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ARTICLE 20—HEARINGS

Article 20

1. The tribunal shall give the parties at least 30 days advance notice of the date, time and place of the initial oral hearing. The tribunal shall give reasonable notice of subsequent hearings.

2. At least 15 days before the hearings, each party shall give the tribunal and the other parties the names and addresses of any witnesses it intends to present, the subject of their testimony and the languages in which such witnesses will give their testimony.

3. At the request of the tribunal or pursuant to mutual agreement of the parties, the administrator shall make arrangements for the interpretation of oral testimony or for a record of the hearing.

4. Hearings are private unless the parties agree otherwise or the law provides to the contrary. The tribunal may require any witness or witnesses to retire during the testimony of other witnesses. The tribunal may determine the manner in which witnesses are examined.

5. Evidence of witnesses may also be presented in the form of written statements signed by them.

6. The tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered by any party. The tribunal shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.

I. Introduction

Article 20 sets out basic procedural guidelines for the arbitral hearing, addressing such issues as general logistics, and notice and hearing requirements, and also vests **20.01**

broad discretion in the tribunal on evidentiary issues. Detailed procedural directions are left to the tribunal. This is commonly accomplished in a procedural order, often after a pre-hearing conference to fine-tune hearing logistics, agree to a detailed timetable, and address anticipated evidence disputes. Despite the fact that contemporary practice puts great weight on having a comprehensive written procedure, most arbitrations that proceed to an award on the merits also include a hearing.[1]

20.02 While the tribunal typically enjoys a broad discretion in laying the 'ground rules' for the hearing, it will also be influenced by several other factors. First, consistent with contemporary international arbitration practice, the tribunal may well decide to adopt outright, or at a minimum be guided by, international standard rules on evidential or procedural matters, such as the 2010 IBA Rules on the Taking of Evidence in International Arbitration[2] or the UNCITRAL Notes on Organizing Arbitral Proceedings.[3] Further, the arbitral procedure may be influenced by any provisions relating to hearings adopted as part of the arbitration clause or submission to arbitration. The tribunal may also have recourse to the applicable laws or 'practice' of the seat of arbitration. Last, but not least, a tribunal will take note of the provisions relating to hearings that are contained in the applicable arbitration rules.

20.03 The scope and language of Article 20 closely match that of the analogous Article 25 of the 1976 UNCITRAL Rules. The UNCITRAL Rules introduced revisions to simplify the rules relating to hearings.[4] Similarly, ICC Rules, Article 21, is less detailed and not nearly as prescriptive as its ICDR counterpart. No specific deadlines or logistics are laid out and the tribunal is given a general power to be in 'full charge of the hearings'. Article 19 of the LCIA Rules includes a basic list of broad principles for hearing organization, but grants the tribunal a general power of 'fullest authority' to address logistics. A panel operating under the ICDR Rules can rely on the similarly broad mandate in Article 16 to 'conduct the arbitration in whatever manner it considers appropriate', with the safeguard that the parties are to

[1] *See generally* on hearings, GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 1,831–59; E Gaillard and J Savage (eds) *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, The Hague, 1999) 1296 ff; N Blackaby, C Partasides, A Redfern, and M Hunter, *Redfern and Hunter on Law and Practice of International Commercial Arbitration* (5th edn, Oxford University Press, Oxford, 2009) paras 6-182–6-241; R Bishop (ed) *The Art of Advocacy in International Arbitration* (Juris Publishing, Huntington, NY, 2004); L Lévy and VV Veeder (eds) *Arbitration and Oral Evidence* (ICC Publishing, Paris, 2005).

[2] IBA Rules on the Taking of Evidence in International Arbitration (adopted 1 June 1999, revised 29 May 2010).

[3] UNCITRAL Notes on Organizing Arbitral Proceedings (finalized 14 June 1996).

[4] *See* 2010 UNCITRAL Rules, Art 28. *See also* UNCITRAL, *Report of Working Group II* (UN Doc No A/CN.9/669, 9 March 2009) paras 55–56 (rules governing the organization of hearings were 'too detailed' and should be replaced by a more 'generic provision').

be 'treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case'.[5] Importantly in the context of hearings, the tribunal, in exercising its Article 16 discretion, is directed to 'conduct the proceedings with a view to expediting the resolution of the dispute', which may include such hearing-related issues as bifurcating proceedings between liability and damages, excluding evidence, or addressing issues that may be dispositive.[6] While tribunals are vested with a great deal of discretion in such situations, they are typically very mindful of the cornerstones of equality of treatment, the right to be heard, and the opportunity to be given a fair opportunity to present one's case.

II. Textual commentary

A. Logistics for hearing (Article 20(1))

Article 20(1)

> *The tribunal shall give the parties at least 30 days advance notice of the date, time and place of the initial oral hearing. The tribunal shall give reasonable notice of subsequent hearings.*

20.04 The general reference in Article 20(1) to giving at least 30 days' advance notice of an 'initial oral hearing' is curious. The reference to an 'initial' hearing does not appear in the rules of the other major institutions, nor in the AAA Commercial Rules. It presumably applies to any sort of hearing, whether on the merits or otherwise. It also presumably applies to any 'oral hearing', whether in person, telephonic or by video-conference. The 30-day time period is also atypically prescriptive compared to most other rules that refer simply to giving 'reasonable notice'.[7] The AAA Commercial Rules, in contrast, are more detailed.[8] In practice, hearings will most often be set in consultation with the parties and with plenty of lead time. Of course, if agreement on timing cannot be reached with all parties, the decision will ultimately be made by the tribunal.

