



Module 10: Practical Pre-hearing and Hearing Issues

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Evidence



- Oral Hearing unless the parties agreed no hearing shall be held (section 52(i) of the Hong Kong Arbitration Ordinance)
- Adversarial v. Inquisitorial Method of Investigation
- Documents Only verses Documentary and Witness Evidence
- Which method more advantageous?
- Two documents: (1) IBA Rules on the Taking of Evidence in International Arbitration; (2) CIETAC –Guidelines on Evidence

Discovery



- Documents relied upon to be attached to parties' case
- No general discovery
- No Peruvian Guano discovery – Chain of enquiry
- Particular discovery – use of Redfern Schedule (Sample)
 - Whether document referred to relevant to particular paragraphs of the pleaded case?
 - Whether material and necessary for the fair disposal of the case?
 - Whether fishing expedition?
 - Whether in the power possession and custody of the requested party?

Witnesses of Fact



- Witness Statements to be exchanged
- Witness Statement to stand as evidence in chief
- Witnesses of fact to be cross examined and re-examined at the hearing
- Consequence of a witness not showing up for the oral hearing: IBA Rules v. CIETAC Rules

Expert Witness



- Opinion v Fact evidence
- Evidence of Foreign Law
- Scope of Expert Evidence
- Whether the purported expert has the required expertise?
- Expertise evidence not be to affected by the “exigency of the case”. Duty of the expert to the Tribunal

Special Power of Court on Evidence



- Power of Court to direct inspection, photographing, preservation, custody, detention or sale of any relevant property
- Direct samples to be taken
- See Section 60 of the Hong Kong Arbitration Ordinance
- Enforcement of an order or direction made by the Tribunal (section 61 of the Hong Kong Arbitration Ordinance)

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- Each party shall have the burden of proving the facts it relies on to support its claim or defence
 - Strict rules of evidence not to apply
 - Arbitral Tribunal to decide on the admissibility, relevance, materiality and weight of the evidence
 - See HKIAC Administered Arbitration Rules Articles 22.1 and 22.2

Prehearing Housekeeping Matters



- Agreed or separate list of issues
- Dramatis Personae
- Venue
- Language
- Interpretation
- Transcript
- Exchange /service of opening submission
- Preparation of hearing bundles

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- Hearing confidential (also see sections 16 and 17 of the Hong Kong Arbitration Ordinance)
 - Sequencing of Oral Openings and witnesses
 - Parties to be treated with equality (section 46 HKAO)
 - Reasonable v Full Opportunity to present their case

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- Tribunal to use procedures appropriate to the particular case
 - Late evidence?
 - Witness preparation?
 - Importance of cross-examination
 - Oral and written Closing (post-hearing) Submission



Procedure and Evidence

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Flexibility and Autonomy of Arbitration



- Party autonomy enshrined in Arbitration Ordinance (s47).
- Tracks Article 19(1) UNCITRAL Model Law.
- “Magna Carta” for party autonomy and most important principle of UNCITRAL Model Law
- Grants parties freedom to agree on procedure to be followed by arbitral tribunal

Flexibility and Autonomy of Arbitration (cont'd)



- Parties may choose procedures established by arbitral institutions (e.g. ICC or HKIAC)
- If parties' procedure is not followed, arbitrators risk having award set aside (S.81(2)(a)(iv))
- After constitution of tribunal, procedural conference is held with parties to agree on rules for procedure
- Procedural conference can offer excellent opportunity to negotiate a settlement

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- Issues discussed at procedural conference include:
 - Methods of communication
 - Types of written submission (format and dates for delivery)
 - Number of witnesses needed
 - Necessity of expert witness
 - Manner evidence will be presented
 - UNCITRAL Notes on Organising Arbitral Proceedings provide a comprehensive checklist of issues that need to be addressed at procedural hearing

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- Tribunal will try to reach consensus with parties during procedural conference as to procedure
 - In absence of an agreement between parties, tribunal may conduct arbitration in manner it considers appropriate (S.47(2)), subject to mandatory provisions
 - In determining arbitral procedure to follow, arbitrators can seek guidance in the UNCITRAL Notes on Organising Arbitral Proceedings

UNCITRAL Notes



- Provide arbitral tribunals with useful comprehensive checklist of situations and issues to consider when determining appropriate procedures for arbitration
- Notes have no legal binding force
- Arbitral tribunal has responsibility to ensure that each party has adequate notice of proceedings and hearings as well as duty to conduct proceedings fairly
- Tribunal must take care to take into account parties' and lawyers' legal traditions

Evidence



- May be in form of oral, physical or real evidence
- Tribunal must take into account parties' linguistic backgrounds and legal cultures
- Tribunal is not bound by Hong Kong courts' rules of evidence (S.47(3)) and may allow any evidence it deems relevant
- Tribunal determines weight that it accords to evidence
 - Ex: Hearsay not excluded, but tribunal would tend to give little weight without independent corroboration

IBA Rules on Evidence



- Guide to assist arbitral tribunals in determining admissibility and weight of evidence (revised in 2010)
- Rules suggest grounds to exclude production of documents, statements, oral testimony, etc.:
 - Lack of sufficient relevance or materiality
 - Legal impediment or privilege under legal or ethical rules
 - Unreasonable burden on party
 - Loss or destruction of documents
 - Confidentially
 - Political or Institutional sensitivity
 - Considerations of economy, proportionality, fairness or equally

Rights of the Parties



- Tribunal accords importance to wishes of parties in adopting suitable procedure
- Party autonomy not absolute
- Must be balanced against mandatory provisions
- Mandatory provisions in Hong Kong include:
 - Right to equal treatment
 - Right to present its case
 - Obligation to avoid unnecessary delay and undue expense

Right to Equal Treatment



- Parties cannot renounce right to equal treatment (S.46(2))
- Arbitrators must act fairly and impartially between parties and give them reasonable opportunity to present their case (S.46(3))
- Arbitrators must avoid ex parte communications
- One-sided communications can lead to removal of arbitrator or challenge of eventual award
- Exception where there are specific grounds for ex parte applications (s.37)

Right to Present Their Case



- Parties must be give reasonable opportunity to present their case (S.46(3)(b))
- Element of natural justice and right to be heard
- Departure from UNCITRAL Model Law which requires ‘full’ rather than ‘reasonable’ opportunity to present case
- Right to present case does not necessarily imply oral hearings
- Award may be rendered on basis of written submissions only

Right to Present Their Case (cont'd)



- If either party requests a hearing, tribunal must hold one under Hong Kong law, unless otherwise agreed
- Length and procedure for hearing is at tribunal's discretion
- Tribunal must balance parties' right to present their case with need to avoid unnecessary delay and expense
- Respecting key strength of arbitration: commercial efficiency

Duty to Avoid Delay and Expense



- Hong Kong arbitrators have a duty to avoid unnecessary delay and undue expense (S.46(3)(c))
- Duty also reflected in modern institutional rules (e.g. ICC and HKIAC)
- Mandatory obligation for arbitral tribunal
- Parties' freedom to agree on arbitral procedure can create unnecessary delay or expense and conflict with mandatory obligation of avoiding delay and expense



Q&A



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