CHAPTER 8

Oral Proceedings

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1 Introduction

The hearing often sits at the apex of a case in an international arbitration, and investment arbitration is no different in this respect. It is the moment when the parties, the tribunal, and the witnesses come together, often after months or even years of written submissions, to complete the presentation of evidence. Frequently, the hearing serves as the last chance for the parties to express their views and for the tribunal to ask questions. For this reason alone, a poor hearing presentation may have a significantly adverse impact on what might otherwise be a meritorious claim or defense.

This chapter will address all aspects of the investment arbitration hearing from a practitioner’s perspective, from making strategic procedural decisions in advance of the hearing to effectively presenting evidence at the hearing itself. Part 2 begins by addressing the differences between oral proceedings in domestic settings and in international arbitration on the premise that counsel’s awareness and appreciation for the unique nature of international arbitration is key to effective oral advocacy. It then considers party autonomy and the corresponding procedural flexibility afforded to the parties in adopting hearing procedures, a theme which informs the remainder of the chapter. Part 3 identifies key pre-hearing decisions and presents strategic and tactical considerations for counsel confronted by such decisions. Part 4 considers methods for effective oral advocacy during an investment arbitration hearing, including best practices for oral argument, effective use of documentary evidence and demonstratives, and tools for successful examination of experts and witnesses.

While the focus of this chapter is on oral proceedings in investment arbitration, it should be noted that many of the techniques and tools for effective oral advocacy discussed are applicable to both investment arbitration and commercial arbitration.

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2 Starting Points for the Effective Oral Advocate

An effective advocate in investment arbitration understands and appreciates that the practice of international arbitration is unlike practice in any other field of law. It requires appreciation and respect for diverse legal traditions and systems of law, mastery of a unique body of procedural law, and accommodation of issues associated with bringing together individuals from different countries with different native languages. These aspects of international arbitration are only magnified at the hearing. In this vein, this section addresses both the distinct nature of the arbitral hearing and the importance of using the procedural flexibility that characterizes international arbitration to the advocate’s advantage.

2.1 The Arbitral Hearing: Its Own Species

Practitioners of international arbitration often hear the question, “is a hearing in international arbitration really that different from a hearing in domestic proceedings?” The answer is, usually, yes.

There are three features of international arbitration that drive this difference. **First**, international arbitration blends different legal traditions and brings together individuals from diverse cultures and different legal backgrounds. It is not uncommon to have an arbitration where the tribunal comprises of members from both the civil and common law legal traditions, counsel from one side practices in a civil law jurisdiction and counsel from the other side practices in a common law jurisdiction, and witnesses are from all over the world. It is certainly the case that norms of international procedure do exist and often characterize investment arbitration proceedings, but in some cases—particularly those that purport to apply national procedural law standards by virtue of the arbitration clause—the result is that arbitration hearings can be characterized by a hybrid common law-civil law approach to procedure and the presentation of evidence.

To take a few well-known examples, an international arbitral tribunal may play a more active role in both managing the presentation of evidence and in questioning counsel and witnesses than the judge in a common law system, where the presentation of evidence and questioning of witnesses is largely within the province of counsel. Similarly, the parties in international arbitration will generally agree to (and tribunals will allow) at least some level of cross-examination, despite the general absence of the practice in civil law jurisdictions. In short, almost every aspect of arbitral procedure and the presentation of evidence is infused with this “internationalized” approach, and an