



Guidelines for the Arbitrator's  
Conduct of the Pre-Hearing  
Phase of Domestic Commercial  
Arbitrations

And

Guidelines for the Arbitrator's  
Conduct of the Pre-Hearing  
Phase of International  
Arbitrations



## Introduction

Set forth here are separate Guidelines for The Arbitrator's Conduct of the Pre-Hearing Phase of: (i) domestic commercial arbitrations, and (ii) international arbitrations. The Domestic Guidelines were unanimously approved by the Executive Committee and House of Delegates of the New York State Bar Association ("NYSBA") in April 2009, and the International Guidelines were similarly approved in November 2010.

The Guidelines were developed by NYSBA's Dispute Resolution Section Arbitration Committee. The Committee perceived that there was a need to provide guidance to arbitrators and practitioners to help combat increasing complexity and associated cost and delay associated with prehearing proceedings in domestic commercial arbitrations. In order to address this need, a subcommittee was formed to study and draft guidelines for the pre-hearing phase of domestic commercial arbitration ("Domestic Guidelines").

As part of its study, the Committee conducted in-depth interviews with numerous leaders of the New York arbitration bar, including advocates, arbitrators, in-house counsel and representatives of administering organizations, who brought significantly different perspectives to bear on the pre-hearing phase of domestic commercial arbitration. These interviews took the form of a series of in person meetings between subcommittee members and well known arbitration practitioners and, in addition, subcommittee members spoke with many other knowledgeable and respected individuals in a more informal manner. The subcommittee also: (i) studied work done by other organizations on the subject of efficient conduct of domestic commercial arbitration; (ii) engaged in independent legal research on a number of topics which related to domestic commercial arbitration; and (iii) reviewed numerous articles and treatises which also were relevant. Emerging from this effort was a set of guidelines which, if followed, will hopefully help arbitrators handle the pre-hearing phase of domestic

commercial arbitration in a manner which is both cost-effective and fair.

Following the completion of the Domestic Guidelines, the Arbitration Committee determined that it would also be useful to provide guidance for the practice of international arbitration in New York. However, the Committee recognized that because practices in international arbitration differ significantly from those in United States domestic arbitration, the guidance should be different in the international context. Given these significant differences, the Committee formed a separate subcommittee (“International Subcommittee”) comprised of prominent practitioners of international arbitration to draft Guidelines for particular use in the pre-hearing phase of international arbitration (“International Guidelines”). In pursuing this project, the International Subcommittee conducted the same kinds of in depth interviews, research and analysis as was done by the domestic subcommittee. However, the focus of the International Subcommittee was more limited since its task was to modify the Domestic Guidelines only where necessary to accommodate the very real differences between domestic and international arbitration.

Set forth below are a few more prefatory comments with respect to each of these sets of Guidelines.

# GUIDELINES FOR THE ARBITRATOR'S CONDUCT OF THE PRE-HEARING PHASE OF DOMESTIC COMMERCIAL ARBITRATIONS

## Introduction

For years, domestic commercial arbitration was in large part viewed in New York as a vehicle for the rapid resolution of relatively minor disputes. Its primary attraction was that it dispensed with many of the expensive and time-consuming characteristics of litigation while at the same time permitting an expeditious but fair result.

More recently, domestic commercial arbitration has increasingly been used in the largest, most complex commercial cases. Not surprisingly, this trend has led to efforts to inject into domestic commercial arbitration expensive elements that had traditionally been reserved for litigation—elements such as interrogatories; requests to admit; dispositive motions; lengthy depositions; and massive requests for documents, including electronic data. To a limited extent, this development is justified since the arbitration of large commercial cases must include enough discovery to permit a fair result in a complex setting. At present, however, arbitrators conducting the pre-hearing phase of domestic commercial arbitrations have too often permitted discovery which goes far beyond a desirable expansion of arbitration discovery to accommodate increased complexity. And at the other end of the spectrum, arbitrators are sometimes driven by interests of efficiency and cost-effectiveness to place limits on discovery which are too strict to permit a fair result in a complex domestic commercial arbitration. Thus, there has emerged an unfortunate element of unpredictability as to what parties might expect in the pre-hearing phase.

