

Steps an Arbitrator should take before and during the Hearing.



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Introduction;

The purpose of this paper is to explain the steps that an arbitrator should take before and during a full oral hearing. This paper is based on United Nations Commission on International Trade Law (UNCITRAL), Modal Law on International Commercial Arbitration.

1.0 Steps an arbitrator should take before the hearing;

1.1 Preliminary Meeting and Engagement Agreement

The preliminary meeting provides an opportunity for the parties to arrive at vital decisions and an understanding on various matters before meeting at the arbitral tribunal. Parties can agree on including the question of the amount of arbitrator's fees and expenses, agreed timetable for some interlocutory steps such as exchange of pleadings and submissions.

Each party shall introduce their authorized representatives to act with authority and knowledge in taking decisions on behalf of the relevant parties.

Then the parties shall meet with the arbitrator before the formal hearing for the purposes listed below. The meeting may take place by telephone conference call.

- To determine the issues in disputes
- To determine the matters, if any, on which they may be in agreement
- To determine what documents, correspondence, books or records shall be produced, when, by whom, and whether experts are to be called
- To determine the law which will govern the procedures and the substance of the arbitration,

unless such law has already been specified in the arbitration agreement?

- To determine the language or languages to be used in the arbitral proceedings
- To consider whether "on site" inspections shall be part of the proceedings
- To decide upon the powers of the arbitrator with respect to the remedies, including interim relief and conservatory measures
- To indicate the number of witnesses likely to be produced
- To estimate the length of time period the hearing might take
- To determine the stenographic record or other type of recording of the proceedings that should be kept or if any particular services, such as interpreters, translations, or security measures should be provided
- To determine the manner in which the arbitrator's fee and the expenses of the arbitration will be calculated, secured and paid, including any deposits to be in advance
- To fix the date, time, and the place of the hearing
- To make any other determinations as may be necessary before the hearing
- To decide which of the items referred above are to be covered by an engagement agreement and to complete and sign such agreement either at the meeting or prior to the formal hearing

At the preliminary meeting the arbitrator shall disclose any personal interest in the matters in disputes and any previous relationship with any of the parties to determine if there is any objection to his/her continuing to act as an arbitrator.

1.1.1 Determination of rules of procedure (Article 19)

According to the Article 19 of the law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. If the parties fail to agree on such procedure, the arbitral tribunal may conduct the arbitration in such a manner as considered appropriate according to the law.

1.1.2 Determination of the place of arbitration (Article 20)

In accordance with Article 20 of the law the parties are free to agree on the place of arbitration (If the place of arbitration is not stated in the Contract). Failing to do so, the place of arbitration shall be determined by the arbitral tribunal after considering the circumstances of the case and the convenience of the parties.

Notwithstanding the provision of the above paragraph, the arbitral tribunal may unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, and other property of documents.

1.1.3 Determination of language or languages to be used in the arbitration. (Article 22)

If the contract does not state the language or languages to be used in the arbitration, in accordance with Article 22 of the law, the parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or language to be used in the proceedings.

1.1.4 Determination of submission of Statements of Claim and Defence Statements (Article 23)

In accordance with Article 23 of the law, within the period agreed by the parties or determined by the arbitral tribunal, opportunity to each party to submit statements of supporting documents or references to the evidence of his/her claim is provided. (In an exceptional case, arbitration may proceed without any such documents.)

Unless otherwise not objected by the other party, any party can amend or supplement its claim or defend during the course of the arbitral proceedings.

1.2 Pre-hearing review meeting / conference

In consultation with the parties and their advisers and the availability of the counsel, arbitrator should fix the date for the hearing. Four to six weeks before the hearing starts, arbitrator will call a pre-hearing review meeting / conference, but it should be after witness statements and experts' reports being exchanged. Pre-hearing meeting / conference can save the time and costs at the hearing itself. It is important that the parties should have comprehensive advance knowledge of the matters to be discussed at the pre-hearing meeting/conference. The arbitral tribunal may make an order directing the parties to appear for a pre-hearing meeting/ conference. The order should state the matters to be discussed at the pre-hearing meeting/ conference and the timing of the pre-hearing meeting/ conference.

The purpose of this meeting is;

- To enable the arbitrator to satisfy him/herself that all previous directions have been compiled.
- To consider if any further directions or discovery is required.
- To ensure that the parties have identified the issues and each party will come to the hearing with his/her attention and concentration on the issues that really matter.
- To consider whether any issue can be tried as a preliminary issue and whether any interim award can be given before the hearing.
- To consider any issue as a preliminary issue.
- To understand the status of any settlement discussions.
- Whether the arbitrating parties require any further written statements or any further statements are required by the arbitral tribunal.
- To fix a schedule for submission by each party of a summary of the documents or lists of witnesses or other evidence it intends to present.
- To fix a schedule for submission of any documents, exhibits or other evidence, that the arbitral tribunal may then require.
- To determine whether voluminous and complicated data should be presented through summaries, tabulations, charts, graphs or extracts in order to save the time and costs.
- To determine what documents are required to be translated and whether any party wishes to have interpreters. Any party wishing an interpreter, shall

make all arrangements directly with the interpreter and shall notify the other parties to bear the cost of the services .

