As regards the possibility of appointing an expert, I only do so if this is absolutely necessary. In most cases, one can find one's way through the technical aspects with the help of the expert witnesses of each side. I sometimes have the impression that certain arbitrators appoint an expert so that he or she does the work for them. The award of such arbitrators is simply a subscription to the opinion of the expert. I find this a disservice to the parties. Even more frustrating for the parties is the case where after years of proceedings, the arbitral tribunal comes out with an award in which it says that an expert is to be appointed to advise the tribunal. If an expert is to be appointed, I suggest trying to identify that need early on in the proceedings and consult the parties thereon.

In the event that the tribunal indeed has to engage an expert, the tribunal members should not think that work has been taken out of their hands. My experience with a number of experts is that they are usually very good in their field of expertise but that they lack two pre-

requisites. First, they have difficulties in writing an understandable report. Second, they are not always aware of the principle of due process. In a construction case, I saw that the first thing that the tribunal appointed expert did was to rush to the site, talk with the people there (representatives of one party only), and present to them how the problem should be solved. Obviously, the other party should have been informed of his expedition and should have been present there as well. In another case, I saw an expert who went to a party and obtained documents without sharing a copy of these documents with the other party. This may really endanger the arbitral award as principles of due process are being violated. The remedy for all this is in most cases either that the chairperson supervises the expert or that the tribunal instructs the secretary of the tribunal to do so.

IX. HEARINGS

It rarely occurs these days that no hearing is held in an international arbitration. The question is rather how many hearings. If the case is fact-intensive, usually there will first be a witness hearing, followed by post hearing submissions, and then a hearing for oral argument. If one can combine them, cost savings can be achieved. However, post-hearing briefs are rather useful and, in my opinion, one should ask for them even if a combined hearing has taken place.

It cannot be emphasized enough that the dates for the hearing should be fixed well in advance. And the period prior to the hearing should have some float to allow for possible extensions for the filing of written submissions. To find a period for the hearings that is available for all concerned proves one of the most difficult things in international arbitration today.

The usual order of a hearing is an opening statement, the examination of witnesses and a closing statement. With respect to the opening statement, that statement should be limited to 30 to 45 minutes in most cases since, if done well, nearly everything has already been said in the written submissions. In a number of cases,

the opening statements are replaced by so-called skeleton submissions that are filed one or two weeks prior to the hearing.

As regards the closing arguments, although it is agreed to in most cases at the outset of the case, at the end of the witness examination exhausted counsel on both sides can usually agree on one thing: no oral closing argument – it will be included in the post-hearing submissions.

The daily schedule of a hearing usually begins at 9.30 until 1.00 with one break, and resumes at 2.30 until 5.30, again with one break. I have seen hearings that have lasted well into the evening, but this is not only tiring for the tribunal members and counsel, but also may prevent counsel from preparing properly for the next day. On the other hand, I have seen arbitrations on the basis of what is called a "light schedule", i.e., 10 to 12 and 2 to 4. This does not appear to be cost efficient to me.

The hearing facilities should be adequate, i.e., one conference room that is large enough to accommodate everyone (including the court reporter and, if applicable, the booth of the interpreter) and three break-out rooms, one for each party and one for the arbitral tribunal. The best practice is to check the hearing facilities or have them checked by the secretary of the tribunal beforehand. The setup of the hearing room can be important. I am myself in favor of the so-called U-shape with a witness table in the middle.

The question whether the hearing should be transcribed is also important. In most cases, the testimony of witnesses is transcribed verbatim. One may wish to clear with counsel whether they wish to have an overnight transcript or a transcript that is completed after the hearing. One may also wish to coordinate with counsel as to how the correction of the transcript will be accomplished. In this connection, it is advisable to hire experienced court reporters, as this greatly influences the quality of the transcript.

If interpreters are to be used, it is my preference to have a simultaneous interpretation. Consecutive interpretation is as a rule disturbing and, more importantly, causes a loss of time.

It is useful to have a so-called pre-trial telephone conference with counsel a number of days in advance of the hearing. During such a

conference, one can solve a number of procedural and administrative matters that otherwise would have to be dealt with at the outset of the hearing itself. In a number of cases in which such a telephone conference has not taken place, I have seen a whole morning or even a whole day lost on these procedural and administrative matters, which may in turn endanger the schedule.