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[5] *See* discussion of Art 16(1) at paras 16.10–16.13 above.

[6] *See* discussion of Art 16(3) at paras 16.14–16.16 above. *See also* discussion of Art 13(2) ('tribunal may hold conferences or hear witnesses or inspect property or documents at any place it deems appropriate') at paras 13.14–13.17 above.

[7] *See eg* ICC Rules, Art 21(1); LCIA Rules, Art 19.2.

[8] *See* AAA Commercial Rules, s R-22:

> The arbitrator shall set the date, time, and place for such hearing. The parties shall respond to requests for hearing dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to the established hearing schedule. The AAA shall send a notice of hearing to the parties at least 10 days in advance of the hearing date, unless otherwise agreed by the parties.

20.05 In contrast with other institutional rules and national laws, Article 20(1) does not explicitly require that there be an oral hearing on the merits or that a party can insist on such a hearing.[9] Article 20(2) of the ICC Rules, in contrast, provides that the tribunal 'shall hear the parties together in person if any of them so requests'.[10] In any event, international commercial arbitration practice suggests that it is typical in most cases for at least some form of hearing to be held.[11] There may also be applicable national laws that, absent agreement otherwise, require a hearing if one party insists thereon.[12]

B. Witness testimony (Article 20(2)–(5))

Article 20(2)

At least 15 days before the hearings, each party shall give the tribunal and the other parties the names and addresses of any witnesses it intends to present, the subject of their testimony and the languages in which such witnesses will give their testimony.

Article 20(3)

At the request of the tribunal or pursuant to mutual agreement of the parties, the administrator shall make arrangements for the interpretation of oral testimony or for a record of the hearing.

Article 20(4)

Hearings are private unless the parties agree otherwise or the law provides to the contrary. The tribunal may require any witness or witnesses to retire during the testimony of other witnesses. The tribunal may determine the manner in which witnesses are examined.

Article 20(5)

Evidence of witnesses may also be presented in the form of written statements signed by them.

20.06 Paragraphs (2)–(5) provide a skeleton set of rules applying to the presentation of oral testimony through witnesses. While helpful in providing a default set of basic procedures, parties will typically have adopted a more detailed timetable and possibly agreed that the tribunal will be guided by one or more of the sets of rules for

[9] *See also* ICDR Rules, Art 16(1) (each party has the right to be heard and to be given a fair opportunity to present its case).

[10] *See also* the similar provision in LCIA Rules, Art 19.1; SCC Rules, Art 27(1); SIAC Rules, Art 21.1.

[11] *See* N Blackaby, C Partasides, A Redfern, and M Hunter, *Redfern and Hunter on Law and Practice of International Commercial Arbitration* (5th edn, Oxford University Press, Oxford, 2009) para 6-182.

[12] *See* UNCITRAL Model Law, Art 24(1); cf English Arbitration Act 1996, s 34(2)(h) (arbitral tribunal may choose not to hear evidence if it deems it unnecessary).

taking evidence—especially the 2010 IBA Rules on the Taking of Evidence in Arbitration.[13]

20.07 Article 20(2), like the preceding paragraph, provides a default rule in this case for providing a list of witnesses, contact details and the languages in which they will be testifying. This follows the text of Article 25(2) of the 1976 UNCITRAL Rules. In the 2010 revision of the UNCITRAL Rules,[14] this was deleted as being 'too detailed' and replaced with a 'more generic provision' about giving timely notice of the hearing.[15] It was pointed out that, in practice, such detailed procedural rules could be adopted based on international standards such as the UNCITRAL Notes on Organizing Arbitral Proceedings.[16] The purpose of early notice of witnesses is to encourage a more efficient examination of the witnesses and prevent 'surprise'. Of course, evidence will typically also be provided by witness statements well in advance of the hearing.

20.08 Article 20(3) anticipates that oral evidence in a language other than that of the arbitration, shall be 'interpreted' if necessary.[17] Further, regardless of language used, the paragraph empowers the tribunal to order that a transcript be produced of the hearing. Commentators on the analogous Article 25(3) of the 1976 UNCITRAL Rules have noted that the reference is only to a 'record' of the hearing, which need not extend to a verbatim transcript. However, it is now common practice to produce a real-time transcript, usually with the assistance of a stenographer or 'court reporter'. The provision assigns the responsibility for making these arrangements to the ICDR case administrator, although this task may also follow the tribunal or the parties. Article 25(3) of the 1976 UNCITRAL Rules was deleted in the 2010 amendments.[18]

