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## Pre-Hearing Techniques to Promote Speed and Cost-Effectiveness--Some Thoughts Concerning Arbitral Process Design

Jack J. Coe Jr.

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# Pre-Hearing Techniques to Promote Speed and Cost-Effectiveness—Some Thoughts Concerning Arbitral Process Design

Jack J. Coe, Jr.<sup>1</sup>

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## I. INTRODUCTION

This essay considers factors and pre-hearing techniques that bear on international arbitration hearings. In general it asks: what can be done to promote speed and efficiency in the hearing process? Given the interdependence of the influences affecting arbitral efficiency, it is difficult to surgically treat the subject; accordingly, this paper will take a broad view of the topic. As experienced arbitrators and advocates might well expect, the bulk of the methods touched upon below are deployed after the tribunal has been formed

but before the hearing actually begins. Nonetheless, some of the tools it describes can be implemented well before a dispute arises, as an aspect of business planning, while the success of certain other techniques may, in turn, depend upon the availability of certain post-hearing procedures.

The following is merely a survey—an introduction. Indeed, a treatment of pre-hearing techniques sufficient to account for the diversity among dispute types,<sup>2</sup> legal cultures, and governing laws could sustain a monograph of considerable length. The attached selective bibliography, under Part X below, should prove useful to one wishing to write such a book.

## II. GENERAL OBSERVATIONS

### A. *The Goals and By-Products of Dispatch*

Like its public cousin, litigation, international arbitration often exacts a surprising toll on resources of various kinds.<sup>3</sup> Ordinarily, relatively high total costs correspond to proceedings of extended length.<sup>4</sup> Prolonged, costly, proceedings in turn give an advantage to the disputant with the greater budget for such activity; regrettably, some arbitrations become wars of attrition in which the outcome may depend more upon which party is better financed than upon the merits of the dispute.

If ponderous deliberateness and costliness were immutable markings of the arbitral process, one would be left only with dismay and resignation. The reality is more promising than that. Parties and the tribunal, working together, enjoy wide latitude in promoting efficient proceedings.<sup>5</sup> While prudence cau-

2. Even within generic dispute categories such as "construction" or "investment" or "admiralty," levels of complexity vary greatly. Factors that influence dispute complexity include the number of parties, the degree of ambiguity in the applicable law, the number of substantive issues raised by the controversy, the legal culture of the parties (more specifically their lawyers), and the extent to which the parties have deviated in practice from any written representation of their rights and duties. The amount in controversy is also a good predictor of the skill, energy and other resources that will be marshaled in advancing the claim and defending against it.

3. Even modestly complex disputes can result in considerable monetary costs and a significant toll in business disruption and related consequences. For the disputants, the process advances without any guarantee that such costs will be recouped, even in victory.

4. One study found also a direct correlation between the amount in controversy and hearing length. See R. Bloore, *A Designer Cost Allocation System to Take Arbitration into the Next Millennium*, 63 *Arbitration* 194, 196 (1997).

5. For examples of inventiveness, see *Customized Arbitration Used in Major Panama Oil Dispute*, 7 (7) *Alternatives* 110 (July 1989); C. Buhning-Uhle, *The IBM-Fujitsu Arbitration: A*

tions against unbridled experimentation, it is a rare arbitration that runs its course without hindsight revealing something superfluous—perhaps an activity pursued more out of habit than necessity.

### *B. Defining Terms and Frames of Reference*

Reasonable minds can differ on the question of what constitutes an “effective” hearing, and accordingly, what pre-hearing techniques warrant special consideration. Doubtless, one’s view is shaped by experience, legal training and—in the case of counsel—perhaps pressures exerted by the client. An arbitrator’s sense of effectiveness is, of course, likely to differ from that of counsel—at least to some extent. Ultimately, for counsel and for the tribunal, “effective”—like the qualifiers “efficient,” and “fair”—is a relative concept tested against the backdrop of numerous competing interests and goals: speed may oppose thoroughness, comfort, and quality control; prolongation promotes expense and defers justice and finality.

For the present author, an “effective” hearing is one in which substantial equality of the parties is observed, there are relatively few surprises, new documents are introduced only exceptionally, counsel are cooperative with the tribunal and each other and all concerned treat time as a precious commodity.<sup>6</sup> These expectations are most likely to be fulfilled when the tribunal is active throughout the proceedings, setting the tone and pace from the moment it is formed. An effective hearing, moreover, can be had without compromising the fairness of opportunity<sup>7</sup> to which each side is entitled.

### *C. The Generic International Arbitration Model—Some Assumptions*

International arbitration is characterized by no single procedural format. In fact, malleability is what enables the process to provide an effective vehicle even when differing legal cultures meet. Naturally, the rules chosen by the parties exert an appreciable influence; but selectivity, inventiveness and compromise are often indispensable as the parties and the tribunal forge a process fair to both sides. Despite the flexibility of arbitration, there are practices that have become almost standard. One such practice, which this essay takes for granted, is the convening by the tribunal of one or more meetings at which

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*Landmark in Innovative Dispute Resolution*, 2 Amer. Rev. 113 (1991).

