

# THE ORAL HEARING



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Perhaps the most significant phase of any international arbitration is the presentation of evidence to arbitral tribunal. In their monthly column, Doak Bishop, Craig Miles and Roberto Aguirre-Luzi of King & Spalding LLP describe the issues

As with most aspects of the international arbitration process, the parties and arbitral tribunal have wide latitude in determining the procedures to be followed with respect to any hearing. Certain minimal “due process” considerations must, however, be respected. Beyond that, the parties may agree to certain procedures or the arbitral tribunal may impose its own rules. This column discusses the issues that relate to the conduct of an oral hearing.

## Due process considerations

To the common law advocate, the term “due process” conjures an image of extensive pre-hearing investigation and discovery, the right to present legal arguments and to come forward with evidence to support his case (including witness testimony), the right to examine witnesses put forward by the opposing party both as to their credibility and the substance of their testimony, and a variety of other procedural safeguards. A civil law practitioner, on the other hand, may have another view entirely, which might merely include a guarantee of notice and of an impartial decision maker who will consider both sides of the issue. International arbitrations strive to achieve a balance between fairness and efficiency. Thus, the notion of “due process” in international arbitrations incorporates elements of both systems.

## Treaty requirements

The formal requirements of due process in international arbitrations are loosely defined. The New York Convention permits national courts to set aside arbitral awards on three grounds relating to due process: violation of the laws of the country to which the parties have subjected the arbitration agreement, where the arbitration took place, or where enforcement is sought. The UNCITRAL model law is less specific, simply stating that “[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.”

## Rules of the arbitral institutions

The rules of various arbitral institutions also provide certain due process protections related to oral hearings. The UNCITRAL arbitration rules require that parties are treated equally, that both sides are given a full opportunity of presenting their case, and that the tribunal hold hearings, either as requested or at their discretion, “for the presentation of evidence by witnesses, including expert witnesses, or for oral argument”. The LCIA rules also provide that either party can request oral hearings on the merits of the case unless otherwise agreed, that the parties must receive timely notice of the time and place of any hearings, and that all hearings must be in private unless otherwise agreed or directed by the tribunal. The AAA’s rules specify that the parties must receive 30 days’ notice of any hearing, that the parties shall exchange witness lists 15 days before any hearing, that hearings are private unless otherwise agreed, and that witnesses may be required to retire during the testimony of other witnesses.

## Agreed-upon procedures

Considering the due process considerations, the parties are generally free to tailor an oral hearing to the circumstances of their particular case or, under certain circumstances, to do away with the hearing altogether.

Some of the major institutions, including the AAA and UNCITRAL, give wide discretion over the procedures to the arbitral tribunal. Nonetheless, arbitrators will generally give great weight to any procedures agreed upon by the parties. Some such procedures may be included in the arbitration agreement itself, but even if they are not, the parties should confer early in the arbitration process with each other and with the arbitrators about the specific procedures to be followed. That said, the parties must be careful to tailor the procedures to due process considerations, the rules of the relevant institution, and the arbitral tribunal’s wishes.

## The location of the hearing

The location of the hearing is particularly important in international arbitrations, since the parties generally are of different nationalities, and the subject matter of the dispute is often located far from some or all of the parties.

The location of the hearing is often addressed in the arbitration agreement itself. This issue arises just as frequently, however, after a dispute begins. In either case, the considerations will generally be the same: should the arbitration take place in the location of the subject-matter of the dispute, in the home country of one or more of the parties, or in a neutral country where neither party has the ‘home advantage’. When this issue arises after the arbitration begins, the convenience of the arbitral tribunal may also be a consideration.

Certain locations may, however, be less desirable than others. The parties should take into account the question of whether an award issued in the chosen country will be enforceable under local law as well as in the country where the prevailing party seeks to collect. In addition, certain idiosyncrasies of local law should be considered; for example, certain countries place restrictions on who may or must appear as counsel in arbitration proceedings (ie, California). Finally, the parties should consider the potential for interference in the proceedings by the local courts.

## Attendees and participants

The question of who may attend or participate in the hearing is key. Initially, the arbitral institutions generally require that hearings be closed to the public and that their content be kept private. The parties are free, of course, to open their proceedings to the public. In the usual case involving private parties, however, confidentiality is highly desirable, and often forms a large part of the initial rationale for choosing to arbitrate rather than to litigate disputes in the courts.

Generally speaking, the parties are entitled to representation by counsel of their choice. The parties and the arbitral tribunal also

should give careful consideration to witness sequestration. In particular, consideration should be given as to whether all witnesses should be excluded except when giving evidence; whether expert witnesses should be permitted to attend the entire hearing; and whether party representatives should be excluded. If witness testimony is to be submitted in written form, the parties should have a clear understanding of whether witnesses should have access to other witness' statements before giving their own testimony or submitting to cross-examination.

### Written submissions and presentation of witness testimony

Written submissions can be a crucial part of an international arbitration. Typically, the parties will exchange written briefs or position papers early in the proceedings setting forth their theories of the case and what they expect the evidence to show. For example, the LCIA rules call for the claimant to submit a statement of the case, for the respondent to submit a statement of defence, and for the claimant to submit a reply, although the parties may vary this procedure by agreement.

