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HOW TO ACHIEVE A SUCCESSFUL HEARING

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I. INTRODUCTION

An arbitration hearing can be a crucial event in an arbitration and can have a great effect on the decision of a tribunal and the terms of an award. Indeed, all the major arbitration rules have provisions on hearings or "Oral Hearings" specifically. According to arbitrator Cecilia Flores Rueda, an arbitral hearing has the following objectives: (i) for the parties to present their case, and (ii) for the arbitral tribunal to obtain the necessary elements to issue the respective award.[1]

As Alexis Mourre has noted, "an arbitrator's learning curve is very different from that of a counsel."[2] There are some arbitrators who decide on the documentary evidence, but they also made their decision at the hearing. In this sense, an oral hearing could be determinative. Getting the tribunal's attention is not always an easy task. We have seen arbitrators who lost their attention during the hearings, i.e. yawning in the middle of a hearing, constantly checking their cellphones, or shifting their attention to other matters. Effectively conveying your arguments to the tribunal is essential.

This article will explain the basic provisions related to the importance and relevance of the hearing, as a procedural aspect of arbitration, and present a few suggestions on how to make the most out of an arbitral hearing.

II. IS A HEARING REALLY NEEDED

The tradition of settling disputes through oral hearings comes from ancient times. For example, the Bible recounts two women contending to be an infant's birth mother and how they presented their claims to possession of the baby to King Solomon, and

[1] *See* Cecilia Flores Rueda, *Audencia*, in DICCIONARIO ENCICLOPÉDICO DE ARBITRAJE COMERCIAL, (Cecilia Flores Rueda ed., 2010).

[2] Colin Ong Q.C., *Case Strategy and Preparation for Effective Advocacy*, *in* THE GUIDE TO ADVOCACY (Stephen Jagusch Q.C. and Philippe Pinsolle eds., 2018).

in Cicero Orations, Cicero defended Milo against an accusation of murder before a panel of Roman judges.[1] Over time, the concept of a hearing has developed, and in some systems oral debate has disappeared. Even now, in certain circumstances, an arbitration procedure may be conducted through the submission of documents only, on the grounds that the parties can property present their case in writing only, without a hearing, or that a matter can be properly decided exclusively on the law because the facts are not in dispute.

In this regard, arbitration provides flexibility and permits the parties to tailor the process to the specific dispute, and it is less formal than judicial process. One of the ways to increase efficiency and minimize the costs of arbitration is to not conduct an oral hearing if it is not necessary. It is common practice for a tribunal hold a hearing unless the parties have agreed that no hearing should be held, although increasingly tribunals are willing to decide disputes in the appropriate circumstances without a hearing upon the request of a party or through a summary disposition procedure. In fact, numerous arbitral institutions have recently introduced amendments to their rules to conduct fast-track processes to avoid an oral hearing or provide the parties with the ability to avoid an oral hearing. For example, the Rules of the International Chamber of Commerce (ICC) the Rules of the London Court of International Arbitration (LCIA), and the Rules of the World Intellectual Property Organization (WIPO) provide as follows:

> ICC Rules of Arbitration (2017), art. 25(6): The arbitral tribunal may decide the case solely on the documents submitted by the parties unless any of the parties requests a hearing.
>
> ICC Rules of Arbitration (2017), Appendix VI, art. 3(5): The arbitral tribunal may, after consulting the parties, decide the dispute solely on the basis of the documents submitted by the Parties, with no hearing and no examination of witnesses or experts.
>
> LCIA Arbitration Rules (2014), art. 19.1: Any party which expresses a desire to that effect has the right to be heard orally before the Arbitral Tribunal on the merits of the dispute, unless the parties have agreed in writing on documents-only arbitration.

[1] *See* Jay Tidmarsh, *The Future of Oral Argument*, 48(2) LOY. U. CHI L. J. 475, 476 (2016).

> WIPO Arbitration Rules, art. 55(a): If either party so requests, the Tribunal shall hold a hearing for the presentation of evidence by witnesses, including expert witnesses, or for oral argument or for both. In the absence of a request, the Tribunal shall decide whether to hold such a hearing or hearings. If no hearings are held, the proceedings shall be conducted on the basis of documents and other materials alone.

