

What To Expect at an International Arbitration Hearing

By Javier Rubinstein

The conduct of a merits hearing in an international arbitration depends a great deal on the input of the parties and the discretion of the arbitral tribunal. Arbitration rules and the law of the arbitral seat generally do not dictate how the merits hearing is to be conducted. This discretion and flexibility enable the tribunal to tailor the hearing process to the needs and circumstances of the case and the issues to be decided.

The arbitral tribunal generally will schedule a pre-hearing conference with the parties approximately 30–45 days before the hearing to give the parties an opportunity to comment on how the merits hearing should be conducted. The issues covered during the pre-hearing conference typically include: (1) how documents and exhibits will be provided to the tribunal, including whether a single set of exhibits (known as the Common Bundle) and whether the exhibits will be provided in hard-copy and/or electronic version; (2) whether there will be opening arguments by counsel and, if so, the time limits for such arguments; (3) the time that will be allocated to each of the parties during the hearing and how that time will be counted (e.g., use of a chess clock); (4) whether direct examination of witnesses will be permitted and, if so, the time limits for such examination; (5) the sequence and scheduling of witnesses to be examined; (6) whether witnesses will be sequestered prior to their examination; (7) arrangements for transcription and interpretation services; (8) the hearing location; (9) procedures for examination of expert witnesses (e.g., whether experts will be allowed to make oral presentations as their direct testimony, and whether witness conferencing procedures will be utilized in which experts for both parties testimony simultaneously, allowing them to interact with one another directly to facilitate the resolution of specific issues and enable the tribunal to focus more attention on the core issues of expert disagreement); and (10) whether there will be closing arguments, including any duration limits for closings.

It is strongly recommended that the parties confer on the issues to be discussed during the pre-hearing conference to reach agreement on as many of the elements as possible, thereby focusing discussion at the conference on those issues that the parties do not agree on. This enables the parties to have as much control and

influence over the hearing structure as possible. It also is recommended that parties begin to consider the hearing structure at an early stage of the arbitration.

In general, the merits hearing generally consists of the arguments of counsel and the examination of fact witnesses and expert witnesses. The direct testimony of witnesses is usually restricted to a brief examination of 10–15 minutes, as the witness statements previously submitted by witnesses serve as their direct testimony. The purpose of the oral direct is to enable the witnesses to briefly introduce themselves to the tribunal.

The cross-examination of witnesses typically is conducted in “adversarial” fashion by counsel, consistent with the model envisioned in the IBA Rules on the Taking of Evidence. It is also common for members of the arbitral tribunal to ask questions as well, either during the cross-examination by counsel or after the cross-examination is completed. Where the parties prefer witness examination to be conducted in the “inquisitorial” style seen in the courts of civil law countries, where the questioning of witnesses tends to be done predominantly by the arbitrator, the parties may choose to adopt the Rules on the Efficient Conduct of Proceedings in International Arbitration (known as the Prague Rules). The examination model set out in the IBA Rules continues to be the most common in international arbitration proceedings.

Whether a hearing will proceed virtually, in person or in hybrid fashion is subject to the agreement of the parties, or failing such agreement, the discretion and determination of the arbitral tribunal. Where a hearing will be conducted virtually, there are many additional issues that the parties need to consider in finalizing the hearing structure, including:

- The videoconferencing platform
- The equipment required for the tribunal, counsel and witnesses in each location
- Who will be responsible for videoconferencing support, including operating the platform
- Confidentiality and security procedures
- Safeguards to ensure that witnesses are not able to communicate with anyone during their testimony

- How documents and exhibits will be provided to witnesses prior to and during their examinations
- Technical requirements to ensure that all participants have equipment that is of sufficient quality to enable them to participate without interruption
- Testing and backup procedures
- Recordings of the hearing
- Emergency and backup procedures
- Arrangements for transcription and interpretation.

The above items generally are reflected in a procedural order established by the arbitral tribunal prior to the hearing.

It is possible that a hearing will be conducted on a hybrid basis, in which some participants are in the same room as the tribunal while others participate remotely. In such instances, it is important to agree on the circumstances in which a hearing participant, such as a witness, is allowed to testify remotely, particularly where there are no travel restrictions that would impede their participation in person.

While virtual hearings are an effective mechanism for conducting international arbitration hearings, it is important to note that virtual hearings require significant preparation and support to ensure that the hearing will go smoothly. The parties therefore should consider utilizing a vendor who will be responsible for operating and managing the technology, allowing the tribunal and counsel to focus on the hearing itself without having to worry about technology issues. There are many things that can go wrong, particularly when hearing participants are located in multiple countries, some of which may have bandwidth and other technology limitations. It is frustrating for the parties and the tribunal when technology interruptions occur, thereby interfering with the hearing flow.

In addition to the technological aspects of participation in a virtual hearing, counsel are well-advised to consider the impact of a virtual hearing on the advocacy techniques they plan to utilize.



Additional sources:

- ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, <https://iccwbo.org/publication/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-covid-19-pandemic/>
- AAA-ICDR® Virtual Hearing Guide for Arbitrators and Parties, https://go.adr.org/rs/294-SFS-516/images/AAA268_AAA%20Virtual%20Hearing%20Guide%20for%20Arbitrators%20and%20Parties.pdf
- Hanessian, The Initial Hearing, Global Arbitration Review, <https://globalarbitrationreview.com/guide/the-guide-advocacy/fourth-edition/article/the-initial-hearing>
- Scherer, Remote Hearings in International Arbitration: An Analytical Framework, Journal of International Arbitration, Volume 37, Issue 4 (2020) pp. 407 – 448