Despite the foregoing criticisms, the fact remains that domestic commercial arbitration has privacy and party control aspects that are not present in court and, in addition, it is still the general experience that such arbitration is less costly, speedier and more efficient than litigation. Still, there is clearly room for improvement and in pursuit of that goal, the Arbitration Committee has developed the following guidelines for the conduct of prehearing procedures in domestic commercial arbitration to help arbitrators set a balance between the sometimes competing goals of conducting an efficient proceeding and enabling the parties to fully present their respective cases.

## **The Key Element - Good Judgment of the Arbitrator**

- While some commercial arbitrations may have similarities, for the most part each case involves unique facts and circumstances. As a result, arbitration discovery must be adapted to meet the unique characteristics of the particular case, and there is no set of objective rules which, if followed, would result in one “correct” approach for all commercial cases.
- The experience, talent and preferences brought to arbitration will vary with the arbitrator. It follows that the framework of arbitration discovery will always be based on the judgment of the arbitrator, brought to bear in the context of variables such as the arbitrator’s background, applicable rules, the custom and practice for arbitrations in the industry in question, and the expectations and preferences of the parties and their counsel. Arbitrators must exercise that judgment wisely, to produce a discovery regimen that is specific and appropriate to the given case, to ensure enough discovery and evidence to permit a fair result, balanced against the need for a less expensive and more efficient process than would have occurred if the case had gone to trial.

Attached as Exhibit A is a list of factors which, if taken into consideration by an arbitrator when addressing the type and breadth

of arbitration discovery, should assist the arbitrator in exercising judgment in a way that will limit discovery to the extent possible while taking into account all relevant factors.

## **Early Attention to Discovery by the Arbitrator**

- It is important that the ground rules governing an arbitration be clearly established in the period immediately following the initiation of the arbitration. Therefore, following appointment, the arbitrator should promptly study the facts and the issues and be fully prepared to preside effectively over the early, formative stages of the case in a way that will ultimately lead to an expeditious, cost-effective and fair process.
- The type and breadth of the discovery regime in an arbitration is subject to applicable rules, which vary significantly with different administering organizations but lack the specificity that one finds, for example, in the Federal Rules of Civil Procedure. That being so, it is imperative for the arbitrator to avoid uncertainty and surprise by ensuring that the parties understand at an early stage what the basic ground rules for discovery are going to be. Early attention to the scope of discovery increases the chance that parties will adopt joint principles of fairness and efficiency before partisan positions arise in concrete discovery disputes.
- The type and breadth of arbitration discovery should be high on the agenda for the first pre-hearing conference at the start of the case. If at all possible, an early, formative discussion about discovery should be attended by in-house counsel or other party representatives, as well as by outside counsel. If practicable, it may also increase the likelihood of an early, meaningful understanding about discovery if the first pre-hearing conference is an in-person meeting, as opposed to a conference call.

- The arbitrator will enhance the chances for limited, efficient discovery if, at the first pre-hearing conference, he/she sets ambitious hearing dates and aggressive interim deadlines which, the parties are told, will be strictly enforced, and which, in fact, are thereafter strictly enforced.
- Where appropriate, the arbitrator should explain at the first pre-hearing conference that document requests:

should be limited to documents which are directly relevant to significant issues in the case or to the case's outcome.

should be restricted in terms of time frame, subject matter and persons or entities to which the requests pertain, and

should not include broad phraseology such as "all documents directly or indirectly related to."

## Party Preferences

- Overly broad arbitration discovery can result when all of the parties seek discovery beyond what is needed. This unfortunate circumstance may be caused by parties and/or advocates who are inexperienced in arbitration and simply conduct themselves in a fashion which is commonly accepted in court litigation. In any event, where all participants truly desire unlimited discovery, the arbitrator must respect that decision, since arbitration is governed by the agreement of the parties. In such circumstances, however, the arbitrator should ensure that the parties have knowingly agreed to such broad discovery and that they have intentionally withheld from the arbitrator the power to limit discovery in any fashion. The arbitrator should also make sure that the parties understand the impact of an agreement for broad discovery by discussing the cost of the course on which the parties propose to embark and the benefit or negative consequences likely



to be derived therefrom. The arbitrator should endeavor to have these communications with in-house counsel or other party representatives, as well as with outside counsel, to ensure that the parties, themselves, fully understand the discovery decision.