The focus of the oral hearing is generally the presentation of evidence. The major issue at this phase is the extent to which witnesses testify 'live'. While common law advocates are generally accustomed to presenting affirmative testimony by a witness or person, significant efficiencies can be realised by following the civil law custom of submitting written witness statements in lieu of direct testimony. Deposition testimony can also be substituted for cross-examination, although common law advocates are generally loath to surrender the right to cross-examine key witnesses before the tribunal.

Another key question with respect to witness testimony is the role of the arbitral tribunal in examining witnesses. Some arbitral tribunals are active interrogators, while others take a more passive approach.

### Opening and closing statements and arguments

The parties and the tribunal should come to an understanding over whether the advocates will make opening statements and closing arguments at the oral hearing. Advocates trained in the common-law system will often insist on the right to make arguments. It is important, however, that advocates remember their audience: closing arguments that include elements of emotional appeal that might be effective in front of a jury will generally be ineffective before an arbitral tribunal, and may put off the arbitral tribunal. On the other hand, a

well-reasoned opening statement that sets a theme for the case, and a closing argument that summarises and organises the evidence presented, can be helpful to the arbitral tribunal and is an effective tool in the arbitral hearing. Many UK barristers present a written 'skeletal argument' (ie, at most, a 10-page outline of their client's case) as part of the opening statement. These can be particularly useful for synthesising complex cases with large amounts of briefing, documents and witness statements.

### Presentation of evidence

The focus of the hearing will almost always be the presentation of evidence. Thus, the questions of what evidence the tribunal will receive and how it will be presented frequently lead to disputes amongst the parties. In addition, advocates and arbitrators from different backgrounds will have different ideas on how evidence should be selected and presented. Civil law practitioners may be accustomed to dealing with active judges who select the documents they wish to review, and question witnesses actively.

Common law advocates are more comfortable controlling the proceedings themselves, by organising and presenting evidence in a manner of their own choosing. In addition, arbitrators with technical backgrounds may be more likely to review the evidence in a manner that was not intended by any party. Ultimately, where the parties cannot agree on evidentiary issues, the arbitral tribunal will impose its own set of rules.

Evidentiary issues in international arbitration hearings generally fall into two categories: documentary evidence and oral testimony.

### Documentary evidence

The parties' contemporaneous documents are usually the strongest evidence in the case. If you have to make a comparison, in civil law countries, which generally do not emphasise oral evidence, the historical documents created by the parties are often dispositive of the case. Likewise in international arbitrations, documentary evidence is crucial, and the advocate should make the documents his first focus when building a case.

The parties should endeavour early in the proceedings to reach an agreement over whether they will submit documents in advance of the hearing for the arbitral tribunal's review. Many arbitrators will insist on being provided in advance with all documents on which the parties intend to rely. Even in the absence of the arbitral tribunal's insistence, it is often good practice to do so: it can save time at the hearing both because the arbitral tribunal will be familiar

with the documents and because objections can be addressed early on.

It is also good practice to organise the documents in a manner that permits easy and efficient review by the tribunal. Counsel should review all documents carefully and thoroughly, mastering the crucial documents, their chronology, how they interrelate, and even critical passages. This will enable the advocate to select the best documents to use in his case and to identify immediately particular documents and passages that refute the points raised by the opponent at the oral hearing.

In addition to organising the documents, counsel should present them in a manner that sheds the most favourable light on the client's position. First, decide how many documents to introduce into the record. Second, if there are many, consider creating a core set of documents so that the tribunal will have a full set of documents and a smaller, more manageable sub-set. Third, bind or at least index the documents using file folders, tables of contents, and chronologies of the events in the case, perhaps dividing the documents into groups that match up with the pertinent stages of the hearing. Fourth, ensure that there is proper pagination and clear markings on all exhibits.

The final organisational issue is whether the documents should be submitted as a single, unified set or whether each side should compile and submit its own set. Arbitrators generally prefer a single set of comprehensive documents because it is more accessible at the hearing. If the parties cannot agree to use single set of all documents, they should at least attempt to submit one core set.

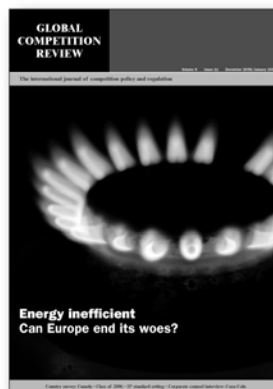
### Oral testimony

Live witness testimony often carries less weight in international arbitrations than in common law courts. Parties must also pay attention to the logistical problems in having witnesses appear, including the difficulty and potential expense associated with having witnesses travel to the location of the arbitration and simultaneous translation. Thus, the parties to an international arbitration usually introduce as much testimony as possible through affidavits or written witness statements rather than through direct live testimony. Likewise, cross-examination can be achieved through the use of prior deposition testimony.

Parties will, however, often wish to cross-examine key witnesses 'live'. Expert witnesses and witnesses with knowledge of crucial facts are candidates for live cross-examination. In those cases, the party offering the witness may wish to supplement the direct testimony or refute the cross-examination through re-direct questioning.

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