20.09 Article 20(4) makes clear that, unless otherwise agreed by the parties or provided by law, the hearing is to be 'private'—that is, access is restricted to only those authorized by the tribunal. This is not to be confused with the Article 34 provision relating to confidentiality.[19] The analogous Article 25(4) of the 1976 UNCITRAL Rules (and Article 28(3) of the 2010 Rules) refers to hearings being held '*in camera*', which 'is clearly intended to exclude members of the public, ie non-party third persons, from the hearing'.[20] The ICDR provision goes on to make clear that the tribunal may order that any witnesses be excluded from the hearing room pending

[13] *See* 2010 IBA Rules, Art 4 (witnesses of fact).
[14] *See* 2010 UNCITRAL Rules, Art 28(1).
[15] UN Doc A/CN.9/669, paras 55 and 56.
[16] *See* ibid, para 56.
[17] The analogous Art 25(3) of the 1976 UNCITRAL Rules refers to 'translation'.
[18] *See* UN Doc A/CN.9/669, paras 55 and 56.
[19] *See* ICDR Rules, Art 34 (discussed in Chapter 34 below).
[20] *See* D Caron, L Caplan, and M Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press, Oxford, 2006) 616. The term 'private' is used in other rules. *See eg* Stockholm Rules, Art 27(3); LCIA Rules, Art 19.4.

his or her testimony. This appropriately leaves the tribunal with sufficient flexibility to determine appropriate rules for the particular setting, particularly considering the expectations of the parties and the law of the seat.[21] In practice, parties are likely also to take guidance from the 1999 IBA Rules or otherwise.[22]

20.10 Article 20(4) also contains a catch-all grant of authority to the tribunal to 'determine the manner in which witnesses are examined'. Commentators on the similar wording in the 1976 UNCITRAL Rules point to two distinct elements of this provision. First, it requires attention to the degree of 'formality' of obtaining witness testimony—that is, the oath or declaration to be used. Second, more broadly, it encompasses the tribunal's writ to fashion an examination procedure appropriate to the circumstances.[23] Much has been written on the different cultural approaches to witness examination.[24] It suffices to say here that the ICDR Rules leave such determinations to the tribunal.

20.11 Consistent with common practice, as evidenced in the IBA Rules, Article 20(5) provides that evidence may also be presented in the form of a signed witness statement as a substitute for live direct testimony.[25]

C. Evidence and privilege issues (Article 20(6))

Article 20(6)

> *The tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered by any party. The tribunal shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.*

20.12 The first sentence of Article 20(6) empowers the tribunal to rule on evidentiary questions. This language mirrors that of Article 25(6) of the 1976 UNCITRAL Rules and Article 27(4) of the 2010 UNCITRAL Rules. Such a broad power appears in other institutional rules.[26]

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[21] On sequestration of witnesses, *see generally* GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 1,846–47.

[22] *See* 1999 IBA Rules, Art 3(12).

[23] *See* Caron, Caplan, and Pellonpää, op cit, 617–18.

[24] *See eg* R Bishop (ed) *The Art of Advocacy in International Arbitration* (Juris Publishing, Huntington, NY, 2004) 451–90.

[25] *See* 2010 IBA Rules, Arts 4 and 8(4). For a rare instance of a case in which a witness was subsequently not made available for examination at the hearing, see ICDR Case No 030-04, 2004 WL 5750007 (ICDR) (tribunal denied a motion to strike the written testimony, finding instead that it would take into account the non-appearance in deciding what weight to give to the testimony, and leaving open the possibility of drawing adverse inferences).

[26] *See eg* SCC Rules, Art 26 ('The admissibility, relevance, materiality and weight of evidence shall be for the Arbitral Tribunal to determine').

20.13 Uniquely, Article 20(6) also explicitly mandates that the tribunal is to take into account applicable principles of legal privilege when making such determinations.[27] The explicit reference to privilege mirrors that found in other rules associated with the AAA.[28] In addition, unless otherwise agreed, the ICDR Guidelines for Arbitrators Concerning Exchanges of Information apply to all arbitrations since 31 May 2008. Guideline 7 provides that:[29]

> The tribunal should respect applicable rules of privilege or professional ethics and other legal impediments. When the parties, their counsel or their documents would be subject under applicable law to different rules, the tribunal should to the extent possible apply the same rules to both sides, giving preference to the rule that provides the highest level of protection.

The default rule of providing, to the extent possible, equal treatment of both parties and a preference for the highest level of protection is consistent with the international practice recommended by leading arbitrators.[30]

[27] *See generally* A Sheppard and F von Schlabrendorff, 'Legal Privilege and Confidentiality in Arbitration', in M Koehnen, M Russenberger, and E Cowling (eds) *Privilege and Confidentiality: An International Handbook* (Schellenberg Wittmer, Zurich/Geneva, 2006) 377.

[28] *See eg* AAA Commercial Rules, s R-31(c).

[29] *See also* discussion of the Guidelines above at paras 1.48–1.50.

[30] *See eg* M de Boisséson, 'Evidentiary Privileges in International Arbitration', in AJ van den Berg (ed) *International Arbitration 2006: Back to Basics? Proceedings of the ICCA International Arbitration Congress* (Kluwer Law International, The Hague, 2007) 705.

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