6. My definition does not depend upon whether I am acting as counsel or as an arbitrator.

7. The UNCITRAL Model Law formulation, reflected in numerous other texts, requires that the parties be treated with equality and that each party be provided a “full” opportunity to present its case. See Model Law, Article 18.

the procedural expectations of all concerned are shaped.<sup>8</sup> The timing, number and format of such meetings will depend upon the complexity of the case and the individual style of the tribunal.<sup>9</sup>

#### D. *The Role of Technology*

Recent advances in telecommunications have been warmly embraced by many sectors of the arbitration community. In theory, virtually any meeting of the parties and tribunal can now be accomplished remotely by video conferencing. Pleadings can be lodged as e-mail attachments and awards can be distributed in the same manner, perhaps after deliberations conducted by e-mail and video conferences among the arbitrators. Certainly these modalities hold great promise as means of achieving faster, less expensive proceedings. They may also be an important tool for reducing the effects of resource disparities among disputants. Without detracting from that prospectus, two minor caveats can nevertheless be acknowledged. First, much can be done to improve efficiency even when the proceedings, for whatever reason, are undertaken without extensive use of telecommunication and computer-assisted innovations.<sup>10</sup> Second, in a given case there may be valid reasons to choose traditional, more travel-intensive ways of proceeding, such as when witness demeanor is thought to be critical and best observed first-hand.

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8. Essential reading in preparing for such meetings is *UNCITRAL Notes on Organizing Arbitral Proceedings*, reprinted in J. COE, *INTERNATIONAL COMMERCIAL ARBITRATION: AMERICAN PRINCIPLES AND PRACTICE IN A GLOBAL CONTEXT* 421-40 (1997)(hereinafter *PRINCIPLES AND PRACTICE*).

9. See H. Holtzmann, *Procedural Aspects: Balancing the Need for Certainty and Flexibility in International Arbitration Procedure*, in *INTERNATIONAL ARBITRATION IN THE 21<sup>ST</sup> CENTURY* 12 (R. Lillich & C. Brower eds., 1994). See also Internal Guidelines of the Iran-United States Claims Tribunal, Art. 15, Note 4, 1 Iran-U.S.C.T.R. 98 (1981-82) excerpted in *PRINCIPLES AND PRACTICE*, *supra* note 8, at 415. The topic, to which this paper returns briefly below, does not enjoy a unified nomenclature. I tend to refer to the meetings that occur soon after the tribunal is formed as "organizational meetings" and to those that occur as the hearing nears as "pre-hearing conferences" or "preliminary" hearings.

10. See generally *PRINCIPLES AND PRACTICE*, *supra* note 8, at 89-90. Not all arbitrators and counsel have comparable experience with computer-assisted data storage and dissemination. The parties, moreover, may not have equal access to the relevant soft-ware, hardware and infrastructure. See, e.g., *Yukiyo, Ltd v. Watanabe*, 111 F.3d 883, 886 (Fed. Cir. 1997)(motion to strike CD-ROM pleading granted in part because opposing party would be required to purchase additional equipment to read the brief).

### III. THE ARBITRATION CLAUSE, PROCESS COMPONENTS AND CONTEXTUAL FACTORS THAT INFLUENCE EXPEDITION

#### A. *In General*

A number of elements not exclusively related to the pre-hearing phase potentially affect the efficiency of the proceedings in general, and the feasibility of specific pre-hearing techniques aimed at speed and economy. Of these variables, many are structural features the parties can contour to their advantage—if they anticipate them.

Certain other factors, while more intangible, will also affect the success of a given strategy. Chief among these are legal-culture-based predispositions (of advocate and arbitrator alike), whether the relationship between opposing counsel allows them to collaborate in streamlining the process,<sup>11</sup> and the extent to which both parties have a genuine desire to promote speed, efficiency and cost-effectiveness.<sup>12</sup>

#### B. *Situs and Related Matters*

The parties are ordinarily empowered to designate the situs of their arbitration. As is widely recognized, the legal system of the situs ordinarily supplies the *lex arbitri*—that body of law that governs a range of important issues.<sup>13</sup> This includes the outer limits of party autonomy over procedure and the tribunal's powers to advance the proceedings. Despite recent unification along liberal lines, the conventional wisdom<sup>14</sup> bears reiteration: if an “unfortunate” place is designated, specific techniques designed to exploit the flexibility of the arbitral method might operate under the shadow of an unsuitable *lex arbitri*, e.g., one who approaches party autonomy and arbitral power with reserve or suspicion, encourages courts to intervene in arbitral proceedings,

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11. It must be conceded that whatever professional goodwill may have existed between counsel when the claim was filed, by the time of the hearing strained relations may have precluded efficient cooperation. Sensing this, a tribunal might be reluctant to impose a joint initiative upon the parties for fear that matters may yet become worse with involuntary interaction.

12. Respondents sometimes have little desire to hasten the day of reckoning. Similarly, a claimant with a weak case may embrace delay to enhance the “nuisance value” of the dispute so as to promote settlement.