However, international arbitration counsel should consider if avoiding an oral hearing is the most effective means to make the arbitration move quicker, and if it is the right procedure for their client's case on a case-by-case basis. One of the main points to consider is whether written submissions, pleadings, and evidence provided during the procedure provide the tribunal with enough information without the need for an additional input or argument to be provided at an oral hearing.

In addition, counsel should be aware that oral hearings might considerably increase the costs of arbitration, which a client may want to avoid. Hearings may require physical attendance of the arbitral tribunal, the parties, their legal representatives, and their factual or expert witnesses, and thus include travel costs and related time.

Aside from the cost benefits, parties' counsel should also consider whether parties could benefit from an arbitral hearing when a case involves "doubtful" legal issues with broad significance beyond the lawsuit that require a full accurate development. Also, parties should consider the complexity of issues or facts.

Moreover, a hearing serves as the opportunity to communicate the theory of your case. Arbitrators might benefit from an oral hearing, which provides them with information about the parties, facts and issues. In other words, the counsel can take the maximum advantage of the potential of its written submissions. Counsel can communicate the story of the dispute, so it is clear in the arbitrator's mind. In this way, the tribunal can identify points of doubt and concern. Also, the tribunal can potentially make more rapid progress in its preparation to write the award and counsel can identify the issues to address in their post-hearing briefs.[2]

[2] David J.A. Cairns, *Oral Advocacy and Time Control in International Arbitration*, in ARBITRATION ADVOCACY IN CHANGING TIMES 185 (Albert Van den Berg ed., 2011).

III. LOGISTICS FOR THE HEARING

An arbitral hearing requires a lot of preparation. It is common for the parties to have a conference call with the tribunal at least a few weeks before the date of the hearing. The conference call can help to ensure that all of the participants are informed of the matters to be addressed at the hearings and schedules. Arbitral Tribunals expect the parties' communication and cooperation to shape the arbitration process.

After the conference call, arbitrators should issue a comprehensive case management order, setting forth the schedule and procedures for the hearing. Logistical items to consider for the hearing are listed below:

A. *Dates and Location.*

The date of the hearing should be fixed early in the proceedings, so scheduling conflicts can be avoided. It is important to make an agreement to determine on what day the hearing is scheduled to start and end, and at what time sessions will begin and end every day. In the context of start date and hours to carry on the hearings, parties should consider travel time for arbitrators who come from a different country or continent to ensure arbitrators give their best attention during the hearing.

Regarding the location of the hearing, it is usually held in the seat of arbitration; however, the arbitral tribunal and the parties can select the place they consider most efficient. If an arbitral process is institutional, an institution may provide services to organize the hearing facilities and meetings. The use of video conferencing or telephone may be considered where appropriate.

B. *Participants.*

Arbitration is usually confidential, so the public is not allowed to access. In this respect, it is advisable to have a registry table out of the hearing room to verify who is attending to the hearing.

C. *Hearing Sequence.*

It is important to define the hearing sequence, such as whether arbitrators will make an opening statement or whether they want to address preliminary matters first. Then parties will make their respective opening statements, present evidence,

and each fact and expert witness will be examined, and the parties will deliver final arguments or closing statements. It is important to confirm schedules and time limits.

D. *Record of Hearings.*

Usually, a hearing is recorded. It is advisable to verify the noise at the facilities during the days that the arbitral hearings take place. If the hearings are going to take place outside of institution hearing space or arbitration centers (for example, at a hotel), it may be important to review if other events will be taking place at the same time to ensure that these events do not affect the audio recording.

Parties should make arrangements to hire audio and/or video recording services. The hearing can be also transcribed, but the digital recording will be the official record of the hearing. If agreed, the parties often make a stenographic record of the hearing.

The parties should refrain from making recording or transmissions of the proceedings and this should be made by a professional to guarantee the quality of the audio.

E. *Documents.*

Arbitrators do not have courtroom staff. Ideally, parties should provide the arbitrator with pre-marked exhibits and agree if there is going to be a set of key exhibits and how these will be shown to the arbitral tribunal and other hearing participants. At the hearing, each party should bring sufficient copies of their supporting documents, properly labeled, for the arbitral tribunal and opposing party. Likewise, tribunals may ask parties to prepare bundles of the core documents. Tribunals may request that parties prepare these bundles jointly or that each party prepare its own bundles.

In this respect, parties should consider the use electronic means, such as tablets, if participants intend to travel. If you choose hardcopy, organize exhibits into notebooks.