- If, after discussion with the arbitrator, the parties still wish to engage in expansive discovery, the arbitrator should, nonetheless, pursue agreement on limitations such as the number and length of depositions, and the total time period in which depositions and other forms of discovery are to be conducted.
- Where one side wants broad arbitration discovery and the other wants narrow discovery, the setting is ideal for the arbitrator to set meaningful limitations since the arbitrator has far more latitude in such circumstances than when all parties have agreed on broad, encompassing discovery.

## E-Discovery

- The use of electronic media for the creation, storage and transmission of information has substantially increased the volume of available document discovery. It has also substantially increased the cost of the discovery process.
- To be able appropriately to address issues pertaining to e-discovery, arbitrators should at least familiarize themselves generally with the technological issues that arise in connection with electronic data. Such issues include the format in which documents are produced, and the availability and need (or lack thereof) for production of “metadata.” A basic understanding by the arbitrator of e-discovery technology and terminology can help the arbitrator reduce discovery costs for the parties.
- While there can be no objective standard for the appropriate scope of e-discovery in all cases, an early order containing language along the following lines can be an important



first step in limiting such discovery in a large number of cases:

There shall be production of electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, no such documents are required to be produced from back-up servers, tapes or other media.

Absent a showing of compelling need, the production of electronic documents shall normally be made on the basis of generally available technology in a searchable format which is usable by the party receiving the e-documents and convenient and economical for the producing party. Absent a showing of compelling need, the parties need not produce metadata with the exception of header fields for email correspondence.

Where the costs and burdens of e-discovery are disproportionate to the nature and gravity of the dispute or to the relevance of the materials requested, the arbitrator will either deny such requests or order disclosure on condition that the requesting party advance the reasonable cost of production to the other side, subject to further allocation of costs in the final award.

## **Legal Considerations**

- Section 10 of the Federal Arbitration Act provides that one of the very few ways an arbitration award can be vacated is “where the arbitrators were guilty of misconduct in refusing ... to hear evidence pertinent and material to the controversy.” Some arbitrators tend to grant extensive discovery out of concern that any other approach might lead to a vacated award under Section 10. The Committee believes, however, that this concern is greatly overstated and that very few arbitration awards are vacated because the

arbitrator put strict limits on discovery in the interests of efficiency and cost-effectiveness.

- Some advocates fear malpractice claims if they fail to pursue scorched earth tactics in connection with arbitration discovery. Such a concern ignores the possibility that the mindless pursuit of marginal discovery or the failure to seek reasonable limits on discovery could also lead to a claim for malpractice. In any case, there should be candid communication between attorney and client in the early stages of an arbitration with respect to the scope of discovery that is to be pursued.

## Arbitrator Tools

- While arbitrators are expected to act in a deliberate and judicious fashion, always affording the parties due process, it is also essential for the arbitrator to maintain control of the proceedings and to move the case forward to an orderly and timely conclusion. The arbitrator has many tools that can be used both to ensure the fairness of the proceedings and to prevent disruption in the rare case where one side may withhold its cooperation. Those tools may include, for example, the making of adverse factual inferences against a party that has refused to come forward with required evidentiary materials on an important issue, the preclusion of proof, and/or the allocation of costs. Depending upon the applicable institutional rules and arbitration law, it may be possible to award attorneys' fees and, in extreme cases, other monetary sanctions against an obstructing party, *Superadio Ltd. P'ship v. Winstar Radio Productions*, 446 Mass. 330 (2006) (discovery abuse in AAA arbitration); *Goldman Sachs & Co. v. Patel*, 1999 N.Y. Misc. LEXIS 681 \* 17-23 (S. Ct. N.Y. Co.) (NASD arbitration), and possibly even against obstructing counsel. On the last point, see *Polin v. Kellwood Co.* 103 F. Supp.2d 238 (S.D.N.Y. 2000) (monetary award against counsel affirmed), *aff'd*, 34 Appx. 406 (2d Cir.), *cert denied*, 537 U.S. 1003 (2002). *But see*

*In re Interchem Asia 2000 PTE Ltd. v. Oceana Petrochemicals AG*, 378 F. Supp.2d 347, 355-57 (S.S.N.Y. 2005) (monetary award against counsel vacated); see also *Millmaker v. Brusco* 2008 U.S. Dist. LEXIS 5548 (S.D. Tex. 2008).