13. See W. L. Craig et al., *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION* 447-49 (2d ed. 1990).

14. For helpful discussions, see H. Holtzmann, *The Importance of Choosing the Right Place to Arbitrate an International Case*, in [1977] *PRIVATE INVESTORS ABROAD* 183; *Identifying and Applying the Law Governing the Arbitration Procedure—The Role of the Place of Arbitration*, in ICCA, *IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION* 336 (A. van den Berg ed., 1998).

maintains strict legal practice restrictions,<sup>15</sup> or propounds arcane grounds for setting aside awards.

Equally, situs selection's more prosaic dimension—its geographical and logistical aspects—also influence efficiency. Apart from the obvious implications of travel distance, time zones and linguistic accessibility are secondary questions that may assume unexpected importance. Experience teaches, for example, that when the tribunal requests the parties to address an unanticipated point of law, for counsel and the expectant tribunal there is simply no substitute for a good library which is open late into the evening.<sup>16</sup>

Under modern procedural formulae, juridical situs (the arbitral seat) is distinguishable from the place where the hearings are actually held. Article 20 of the Model Law is typical. It allows the parties to choose the place of arbitration but authorizes the tribunal “unless otherwise agreed by the parties, [to] meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.” Many tribunals are quite willing to exercise this apparent discretion, which adds a measure of unpredictability for the parties. For one team of disputants, currency costs, amenities, support services and proximity may vary greatly among the places thought convenient by the tribunal and the other party. It is therefore remarkable that arbitration clauses are often silent on the question of where the hearings and similar meetings are to be held.<sup>17</sup>

### C. Number of Arbitrators

Three-person tribunals, although not a mandatory characteristic of international arbitration, are part of a standard model. Indeed, under many formu-

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15. See generally D. Rivkin, *Keeping Lawyers out of International Arbitration*, [Feb.1990] Int'l Fin. L. Rev 11; cf. *Birbower, Montalbano, Condon & Frank v. Superior Court*, 949 P.2d 1 (1998)(no arbitration exception to unauthorized practice of law statute; later relaxed by statute).

16. Though marvelously complete, the law data bases available on-line will not invariably have everything that counsel needs in meeting the tribunal's expectations. There are also the untimely technical problems that one learns to expect when arbitrating far from home.

17. Under many familiar texts, including the Model Law provision just quoted, it seems uncontroversial that the parties can limit tribunal latitude to hold the proceedings away from the situs. The arbitration clause is an appropriate place to do so. Hypothetically, such a provision might distinguish between the juridical seat and the accepted places for hearings, fixing both as appropriate while prohibiting departures from the latter without the parties approval.



lae, a tribunal of three is the default rule.<sup>18</sup> Arbitrators often express a preference for multi-arbitrator tribunals; the cited benefits of not serving alone include the ability to confer and confirm one's sense of the case and governing law, the potential for greater diversity of expertise and language skills and the capacity for greater efficiency through divisions of labor. Counsel often view the three-arbitrator tribunal as a hedge against the risk of a rogue sole arbitrator or one who is simply unequal to the task.

In comparison to the one-person tribunal, however, the three-arbitrator configuration is generally more costly and cumbersome in operation and carries more potential for distraction during both the pre-hearing and hearing phases. Increasing the number of arbitrators prolongs the appointment process and amplifies the risk of challenge. It also slows tribunal determinations to the extent they depend upon intra-tribunal collaboration.<sup>19</sup> Further, the need to accommodate the schedules of three active professionals rather than one makes hearings more difficult to schedule and may influence the places the tribunal chooses to convene the parties. Finally, if a party labors under strict financial limitations, the added recurrent costs of the larger tribunal may leave that party less able to press its claim or defense.<sup>20</sup>

Given the foregoing, a tribunal of three persons, despite its virtues,<sup>21</sup> might well be considered a luxury, rather than an axiomatic feature of the process; and it is at least arguable that the number of arbitrators does not affect the process in sufficiently predictable ways to allow disputants to assess, for a specific case, the advantages that flow from the added expense.<sup>22</sup>

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18. See e.g. Model Law, Art. 10(2) (failing party agreement to the contrary, "the number of arbitrators shall be three").

19. Some rule formulae state that the tribunal chair may decide procedural questions alone. Even when that division of labor has been established, it would not be unusual for the chair to seek the views of the other two arbitrators. This seems especially true when questions arise at a hearing and all arbitrators are present.

20. In a given case, the money might be better spent on a tribunal appointed-expert than on two additional arbitrators, or indeed, to maintain symmetry, on a party-employed expert that might otherwise be financially out of reach for the less solvent party.

21. Three member tribunals often enjoy linguistic, governing law, and case management expertise not found in a single-arbitrator tribunals. In addition, because each party has appointed an arbitrator, and typically will have influenced the designation of the chair, may add to the perceived legitimacy of the process, despite the impartiality that each arbitrator is to possess.

22. The Arbitration Rules of the Commercial Arbitration and Mediation Center for the Americas (CAMCA) reflect a sensible approach. In default of any agreement, one arbitrator serves "unless the administrator determines that three arbitrators are appropriate because of the size, complexity or other circumstances of the case." CAMCA Arbitration Rules, Art. 6. Article 5 of the AAA International Rules (1997) and Article 14 of the World Intellectual Property Organization (WIPO) Rules adopt substantially the same formula. WIPO's Expedited Rules (1994) are also based, apparently without exception, on a one-arbitrator format.

