Focus ALTERNATIVE DISPUTE RESOLUTION

International arbitrations: short and sweet

A lot of front end loading, minimum objections and strict time limits make global tribunals faster and more efficient

William Horton

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Commercial litigation counsel are often surprised to learn how much shorter hearings in international arbitrations can be, even when the amount at issue and the subject matter are quite comparable to cases that go to trial in the court system. In one Stockholm Chamber arbitration on which I sat as a tribunal member, five days were set aside for the final hearing of a $10 to $20 million contract dispute involving geothermal power provided to a manufacturing facility. Nine lay witnesses and four experts were to be examined. Counsel actually completed all witness examinations and brief oral arguments in a little over a day and a half. How is that possible?

First, it must be borne in mind that under most international rules of arbitration, evidence — including reply and rebuttal witness statements, expert reports, and documents — is exchanged prior to the hearing. The tribunal is expected to have read everything in advance. Therefore, the hearing is reserved for testing the evidence already submitted in writing.

Second, in addition to exchanging evidence in advance of the hearing, the parties will typically have exchanged memorials, which are essentially written submissions that relate the evidence to the law and arguments submitted by the parties. Since the parties have been given a full opportunity to meet the factual and legal case presented by the other side, the need for any new documents or evidence to be presented at the hearing is minimal. The presentation of such evidence at the hearing is frowned upon and will likely be given little weight in the face of a legitimate objection.

Third, the exchange of factual and legal submissions in advance of the hearing means that it is not necessary to cross-examine a witness on a point in order to submit that the evidence of the witness should be rejected. The "fairness" principle that underlies the rule in *Brown v. Dunn* has no application. In any event, any contradiction between the evidence of a witness and other evidence will have, or should have, already been noted in the memorials, and any need to respond should have been dealt with in reply or rebuttal evidence.

Fourth, the rules of evidence as conceived by any particular legal system do not apply. The tribunal relies on its own expertise and judgment to determine what information should be used as the basis of its decision. Thus objections at a hearing are rare and take little time.

Fifth, although the rules of evidence may not be applicable, the principle of relevance is arguably more strictly and effectively applied in international arbitration. However, this principle is applied primarily at the pre-hearing disclosure stage when, arguably, it does the most good. The tribunal can exercise its judgment about relevance relating to document production issues with greater rigour and confidence than a motion judge because it is deciding what it is likely to consider to be relevant in the final analysis, and is not concerned with being second-guessed by a Court of Appeal that wishes to "develop the law."

Sixth, the absence of pre-trial examinations for discovery and depositions in virtually all international arbitration means that hearing time is not spent taking witnesses through differently worded answers given on prior occasions in the hope of establishing a contradiction. The evidence of each witness is judged by the tribunal, using its experience and expertise, against the documentary record, statements from other witnesses and any other facts in evidence.

Seventh, the imposition of strict time limits for each side to use at the final hearing requires counsel to be strategic in terms of how to use the allotted time. In most cases, time is equally divided between the parties and usage is tracked by a chess clock or by a secretary to the tribunal. Variations in allocation are possible. Each side can decide how it wants to divide its time between examining witnesses, making submissions or objections etc. Counsel who engages in discursive, repetitive or abusive questioning soon runs out of time.

It must be noted that the shortness of the final hearing in international arbitration does not automatically translate into a cost saving for the parties, although it certainly is more efficient for the tribunal. Where the tribunal is being paid on an hourly basis, shorter hearings can translate into significantly lower costs of the arbitration itself. Where the tribunal is being paid on an ad valorem basis (as in Stockholm Chamber and ICC arbitration) the cost benefit to the parties is not as direct. In either case, it might be argued that the greater efficiency for the tribunal comes at a higher cost to the parties based on the greater pre-hearing activity required.

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William Horton is an independent arbitrator and mediator of Canadian and international business disputes.

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