- Sanctions may even include the resolution of a claim or defense against a party. See *First Preservation Capital, Inc. v. Smith Barney Harris Upham & Co.* 939 F. Supp.1559 (S.D. Fla. 1996) (NASD arbitration); Patel, *supra* (NASD arbitration; failure to pay monetary sanction and failure to obey arbitrator orders).
- Despite some disagreement as to the outer limits of the arbitrator's authority to impose sanctions, and the paucity of cases on the subject, the cases that do exist demonstrate the courts' generally deferential approach to review of such awards.

## Artfully Drafted Arbitration Clauses

- There is significant potential for dealing with time and other limitations on discovery in the arbitration clauses of commercial contracts. An advantage of such drafting is that it is much easier for parties to agree on such limitations before a dispute has arisen. A drawback, however, is the difficulty of rationally providing for how best to arbitrate a dispute that has not yet surfaced. Thus, the use of such clauses may be most productive in circumstances in which parties have a good idea from the outset as to the nature and scope of disputes that might thereafter arise.
- In order for rational time and other discovery limitations to be effectively included in an arbitration clause, it is necessary that an attorney with a good understanding of arbitration be involved in the drafting process.

## Depositions

- Because depositions have traditionally not been a major part of the arbitration process,

the best exercise of an arbitrator's judgment might be to direct no depositions or the minimum number of depositions in instances, for example, where the parties' positions are already well known or are fully reflected in surrounding documents.

- However, the size and complexity of commercial arbitrations have now grown to a point where one or more depositions can serve a real purpose in many instances. In fact, at times, the absence of any depositions in a complex arbitration can significantly lengthen the cross-examination of key witnesses and unnecessarily extend the completion of the hearing on the merits. So too, a limited deposition in advance of document requests might serve to focus and restrict the scope of document discovery and/or reduce the risk that the other party is hiding relevant evidence.
- If not carefully regulated, deposition discovery in arbitration can get out of control and become extremely expensive, wasteful and time-consuming. In determining whether and what scope of depositions may be appropriate in a given case, an arbitrator should balance these considerations, consider the factors set forth in Exhibit A, and confer with counsel for the parties. If an arbitrator determines that it is appropriate to permit depositions, it may make sense for an arbitrator to solicit agreement at the first pre-hearing conference on language such as the following

Each side may take \*\*\* discovery depositions. Each side's depositions are to consume no more than a total of \*\*\* hours. There are to be no speaking objections at the depositions, except to preserve privilege. The total period for the taking of depositions shall not exceed \*\*\* weeks.<sup>1</sup>

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<sup>1</sup> The asterisked numbers can of course be changed to comport with the particular circumstances of each case.

## Discovery Disputes

- It is essential that arbitration discovery disputes be resolved promptly and efficiently since exhaustive discovery motions can unduly extend the discovery period and significantly add to the cost of the arbitration. In addressing discovery disputes, the arbitrator should consider the following practices which can increase the speed and cost-effectiveness of the arbitration:

Where there is a panel of three arbitrators, the parties may agree, by rule or otherwise, that the Chair or another member of the panel is authorized to resolve discovery issues, acting alone. While the designated panel member may still wish to consult the other arbitrators on matters of importance, the choice of a single arbitrator to decide discovery issues can nonetheless avert scheduling difficulties and avoid the expense and delay of three people separately engaging in the laborious tasks related to resolving discovery issues.

Lengthy briefs on discovery matters should be avoided. In most cases, a prompt discussion or submission of brief letters will sufficiently inform the arbitrator with regard to the issues to be decided.