#### D. *Fast-Tracking Clauses*

Among practitioners and arbitrators, the strategy of building narrow time tolerances into the parties' arbitration agreement seems to have met largely with guarded enthusiasm.<sup>23</sup> The approaches to fast-tracking vary; two methods illustrate the possibilities. One consists of a detailed clause that addresses one or more segments in the process, attaching a rigorous deadline to each. The other leaves more room to maneuver by merely recording the parties' desire that the tribunal, soon after being constituted, collaborate with the parties to establish an expeditious program. Such a generic mandate, of course, may merely restate a charge found in the governing rules or statute.<sup>24</sup> A hybrid combines elements of both. Certain time frames and expedients are agreed by the parties in the clause, which also provides that the tribunal shall be entitled to effect other measures it deems appropriate after consulting the parties.<sup>25</sup> It is also possible to set apart certain issues for fast-track proceedings, leaving others to be addressed with ordinary dispatch.

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23. See generally PRINCIPLES AND PRACTICE, *supra* note 8, at 265-66; L. Newman et al. *International Fast-Track Arbitration: Part I—An Overview*, 5 World Arb. Mediation Rep. 165 (1994). A. Rovine, *Fast-Track Arbitration: A Step Away from Judicialization of International Arbitration*, in Lillich & Brower eds., *supra* note 9, at 45.

24. The English Arbitration Act of 1996, at Article 33(1)(b), for example, states that the tribunal shall: "adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined." That duty extends to "decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it." *Id.*, Article 33(2). See also AAA International Arbitration Rules, Article 16(2)(tribunal to "conduct the proceedings with a view to expediting the resolution of the dispute"); LCIA Arbitration Rule, Article 14 (text parallel to English Arbitration Act, Article 33, *supra*).

25. Thus, for instance, the parties might agree: there will be one arbitrator, not three; that once appointed, the arbitrator may not be challenged; there will be one round of pleadings, not two, no post-hearing briefs will be filed; each side will have a fixed number of hours to expend as it desires at the hearing subject to the tribunal's power to limit irrelevant or redundant submissions; that the arbitrator must render a reasoned award within 30 days from the close of hearings and that the award's allocations of costs must reflect not only who succeeded but any deleterious or wasteful conduct of a party.

#### IV. REFINING THE MIX OF DOCUMENTARY AND ORAL SUBMISSIONS

##### A. *In General*

Modern rule texts acknowledge that the parties might elect to dispense with an oral hearing, a practice which is common-place in some types of arbitration.<sup>26</sup> Where witness testimony has been proffered, however, many advocates and arbitrators consider the hearing an essential, watershed event—an opportunity to both cross-examine key witness and to expose them to tribunal questions, lest their accounts enjoy more influence than they deserve.<sup>27</sup> For the common law lawyer especially, the hearing is viewed also as a chance to present opening and closing statements calculated to place in context and consolidate a theory of the case, while allowing the tribunal what may be the final opportunity to probe and clarify before deliberations begin.

##### B. *Increasing Reliance Upon Written Submissions*

In the interest of expedition are there not matters which can be surgically relegated to a documents-only procedure? Advocates perform this selection naturally when determining what matters to amplify with their often limited hearing time, perhaps prompted by the tribunal's reminder that the written submissions, having been studied by the tribunal, need not be exhaustively rehearsed. Extending this familiar pattern produces several possibilities for increased efficiency through greater dependence on written pleadings and greater selectivity in setting the hearing agenda.

One approach is for the tribunal to encourage the parties to agree upon a series of documents-only issues, concerning which each would rest on the writings submitted by it. The parties could be asked early in the process to anticipate the designation process. The proposed agenda tentatively agreed to would be submitted to the tribunal for comment, giving it therefore an opportunity to request oral treatment of issues slated for written coverage and to recommend other topics which in its view have been amply explained already. The result of the procedure would be greater predictability, symmetry and dispatch.<sup>28</sup> Increasing dependence upon written submissions could be

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26. See generally R. Bernstein et al., *HANDBOOK OF ARBITRATION PRACTICE* 105-21, 126-37, 162-77 (3<sup>rd</sup> ed. 1998).

27. C. Pearce & J. Coe, *Arbitration under NAFTA Chapter 11—Some Pragmatic Reflections Upon the First Case Filed Against Mexico*, 23 *Hastings Int'l & Compar. L. J.* 311, 335 (2000).

28. A range of subjects can be effectively pursued without oral argument, including the content of applicable law, collateral theories of recovery, and elements of valuation (such as technical arguments about the proper interest and discount rates). Those questions which might to the

achieved without requiring complete reliance on pre-hearing filings. Some documents-only issues could be handled in post-hearing briefs, a subject discussed in the next section.

### *C. Reconsidering The Role of Post-Hearing Briefs<sup>29</sup>*

The filing of post-hearing briefs (memoranda) is a common but not inevitable feature of international arbitration. The procedure is addressed only with abstractness in most rule formulae and is typically not addressed in the arbitration agreement, usually remaining a matter of tribunal discretion. Not surprisingly, arbitrator practices vary widely concerning post-hearing filings. Many tribunals are unsympathetic to the prospect of yet another filing; in addition arbitrators who are neutral on the subject willing to confirm before the hearing that such filings will be ordered.

