



Slovenian Arbitration Conference 5 November 2012

3rd Panel: Attorneys in Arbitration Proceedings

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"Presentation of Evidence in Arbitration Proceedings"

Forget Territorial Limits

- Parties, otherwise the tribunal, free to agree on the rules of procedure

- UNCITRAL Model Law
 - Art 18: "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."
 - Purpose (General Assembly Resolution): "Establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations."
 - Article 19(1): (1) "Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings."
 - Article 19(2): "Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence."

- Slovenian Arbitration Act
 - Articles 18 and 19(1) and (2) are similarly worded

Forget Territorial Limits

■ CCIS Rules

Article 26(1): "Subject to these Rules, the tribunal may conduct the proceedings in such manner as it considers appropriate, provided that the parties are treated equally and that at any stage of the proceedings each party is given a full opportunity to assert their rights and to present their case."

■ The only limits:

- Equal treatment
- Due process
- Art V (b) NY Convention: "The party against whom the award is invoked ... was otherwise unable to present his case"

Fleixibility, but no Need to Reinvent the Wheel

- Internationally accepted/acceptable practices and approaches to the presentation of evidence
- Best practice: The 2010 IBA Rules on the Taking of Evidence in International Arbitration
 - Preamble (1): " ... intended to provide an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those between Parties from different legal traditions".
 - Article 1(1): "Whenever the Parties have agreed or the Arbitral Tribunal has determined to apply the IBA Rules of Evidence, the Rules shall govern the taking of evidence, except to the extent that any specific provisions of them may be found to be in conflict with any mandatory provision of law determined to be applicable to the case by the Parties or by the Arbitral Tribunal."
 - Article 2: "The Arbitral Tribunal shall consult the Parties at the earliest appropriate time in the proceedings and invite them to consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence."
- Art 34(1) CCIS Rules: "Before starting to deal with the substance of the dispute, the arbitral tribunal may propose to the parties and draft with their participation a written agreement on the proceedings."

Unlike State Courts: Submission of Evidence

- *Jura non novit semper curia*

- Before state courts: in many jurisdictions *ex officio*
- But: Arbitrators coming from different jurisdictions

- Therefore, the parties regularly translate and submit (as exhibits) all legal authority upon which they wish to rely.

- Legal scholars as expert witnesses

- Useful: Expert conferencing

Unlike State Courts: Witness Statements

■ Purposes

- Stand alone evidence without additional testimony at a hearing
- Avoid surprise attacks by introducing new evidence at the hearing
- Starting point to conduct cross examination of witness during hearing

■ Standard process

- Short "direct examination" (also known as examination-in-chief)
- "Redirect" (re-examination), limited to issues raised during cross examination
- At any time: questions of tribunal

■ Chess clock system

Unlike State Courts: Document Production

■ Benefits

- Powerful procedural tool to compel an opposing party to hand over (produce) relevant and material documents so as to enable the requesting party to establish its case
- Getting closer to "objective truth"

■ Risks:

- Tactical abuse possible
- Practical examples
- Good practice: the Redfern Schedule

Unlike State Courts: Expert Witnesses

- In majority of cases: Party-appointed and unilaterally offered
- If tribunal-appointed:
 - Mostly if need of an expert arises during proceedings
 - If possible: Appointment of expert "agreed" by both parties, under the guidance of tribunal
- Meeting of Party-appointed experts prior to hearing in order to prepare a list of issues upon which they agree or do not agree.
- "Expert Conferencing"
- "Hot Tubing": Two experts giving testimony at the same time.

Congratulation to the Slovenian Legislator

- Law on Arbitration of Slovenia based on the UNCITRAL Model Law
 - For granting the parties and the tribunal broad discretion to tailor arbitral proceedings to the parties' preferences.
 - For creating Rules that live up to the standards and customs of international commercial arbitration.

Thank you for your attention!

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