The parties should be required to negotiate discovery differences in good faith before presenting any remaining issues for the arbitrator's decision.

The existence of discovery issues should not impede the progress of discovery in other areas where there is no dispute.

## Requests for Adjournments

- Requests for adjournment of the hearing on the merits are not uncommon and can cause significant delay. While the arbitrator may not reject a joint application of all

parties to adjourn the hearing, the fact is that such adjournments can cause inordinate disruption and delay by needlessly extending unnecessary discovery and can substantially detract from the cost-effectiveness of the arbitration. If the request for adjournment is by all parties and is based on a perceived need for further discovery (as opposed to personal considerations), the arbitrator should ensure that the parties understand the implications of the adjournment they seek and, if possible and except for exceptional circumstances, the arbitrator should try to dissuade them from the adjournment in a way that would still accommodate their perceived needs. The arbitrator may request that the represented parties attend any conference to discuss these subjects if, in the arbitrator's judgment, the presence of clients may facilitate the adoption of a practical solution.

- If one party seeks a continuance and another opposes it, then the arbitrator has discretion to grant or deny the request. Particularly with busy arbitrators and advocates, such requests can cause long delays. In general, courts are well aware that a core goal of arbitration is speed and cost-effectiveness and will not disturb an arbitrator's rejection of an unpersuasive request for an adjournment. However, the arbitrator should carefully consider the merits of the request and the legitimate needs of the parties, as well as the proximity of the request to the scheduled hearing and any earlier requests for adjournments.
- Last minute requests for adjournments sometimes come as a complete surprise to the arbitrator who assumed all was going well because he/she had not heard from the parties for months. In such circumstances, the arbitrator may be at least in part responsible for the breakdown of the process since the arbitrator should have scheduled periodic conference calls throughout the pre-hearing



phase. When the arbitrator does this, he/she will likely get an early sense of problems in maintaining the pre-hearing schedule and will be in a much better position to deal with such problems at a relatively early stage rather than at the eleventh hour.

## Written Witness Statements

- The use of written witness statements in lieu of direct testimony (“Witness Statements”) has certain benefits. Witness Statements can save considerable time at the hearing. From a discovery perspective, they can avoid or lessen the need for depositions since the cross-examining party has detailed advanced notice of the witness’ direct testimony. The effectiveness of witness statements as a discovery tool is greatly increased if they are produced relatively early in the proceedings.
- The use of witness statements also has drawbacks, i.e.: (i) they are written by lawyers and often do not reflect how the witness would actually have said something; (ii) being written by lawyers, the Witness Statements can be very expensive; (iii) the witness often trusts the lawyer too much and only cursorily reviews the Witness Statement before signing it; and (iv) oral direct testimony can be a good time for an arbitrator to assess credibility from a perspective other than cross-examination.

Thus, use of Witness Statements should be considered on a case by case basis, particularly in connection with secondary witnesses.

## Dispositive Motions

- In arbitration, “dispositive” motions can cause significant delay and unduly prolong the discovery period. Such motions are commonly based on lengthy briefs and recitals of facts and, after much time, labor and expense, are generally denied on the ground that they raise issues of fact and are inconsistent with the spirit of arbitration. On the other hand,

dispositive motions can sometimes enhance the efficiency of the arbitration process if directed to discrete legal issues such as statute of limitations or defenses based on clear contractual provisions. In such circumstances an appropriately framed dispositive motion can eliminate the need for expensive and time consuming discovery. On balance, the arbitrator should consider the following procedure with regard to dispositive motions:

Any party wishing to make a dispositive motion must first submit a brief letter (not exceeding five pages) explaining why the motion has merit and why it would speed the proceeding and make it more cost-effective. The other side would have a brief period within which to respond.

Based on the letters, the arbitrator would decide whether to proceed with more comprehensive briefing and argument on the proposed motion.

If the arbitrator decides to go forward with the motion, he/she would place page limits on the briefs and set an accelerated schedule for the disposition of the motion.