The notion that the post-hearing filings merely add a segment to the proceedings can be meaningfully reexamined. Consider, for example, an arbitration in which only one round of pre-hearing memorials occurs and the closing statements are used merely to preface an elaborate post-hearing submission. This would incorporate a number of elements including reflections upon the final record (especially the testimony of key witnesses) and topics to which the parties' attention would be drawn by the tribunal. Presumably a net savings would result: there might be fewer hearing days, and the second round and post-hearing submission would be consolidated into a single, simultaneous, post-hearing submission.<sup>30</sup>

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advantage of the parties be settled early—such as applicable law and tribunal jurisdiction—can be handled in the first stage of a bifurcated proceeding.

29. See generally Pearce & Coe, *supra* note 27; S. Smith, *Advocacy and Tactics in International Commercial Arbitration*, 5 Cal. Int'l Prac 64, 71-72 (1994).

30. When I refer to a "round" of pleadings, I mean claimant's written submission (variously described in practice) and the corresponding responsive document filed by respondent. Some arbitrators regard a second filing by respondent (sometimes called a rejoinder) as non-essential in many cases; thus the claimant would file an initial submission (variously referred to as memorial, statement of claim, etc.) and (after respondent's counter-memorial) claimant would file a reply to end the written phase. Regardless, limiting the parties to only one pre-hearing written submission would require them to be as complete as possible in that submission. Accordingly, they might be allowed slightly more time than usual to prepare those pleadings. The post-hearing brief, while being less synoptic than the norm, would be subject to scope limitations, not unlike those applicable to a second round of pleadings. For example, new theories of recovery and defense would be prohibited, and the introduction of additional redirect or new documents would be disallowed, subject (extraordinarily) to the tribunal's grant of an exemption in light of

It is not suggested that every case would benefit from omitting a second round of pre-hearing submissions. In complex cases, the framing of core issues may need the additional refinement that results from further pleadings. Accordingly, in many cases it may be best for the tribunal to voice the aspiration of limiting the pre-hearing segment to one round of briefs, while reserving discretion to request an additional filing along carefully delineated lines as needed to promote a meaningful and efficient hearing.

#### *D. The Benefits of Simultaneous Submissions*

If the dispute is sufficiently uncomplicated that one round of written submissions would ordinarily suffice, the further expedient of substituting simultaneous written submissions for the traditional, consecutive pattern may warrant consideration. The ostensible advantage is that the pre-hearing stage would be shortened, thus bringing the matter to hearing sooner. From the perspective of the claimant, little would have changed except that there would be less time to prepare for the approaching hearing.

The impact upon the respondent by contrast would seem to depend upon the complexity of the issues and how clearly they were delineated before the parties made their submissions. In a complicated case, if the pre-filing proceedings leave claimant's contentions amorphous, a respondent made to file simultaneously could legitimately complain that it has been required to defend itself in the abstract, to anticipate sight-unseen the allegations against it. Because it would rarely be able to do so, certain issues would remain poorly framed after the submissions were made, dampening the prospects of an efficient hearing.

By contrast, in a single-issue case—e.g., was grade x a “reasonable substitute” for grade y under the contract?—the ability of the respondent to address the dispositive question does not depend heavily upon having time to consider claimant's position. Ordinarily, that pivotal issue would be well known to the parties and the tribunal before briefs were filed, by virtue of a terms of reference procedure or analogous preliminary exercise.

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matters raised for the first time at the hearing or truly fresh and important evidence previously unknown through no fault of the proffering party. Though the post-hearing brief is simultaneous, perhaps a claimant would, in recognition of the burden, be entitled to address matters raised in respondent's pre-hearing submission, an accommodation that acknowledges that claimant was not permitted a pre-hearing reply.

## V. THE ROLE OF PRE-HEARING CONFERENCES

A. *Sample Agenda Items*

Hearings are most likely to unfold in a predictable, orderly fashion when collateral issues are addressed before the hearing commences. With the help of useful memory aids such as the *UNCITRAL Notes*, such matters need not be overlooked. At the meeting most contemporaneous to the hearing in chief, a number of issues typically appear on the agenda. These might include: the manner of witness sequestration;<sup>31</sup> whether interpretation will be sequential or simultaneous;<sup>32</sup> the methods through which the proceedings will be recorded;<sup>33</sup> the order of presentations and who will have the last word; the daily and weekly schedule;<sup>34</sup> the amount of time allocated to each side; whether direct testimony will be offered; the extent and manner of cross-examination;<sup>35</sup>

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31. Who will be allowed to remain present throughout the hearing as a representative of a party? May a witness who has testified and been released stay in the hearing room thereafter? What standard oath will be read to the witnesses and what admonishment will they receive about contact with counsel and other witnesses?