- To consider the programme of the hearing to ensure that the witnesses attend on time and not attend those parts of the hearing with which they are not concerned.
- To arrange appropriate bundles of documents, including the list of issues to be delivered to the arbitrator during the hearing giving him/her sufficient time enabling him/her to read them thoroughly before the hearing begins.
- To shorten the time of hearing by admitting to all or part of the witness statements or by directing a further meeting between the experts.
- To check whether a suitable venue has been arranged and whether all the other preparations for the hearing are in place.
- To determine the record keeping method. Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements at least three days in advance of the hearing. The requesting party or parties shall pay the costs of the records.
- To ensure that the hearing will start in an efficient manner on the scheduled date.

The above items are to be covered by an engagement agreement and to complete and sign by the parties at the meeting or prior to the formal hearing.

1.3 Preparation before the hearing.

Following are the important items an arbitrator must consider when preparing for the hearing;

- Venue arrangements – The usual practice is for the venue arrangements to be made by the claimant. If the claimant finds any difficulty in locating a venue, the arbitrator may be of help in finding the same for arbitration. The important point is the layout of the room in which the hearing is to be held and the ancillary accommodation.
- If a full formal hearing is required, there should be a separate retiring room for the arbitrators and accommodation for the parties and their advisors enabling them to hold private conferences.
- A common way of setting the tables and chairs is in a U shape or alternatively using the courtroom style layout.
- The arbitrator, parties and their witnesses must have

sufficient rooms for themselves and for books and documents. In a building arbitration there are many drawings to be consulted and these drawings are to set on a separate table. (These questions will have to be decided at the preliminary meeting or at an early stage in the proceedings.)

- Fixing the dates and time for hearing
- Making arrangements for the transportation of the arbitrators, experts and the witnesses
- Witnesses – Lists of witness who are to be presented for the hearing and a time table for the witnesses and the oaths of the witnesses
- Cross examination – Prepare the lists of witnesses, who are to be cross- examined
- If a site visit is required, a date and time should be fixed.
- Photocopy machine, telephone and fax facilities should be available in the hearing room and in the retiring rooms / accommodations.
- Record keeping arrangements should be discussed and agreed upon. A party requiring a stenographic record of the proceedings or the service of a translator/ interpreter the requiring party shall make necessary arrangements for and shall be responsible for the cost. If the arbitrator calls for any such services of a stenographer or an interpreter or parties agree to the need of such services, the costs of thereof may be shared as agreed or may be handled as costs of arbitration. If the transcript agreed by the parties or determined by the arbitrator is to be the official record of the proceeding, it must be provided to the arbitrator and made available to the other parties for inspection, at a date and place determined by the arbitrator.
- At least five business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing.
- The arbitrator is authorized to resolve any disputes concerning the exchange of information.
- The notices should be sent to the parties at least 10 day in advance of the hearing date unless otherwise agreed by the parties.

2.0 Steps an arbitrator should take during the Hearing;

2.1 The Hearing

Hearing is purely private and only persons entitled to attend are the parties themselves and those whose

attendance is required in order to assist the parties in assisting/presenting their cases. They are advocates or witnesses. If anyone else wishes to attend the hearing, the agreement of all other parties should be obtained first.

If any party fails to attend or be represented at the hearing of which due notice has been given, the arbitral tribunal may continue to proceed in the absence of such party (Article 25).

Smoking, drinking coffee, tea, soda etc. or eating at the hearing are not allowed. Do not address the parties on first name basis. Dress as you would in Court.

2.2 Procedure an arbitrator should follow at the hearing;

- a) The arbitral tribunal opens the proceedings and announces the arrangements for the hearing.
 - b) Before proceeding with the first hearing the arbitrator may require witnesses to testify under oath. The administration of the oath depends upon the religious beliefs of the witnesses.
 - c) The claimant or their representative opens and presents their case.
 - d) The claimant calls their first witness and examines them upon the evidence, which they give.
 - e) The responding party cross-examines the witness.
 - f) The arbitral tribunal may ask questions if necessary.
 - g) The arbitral tribunal gives each party the opportunity to ask questions arising out of the witness's answers to the arbitrator's questions.
 - h) The respondent outlines their case if they wish.
- i) The respondent makes their final submissions.
 - j) The claimant makes their final submissions.
 - k) Prior to closing the hearing the arbitral tribunal shall inquire of all parties whether they have any further evidence to offer or witnesses to be heard. Upon receiving negative replies or the parties being satisfied that the records are completed, the arbitral tribunal shall declare that the hearing is closed. If the briefs are to be filed, the hearing shall be declared closed as of the final date set by the tribunal for the receipt of briefs. If documents are to be filed and the date set for their receipt is later than that set for the receipt of briefs, the later date shall be the closing date of the hearing. The time limit within which the arbitral tribunal is required to make the award shall commence, in the absence of other agreements by the parties upon the closing of the hearing.
 - l) After the closing of the hearing the arbitral tribunal will proceed to make its award.

It is important for arbitral tribunal to keep in mind that, the two parties that are likely to give rise to problems when the enforcement of the award is sought. Therefore each party should have a proper opportunity to present their case and that the parties must be treated equally.

References:

- 1) Bernstein R., Derek Wood (1993 2nd edition) Handbook of Arbitration Practice.
- 2) Powel V., Sims J., Dancaster C. (1998 2nd edition) Construction Arbitration.
- 3) Redfern A., Hunter M. (1999 3rd edition) Law and Practice of International Commercial Arbitration

Sauter Automation Ltd v Goodman (Mechanical Services) Ltd (1840)

A sub-contractor's quotation was expressed as 'subject to our standard terms and conditions' which included a retention of title clause. The main Contractor sent an order stating 'terms and conditions in accordance with the main contract'. The Sub-contractor, without further communication, delivered the goods.

Held that this amounted to an acceptance by them of the main Contractor's counter offer.