F. *Audiovisual Support.*

It is common that attorneys or experts use visual materials, such as power points,

tables, graphics, etc. In this respect, it is advisable to test the devices to be used in the hearing room prior to the hearing to make sure the display or the software is compatible. Also, parties should make sure high-speed Wi-Fi, photocopy and printer services are available to the arbitral tribunal or the secretary of the tribunal.

G. *Interpreters and Transcript.*

If necessary, an interpreter can be present at the hearing. Prior to the hearing, it is important to determine a simultaneous or consecutive interpretation. Sometimes, simultaneous interpreters can distract the attention so make sure they have a proper space in the room.

Also, if transcripts are to be produced, they may consider whether and how the parties will be given an opportunity to check the transcripts.

H. *Break-Out Rooms.*

If necessary, parties and arbitral tribunals can have a break-out room. These are used to set up hearing documents, any equipment, or discuss confidential matters during the breaks.

I. *Presentation of Expert Evidence.*

The tribunal may give party experts the opportunity to make a presentation, which gives experts the opportunity to explain in their own words their methodology, assumptions, and conclusions presented in their expert report. Usually, experts' presentations are lengthy, so parties should allocate enough time for their presentation and for tribunal's questions that it could have.

J. *Witness Testimony.*

It can be relevant for the tribunal to hear from the individuals directly involved in the case to understand it better and to get a feel for their concerns. Likewise, the parties may submit witness testimony in written form. A tribunal may also call a witness to testify. If a witness is unable to travel, he or she may be permitted to testify by videoconference. In this regard, parties should review the law of the seat to determine if a witness has to swear or may affirm the truthfulness of their testimony.

IV. OPENING / CLOSING STATEMENTS: KEEP IT SIMPLE

Hearings traditionally provide an opportunity for the parties to present their

opening and closing statements. The parties' decision of whether to have an opening or closing statement (or both) is a relevant point of strategy and cost analysis. Lengthy closing statements, for instance, could be deemed unnecessary if written closing pleadings are already contemplated in the procedure.

An opening statement is an opportunity to make a summary and synthesis of the case and can help focus the arbitral tribunal's attention on the key issues.[3] The specific strategy of an attorney presenting a case before a tribunal depends largely on the attorney's legal tradition, experience, and the merits of the case. The profile of the arbitrator(s) is also relevant for this strategy.

Attorney Sapna Jhangiani makes an excellent summary of suggestions for opening statements, regarding the attention span of the arbitrators, oral techniques, and general strategy.[4]

A. *Tribunals are Not Superhuman.*

Arbitrators, especially more experienced ones, have a busy agenda. They are often on several cases at the same time. Complex proceedings with thousands of documents, bundles, witness statements, and hefty submissions are deemed heavier to process for arbitrators than for counsel that filed such content. It is simply unrealistic to believe that a tribunal will be able to read and understand all the memorials and evidence prior to attending a hearing. Therefore, it is critical to present a complex case in the easiest way possible for the arbitrators to focus on the most relevant provisions and evidence of the case.

B. *Storytelling.*

Everyone loves a good story. Humans are inherently social creatures who dwell on good stories for behavior and social rules. Oxytocin, a "feel good" hormone released when hearing a story, boosts feelings like trust, compassion, and empathy. Stories are unique for building social connections, which are therefore strongly

[3] *Effective Management of Arbitration—A Guide for In-House Counsel and Other Party Representatives*, INT'L CHAMBER OF COM. (2018).

[4] Sapna Jhangiani, *Keep it Simple: Keep it Interesting*, KLUWER ARB. BLOG, Sept. 17, 2015, http://arbitrationblog.kluwerarbitration.com/2015/09/17/keep-it-simple-keep-it-interesting/?doing_wp_cron=1591243158.9364919662475585937500.

encouraged when presenting a case.

As Jonathan Gottschall aptly stated: "We are, as a species, addicted to story. Even when the body goes to sleep, the mind stays up all night, telling itself stories."[5] To persuade, attorneys must aim to bring out the "human aspect" of the story by presenting their narrative as a tale, rather than straightforward facts or boring legal provisions.

C. *Less is More*

Jörg Risse is quoted as saying, "Do you have a PowerPoint, or something to say?"[6] A lengthy Power Point presentation, with huge amounts of text will probably go unread by the Tribunal. A short, succinct presentation, explaining a complex legal problem in the simplest way, is more efficient to send a message to the Tribunal.