32. Sequential (consecutive) interpretation is generally more time-consuming than simultaneous interpretation. Some counsel insist upon the slower format because it better allows them to police misleading interpretations. When the witness can understand the language in which the original question is uttered, that witness is given more time to formulate a reply than when simultaneous interpretation occurs. This issue arose in *Metalclad v. United Mexican States*; at Mexico's urging, the tribunal ordered that interpretation be sequential, but if necessary would enlarge the time allowed to claimant to accomplish cross-examination. See Pearce & Coe, *supra* note 27, at 385.

33. A transcript is not a necessary part of every arbitration; some tribunals rely heavily on personal note-taking even when a transcript is available. Institutions provide a range of means of preserving the proceedings. Perhaps the least costly method is to make audio recordings. The fee for written transcripts usually depends upon how quickly they must be made available to the party.

34. Will weekends be free of proceedings and will any weekdays be set aside for rest, preparation and, conceivably, for settlement discussions?

35. Cross-examination is a common law procedure and may be modified by a tribunal attempting to construct a neutral methodology to accommodate counsels' differing backgrounds. Perhaps all questions go through the tribunal; perhaps the tribunal advances its questions first and asks that only limited cross-examination follow. Numerous other protocols, of course, can be imagined. Where cross-examination is to occur, and even when written statements are to replace direct oral testimony, some advocates prefer a format that allows a witness to be introduced briefly before the other side begins cross-examination. Under this format, it may be agreed that the witness be given an opportunity to add to his or her written statement a brief observation or clarification before being questioned. This "warm-up" technique is thought by some to promote

how the tribunal will present its own questions to witnesses; the privileges that the tribunal will recognize,<sup>36</sup> and whether the parties should anticipate post-hearing briefs.

### *B. Other Pre-Hearing Clarification*

In addition to settling the above-mentioned organizational matters, some tribunals use the pre-hearing session to ascertain the specific witnesses whom each side seeks to cross-examine at the hearing and the order in which that will be possible.<sup>37</sup> The party who sponsored the prospective witnesses' direct testimony may be called upon to confirm that person's availability. The tribunal might also at this time alert the parties to any inventive procedures it expects to employ, such as the tandem examination of experts<sup>38</sup> or to substantive questions which counsel ought to pay particular attention in argument.

### *C. Tribunal Questions ("Homework")*

Tribunals sometimes circulate a list of questions which the advocates are encouraged to address during the hearing. In general they are legal questions. The practice is beneficial since it gives counsel a sense of what is important to the tribunal and implies that the tribunal is actively engaging in matters of substance with sufficient precision to formulate detailed interrogatories. Unfortunately for counsel, these assignments often emerge for the first time at the hearing, perhaps because the tribunal's physical mustering has somehow prompted consensus building thought to be premature earlier in the process. It

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more relaxed witnesses, but left unregulated could consume considerable time and thwart the containment in direct testimony that written statements achieve. As an alternative, the tribunal chair may be able to settle the witness by briefly but cordially explaining the process and its expectations as part of the oath-giving procedure; chairpersons often do so regardless.

36. The question of privileges may present thorny applicable law questions and some tribunals prefer to be warned if a given witness will possibly rely on such a privilege, although in practice that may not be known until the disputed line of questioning raises the issue. Within the annals of arbitration lore are stories of witnesses whose enthusiasm for appearing against a sovereign state waned with that state's commencement of criminal proceedings against the witness concerning matters related to the case being arbitrated. Should such a witness be allowed to limit testimony by excluding responses likely to incriminate him or provoke his accusers? The alternative may be to suffer a non-appearing witness, which, of course, may have been what the respondent state wished for.

37. It is sometimes necessary to accommodate the elderly, the infirm, high-level government officials and others facing especial challenges in appearing.

38. See S. Sklar, *Innovations in Arbitration: Using Tandem Witness Examination When Experts Collide*, 2(1) ADR Currents 14 (Winter 1996-1997)(attaching Tandem Witness Examination Protocol).

is difficult to see why such an exercise could not be started sooner; for example, the procedural order summarizing the last pre-hearing conference could carry the question list. Tribunals who give counsel the advantage of time to prepare their answers will usually find that arguments are built more coherently around the concerns intimated in the questions.

## VI. STIPULATIONS, SELF-EXECUTING STIPULATIONS AND PRESUMPTIONS THAT NARROW THE SCOPE OF CONTROVERSY

Once the parties' pre-hearing written submissions have been filed, the scope of facts thought to be in contention can be narrowed by stipulation. Some rules promote identification of such common ground by requiring the parties to set forth admissions and denials in certain pleadings.<sup>39</sup> A less ambitious form of factual stipulation, which is invariably helpful in a complex case, is an agreed time-line of events. Such chronologies are often constructed by respective counsel as a means of better understanding the case. Consequently, the degree of collaboration needed to produce a joint submission of this type may be relatively minor.

At least one experienced arbitrator<sup>40</sup> has advocated the use of self-executing concessions, functionally waivers, as a way to curtail belated reliance on extraneous matters by tireless advocates. Thus, for instance, after a prescribed time following its submission, unless timely placed in question: a document will be deemed authentic; translation will be taken as free of material errors and correspondence will be assumed to have been received by the addressee indicated without additional proof of that premise.