With respect to timing, it was mentioned earlier that, within limits, each party should have equal time at the hearing. A useful tool is to send the parties beforehand a chart in which they have to indicate the estimated time for their opening statements, the direct, cross and re-direct examination (as applicable), and the closing statements. The secretary of the tribunal then acts as a timekeeper. Such a tool is useful for scheduling and re-scheduling. At the end of each day one can compare the estimates to the actuals with counsel and take appropriate measures with respect to the remainder of the schedule. Counsel generally also like the time-keeping chart as it helps them to focus on the questions they really need to ask to the witnesses.

X. SECRETARY TO THE TRIBUNAL

In most international arbitrations there will be a secretary to the tribunal. He or she can be quite useful in assisting the tribunal in administrative matters and control over the procedural progress. While the secretary may be helpful in drafting so-called non-operative parts of the arbitral award, he or she should not become a fourth arbitrator. A complaint heard about certain arbitrators is that after receipt of the file they see it again only at the eve of the hearing. That should be avoided by all means. Being secretary to a tribunal is also a good learning experience for being an arbitrator in the future.

XI. PLACE OF ARBITRATION

In most cases, the place of arbitration has either been agreed upon between the parties in the arbitration clause or has been determined by the arbitral tribunal or arbitral institution (if any). If

that is not the case, it is the arbitral tribunal that has to determine the place of arbitration. That may not be an enviable task. If one finds oneself in such a situation, the first thing one should do is make clear to the parties that nowadays a distinction between the place in the physical sense and the place in the legal sense is generally accepted. The place in the legal sense means, in virtually all cases, that the arbitration law of that place governs the arbitration. The place in the physical sense, on the other hand, means the place or places where the arbitration is actually (physically) conducted. The place in the physical sense may be anywhere. Unfortunately, too frequently I have seen arbitrators and counsel engage in a lengthy debate about the place of arbitration without distinguishing between the two.

The criteria for determining the place of arbitration in the legal sense are in my opinion the following: (1) an adequate arbitration law (2) courts that are supportive of the international arbitral process; and (3) that the State is party to the New York Convention of 1958.

Once the place in the legal sense has been determined, the place in the physical sense does not matter that much any more. Most modern arbitration acts allow for the conduct of arbitral proceedings anywhere inside or outside the jurisdiction. It then depends on matters such as cost efficiency and convenience where the arbitration will be physically held. That may be for the hearing of witnesses at the place where most of the witnesses reside, and for the hearing for oral arguments at another place that is mutually convenient to counsel, the parties' representatives and members of the tribunal.

XII. BIFURCATION

Basically, there are three types of bifurcation. The first type is to bifurcate preliminary issues (such as jurisdiction, applicable substantive law, period of limitation) from the issues on the merits. A second type is to distinguish between liability and quantum. A third type is grouping of claims in consecutive phases of the arbitration.

For some time it was believed that bifurcation was useful on the basis that it could save time and money. This applies in particular to the first and the second type of bifurcation. If, for example, liability

is found not to exist, it will have been a waste of time and money to have dealt with the quantification of damages. On the other hand, if liability is found, it is said that the parties may be more conducive to settlement following such a ruling.

I have also been for some time in favor of bifurcation. More recently, I have become more cautious, since in a number of cases I have seen that evidence that came up during the second phase would have had a material impact on (part of) the decisions made in the first phase. However, decisions on the merits rendered in the first phase cannot be amended as they have become final. The lesson to be learned is that if one believes that bifurcation is to be adopted, one should be rather generous with respect to the evidence that can be introduced by the parties during the first phase.

XIII. CONCLUSION

Organizing international arbitral proceedings is a challenging task. This is to a certain extent driven by the applicable rules for (an understandable) lack of practical guidance, but by no means in all respects. The challenge arises not so much because arbitration rules and laws are insufficiently detailed, but rather because each case has its own unique characteristics, not in the least due to the widely varying characters involved. Even if one is regularly a chairperson of an arbitral tribunal, one will find surprises almost every day. In my mind, that also makes the job rather attractive.

The final question put to me was: how did you learn it? The first part of the answer is obvious: by doing it. The second part of the answer may be less obvious: by watching others do it. There are a number of very good chairpersons in international arbitration, each with his or her own style and tools. Actually, it is to them that I owe a great debt of gratitude.