A long monologue, explaining your case might bore the arbitrators, too. Reading your audience by keeping eye contact and pausing from time to time can help to keep the desired attention.

V. DIRECT EXAMINATION, CROSS-EXAMINATION, WITNESS CONFERENCING

Direct examination provides a party with an opportunity to tell its story. Cross-examination is the opposing party's opportunity to show that the story is not accurate and not reliable.[7]

A direct examination is frequently substituted with written witness statements. In the case of written statements, the document itself is evidence. If the direct examination is to be conducted, the counsel should guide the witness to tell the relevant facts in an orderly chronological way, like telling a story. Usually, witnesses that provided a written testimony must only attend the hearing if the opposing counsel or the tribunal requests their presence for cross-examination or further

[5] *See* JONATHAN GOTTSCHALL, THE STORYTELLING ANIMAL: HOW STORIES MAKES US HUMAN (2012).

[6] Mentioned in Aina Hannisa's news publication at the Humboldt Universität zu Berlin website, *Workshops on oral advocacy with Prof Dr Jörg Risse*, https://www.rewi.hu-berlin.de/en/sp/angebote/master/idr/workshops-on-oral-advocacy-with-prof-dr-joerg-risse-ll-m-berkeley.

[7] *See* RAGNAR HARBST, A COUNSEL'S GUIDE TO EXAMINING AND PREPARING WITNESSES IN INTERNATIONAL ARBITRATION 97–152 (2015).

questioning from the tribunal.

Something important to bear in mind while preparing a cross examination is to be aware there are no "Wow Moments" in the cross examination, as it is depicted in American movies, such as A *Few Good Men*.[8] The purpose of a cross examination is to demonstrate the witness' testimony is not to be relied on for the purpose of the tribunal's analysis. How can this be achieved? By showing the witness' facts, as testified, are not credible or by showing incoherent statements and other factual elements that will smudge the witness' testimonies.

Also, counsel should ask questions of which he or she already knows the answer to. Asking questions to which one does not know the answer is almost never a good idea. This principle of Less is More is also relevant in the examination of witnesses.

Witness conferencing can be an alternative or addition to cross examination, which can save time and costs as it helps the tribunal to focus on and clarify certain evidential disagreements. This is especially relevant for expert witnesses, who often provide different theories on technical and evidential issues.

Witness conferencing can be suggested by the parties or the tribunal itself. Opting for witness conferencing depends on the complexity of the case and relevance of the statements.

VI. POST-HEARING BRIEFS—ASSIST THE TRIBUNAL, DON'T CONFUSE THEM

One of the primary roles of an attorney is to assist the tribunal in their decision making. Seeing your role as that of assisting the tribunal on post-hearing briefs is an effective way to get the tribunal's attention. Instead of repeating the same arguments used in previous submissions, counsel should try to summarize or remark relevant issues that occurred during the hearing.

Most arbitral rules prohibit the introduction of new claims or arguments in the post-hearing briefs. Arbitrators tend to dislike such attempts by the parties' counsel. While parties might be tempted to re-plead their strongest arguments or to sneak in new ones, the cost-benefit analysis will often speak against post-hearing

[8] Rob Reiner, A FEW GOOD MEN (1992) (Colonel Jessup (Jack Nicholson) "*You can't handle the truth*!").

submissions.[9]

VII. CONCLUSION

The need for a hearing should be considered in light of the parties' submissions, and parties and their counsel must make a cost-benefit analysis as to whether to hold an oral hearing. If a hearing does take place, it is imperative for the parties' counsel to present their case in the most effective way for the tribunal.

Parties should be prepared to support with logistics when preparing for the arbitral hearing, and they must cooperate to make the arrangements in advance. Parties have the responsibility to optimize a hearing, and this should be observed throughout the arbitral hearing in order to manage expectations, define objectives, allocate and arranging timing.

However, faster is not always better. There is no one-size-fits-all answer. The key is to ensure that the dispute resolution process is thoughtfully selected by the parties to meet their needs.

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[9] Victoria Pernt, *Efficient Arbitration – Part 3: Winning an Efficient Arbitration*, KLUWER ARB. BLOG, July 21, 2018, http://arbitrationblog.kluwerarbitration.com/2018/07/21/efficient-arbitration-part-3-winning-efficient-arbitration/?doing_wp_cron=1591244545.4975619316101074218750.

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