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39. Article 38 of the ICSID's Additional Facility Rules requires that both Respondent's Counter-Memorial and Rejoinder contain admissions and denials "of the facts stated in the last previous pleading." Claimant's Reply must also do so. A related technique, unilaterally undertaken by a party, is to set forth as part of a second round of pleadings a schedule of apparent common ground. Thus, a claimant's reply or a respondent's rejoinder might begin with such a listing (chronologically organized). If composed without an argumentative gloss it will prove helpful to the tribunal, will advance the advocate's credibility and can inform counsel's subsequent argument. If both parties undertake such a catalog, the tribunal will be able to construct its own list of factual stipulations and identify remaining factual issues. Where opposing counsel are unable to effectively collaborate toward a joint stipulation, the separate common ground approach just outlined may provide the next best approach and may in a given case be an apt substitute for the admissions and denials exercise required under some rules.

40. Holtzmann, *Balancing*, *supra* note 9, at 21.



## VII. HANDLING DOCUMENTS: CORE COLLECTIONS, AGREED BUNDLES AND SIMILAR DOCUMENTARY CONSOLIDATIONS

### A. *One Prevailing Model Among the Many*

Under one approach to submitting documentary evidence, consecutive written submissions of a party carry various attachments and appendices including such materials as witness statements, expert reports, legal instruments, correspondence and such miscellaneous proffers as that party seeks to place before the tribunal.<sup>41</sup> Unless there is misunderstanding, both disputants will have followed this practice. Therefore little material should be tendered for the first time at the hearing, an expectation some tribunals vigorously enforce with a “no new documents” rule.

### B. *Extracting The Core Documents*

Without some coordination, the parties will often submit copies of the same documents. Some of these are at the heart of the matter, others are collateral but included for the sake of completeness. Following a practice known to most advocates, some arbitrators cope with what becomes unmanageable duplication by gathering the most important documents and placing single copies into one or more binders for easier handling and transport. For many tribunals, the practice produces a net gain in efficiency. Confusion usually does not result, since, when referenced at the hearing, the oft-mentioned documents will be both familiar and identified by general description and date, rather than the place where they were originally found amongst the pleadings. As a refinement of this basic practice, a tribunal may wish to publish a draft table of contents of its “core collection,” inviting the parties to recommend additions as desired.

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41. On the attachment method of proffering documents, see P. Friedland, *Combining Civil Law and Common Law Elements in the Presentation of Evidence in International Commercial Arbitration*, 12(9) Mealey's Int'l Arb. Rep. 25 (1997); see also H. Smit, *Managing an International Arbitration: An Arbitrator's View*, 5 Amer. Rev. Int'l Arb. 129, 132-33 (1994). The present author has in mind a model in which the opposing party and the tribunal receive the submission simultaneously, rather than the opposing party receiving the submission some period before the tribunal does. Some systems of arbitration contemplate that the opposing side will receive the submission first, so that objections to privileged and otherwise inadmissible material can be raised to the submitting party before the arbitrator is irretrievably exposed to the disputed proof. See Bernstein et al., *supra* note 26, at 165 (giving “without prejudice” discussions as example).

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### C. *Variants of Agreed Bundle Practice*

Inspired by English “agreed bundle” practice,<sup>42</sup> tribunal intervention early in the process can reduce duplication of the documents submitted in the first instance. At an initial preliminary meeting, the parties can be requested to exchange views on what documents will doubtless be central to the case, and jointly submit them prior or contemporaneously to the first brief filed. Subsequent references to the common (“agreed”) documents are made by citation to their place in the bundle, rather than to an attachment to the pleading in question.<sup>43</sup>

### D. *Professional Tabulations*

In a given case, the character of performance or damages may be best substantiated by reference to certain seminal commercial documents (e.g., invoices). When these are so numerous as to defy efficient perusal and tabulation by the tribunal, it is sensible to allow a party to submit the data in the form of an independent accountant’s report.<sup>44</sup> Ordinarily, the proffering party bears the expense, subject of course to the ultimate allocation of costs. The computations, however, could also be done by a tribunal-appointed expert, depending upon the circumstances.

## VIII. ADJUDICATIVE AND COLLABORATIVE NARROWING OF THE CONTROVERSY

### A. *Bifurcation*

When bifurcation is elected, logically antecedent issues (such as jurisdiction, applicable law and liability) are decided before others (such as the extent of damages). The technique has obvious appeal as a method for avoiding superfluous proceedings and promotes a more focused attention by the tribu-

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42. See generally M. Mustill and S. Boyd, *THE LAW PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND*, 327 (2d ed. 1989); Bernstein et al., *supra* note 26, at 164-65; Holtzmann, *Balancing*, *supra* note 9, at 21.

43. Ordinarily, the agreed upon bundle consists of copies of documents, the authenticity of which is not in dispute. The significance, factually and legally, of an included document is typically not be conceded as part of the agreement.

44. This technique has been used at the Iran-United States Tribunal. Cf. Holtzmann, *Balancing*, *supra* note 9, at 21.

nal and advocates alike. The partial determination of the case may prompt settlement discussions that would otherwise not occur.

In arbitrations where the earlier segments fail to dispose of the case, however, it is not certain that the technique leads to briefer proceedings. Additional adjudicative segments, though narrower in focus than a single plenary hearing, require the arbitrators to coordinate their schedules additional times; some advocates consider that these scheduling challenges combined with the staccato effect of split proceedings makes for less momentum, concentration and cost-effectiveness.<sup>45</sup>

### B. Summary Judgment Proceedings

American courts have acknowledged an arbitral tribunal's power to dispose of issues in a summary procedure, subject to the parties being provided an appropriate opportunity to be heard.<sup>46</sup> In a complex case, the technique could be used to narrow the issues in dispute by eliminating theories of recovery or defenses which stand no chance of prevailing. Where the fatal flaw remains manifest after the written submissions are complete, arguably the tribunal could act on the pleadings alone. Nevertheless, in an abundance of caution it might entertain truncated oral arguments on the matters slated for summary disposition, perhaps at the pre-hearing conference scheduled nearest the plenary hearing. The latter will then be free of topics undeserving of the participant's further energies. Obviously, a summary disposition of many issues could be considered earlier in the proceedings, as a species of bifurcation.

### C. Interim, Post-Brief, Pre-Hearing Mediation

It is no doubt true that if mediation precedes arbitration, and it succeeds, there results a savings in time, money and other resources. Traditional med-arb deploys the collaborative process early in the dispute's life. This has the advantage of engaging the parties before they have become entrenched behind ossified legal positions.<sup>47</sup> While these generalizations no doubt hold true

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45. Cf. R. Goldscheider, *Measuring the Damages: ADR and Intellectual Property Disputes*, 50 Disp. Resol. J. 55, 56 (October-December 1995)(bifurcation in patent litigation causes months and years of delay).

46. See M. Hoellering, *Dispositive Motions in Arbitration*, 1(1) ADR Currents 1 (Summer 1996).

47. See generally M. Blessing, *The Mediation Rules of WIPO and Others: A Ticket to Paradise or Into a Better Mousetrap?*, in WIPO, CONFERENCE ON RULES FOR INSTITUTIONAL ARBITRATION AND MEDIATION (1995). Pearce & Coe, *supra* note 27; cf. W. Gans, *Saving Time and Money in Cross-Border Commercial Disputes*, 52 Disp. Resol. J. 50, 52-54 (January 1997)(discussing several reasons to attempt collaborative techniques rather than arbitration, e.g., speed, cost, pres-

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much of the time, they ought not preclude attempts to mediate later in the process. In particular, after both sides have exchanged pleadings, their respective understandings of the case (perhaps with new-found weaknesses) will have heightened considerably. Often by that stage, budgetary concerns will have assumed fresh importance, causing one or both of the parties to reconsider their resolve.

Few disputants having just completed written submissions would risk signaling weakness by inviting the opposing party to join in mediation; but such an overture need not be made if the exercise is either agreed to in advance (perhaps even in the arbitration clause) or promoted by the tribunal.<sup>48</sup> Each party could retain its confident posture while entering into the process as planned or recommended. For mediation to be profitable, it is not necessary for the entire case to settle. If it succeeds in jettisoning implausible defenses and fanciful theories of recovery, it will have been worthwhile, as evidenced by a shorter, more focused hearing.

#### IX. THE ADVOCATE'S MANTRA—HOPE FOR THE BEST, PREPARE FOR THE WORST

##### A. *In General*

The parties and their counsel share with the tribunal an obligation to facilitate efficient proceedings. Only on occasion do the genuine best interests of the client come into serious conflict with this obligation. Happily, in many situations the more efficient method will also present the client's case to advantage since tedious and laborious approaches to marshaling a case rarely impress the tribunal. The tribunal, after all, will already have digested the parties' written submissions and usually will have isolated only a handful of questions that it deems pivotal. In the best case, the tribunal gives ample clues as to what those questions are and counsel is alert enough to respond accordingly.

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ervation of business relationships and the possibility for mutually beneficial results).

48. See generally C. Koch & E. Schafer, *Can It Be Sinful for an Arbitrator Actively to Promote Settlement?*, *Arb. & Disp. Resol. L.J.* 153 (1999).

## B. *Less Is More*

For many arbitration counsel, nothing improves technique like a strict budget. One well-chosen expert may be preferable to three who overlap, contradict each other, and ultimately confuse the tribunal. Cross-examining only seven of a possible twelve witnesses in the interest of time causes one to designate with care and is less likely to produce a melange of testimony so diverse that the central truths sought to be adduced are obscured.

Similarly, a Power Point presentation containing dozens of demonstrative frames may be less effective than three posters on three easels setting forth the entire case in its rudiments and in plain view for the entire presentation. This is not meant as a all-encompassing indictment of technological assistance. But, to borrow (utterly out of context) Professor Rusty Park's phrasing, "one need not be a Luddite to resist wholesale replacement"<sup>49</sup> of low-tech means with hi-tech gadgetry. Hence, just as the proverbial banking lawyer is known for simultaneous use of belt and suspenders, so should every advocate relying on computer-generated images have distributed to the tribunal hard-copy versions of those slides, organized sequentially to track the main presentation. The arbitrators will have a choice of media and when the computer mysteriously ceases operations (as it will), the proceedings can advance with only minimal loss of face and disruption.

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