Under ordinary circumstances, the pendency of such a motion should not serve to stay any aspect of the arbitration or adjourn any pending deadlines.

### **Relevant Factors In Determining The Appropriate Scope Of Arbitration Discovery**

#### **Nature of The Dispute**

- The factual context of the arbitration and of the issues in question with which the arbitrator should become conversant before making a decision about discovery.
- The amount in controversy.
- The complexity of the factual issues.
- The number of parties and diversity of their interests.
- Whether any or all of the claims appear, on the basis of the pleadings, to have sufficient merit to justify the time and expense associated with the requested discovery.
- Whether there are public policy or ethical issues that give rise to the need for an in depth probe through relatively comprehensive discovery.
- Whether it might be productive to initially address a potentially dispositive issue which does not require extensive discovery.

#### **Agreement of The Parties**

- Agreement of the parties, if any, with respect to the scope of discovery.
- Agreement, if any, by the parties with respect to duration of the arbitration from the filing of the arbitration demand to the issuance of the final award.
- The parties' choice of substantive and procedural law and the expectations under that legal regime with respect to arbitration discovery.

## Relevance and Reasonable Need For Requested Discovery

- Relevance of the requested discovery to the material issues in dispute or the outcome of the case.
- Whether the requested discovery appears to be sought in an excess of caution, or is duplicative or redundant.
- Whether there are necessary witnesses and/or documents that are beyond the tribunal's subpoena power.
- Whether denial of the requested discovery would, in the arbitrator's judgment (after appropriate scrutinizing of the issues), deprive the requesting party of what is reasonably necessary to allow that party a fair opportunity to prepare and present its case.
- Whether the requested information could be obtained from another source more conveniently and with less expense or other burden on the party from whom the discovery is requested.
- To what extent the discovery sought is likely to lead, as a practical matter, to a case-changing "smoking gun" or to a fairer result.
- Whether broad discovery is being sought as part of a litigation tactic to put the other side to great expense and thus coerce some sort of result on grounds other than the merits.
- The time and expense that would be required for a comprehensive discovery program.
- Whether all or most of the information relevant to the determination of the merits is in the possession of one side.
- Whether the party seeking expansive discovery is willing to advance the other side's reasonable costs and attorneys' fees

in connection with furnishing the requested materials and information.

- Whether a limited deposition program would be likely to: (i) streamline the hearing and make it more cost-effective; (ii) lead to the disclosure of important documents not otherwise available; or (iii) result in expense and delay without assisting in the determination of the merits.

## **Privilege and Confidentiality**

- Whether the requested discovery is likely to lead to extensive privilege disputes as to documents not likely to assist in the determination of the merits.
- Whether there are genuine confidentiality concerns with respect to documents of marginal relevance. Whether cumbersome, time-consuming procedures (attorneys' eyes only, and the like) would be necessary to protect confidentiality in such circumstances.

## **Characteristics and Needs of The Parties**

- The financial and human resources the parties have at their disposal to support discovery, viewed both in absolute terms and relative to one another.
- The financial burden that would be imposed by a broad discovery program and whether the extent of the burden outweighs the likely benefit of the discovery.
- Whether injunctive relief is requested or whether one or more of the parties has some other particular interest in obtaining a prompt resolution of all or some of the controversy.
- The extent to which the resolution of the controversy might have an impact on the continued viability of one or more of the parties.



# NEW YORK STATE BAR ASSOCIATION GUIDELINES FOR THE ARBITRATOR'S CONDUCT OF THE PRE-HEARING PHASE OF INTERNATIONAL ARBITRATIONS

## Introduction

International arbitration is a substantial practice in New York. Many international contracts provide for applicability of New York law, and such contracts often specify New York as a venue for international arbitration. International arbitration is in many respects very different from domestic arbitration in New York. Among other things, the expectation in the New York international arbitration community is that there will be far less pre-hearing disclosure in international arbitration than is typically encountered in domestic arbitration.

There has nonetheless been concern in recent years that the choice of New York as the site of an international arbitration might prompt the arbitral tribunal to depart from normal international practice by imposing American style discovery on the parties. It is the view of the international arbitration bar in New York that these concerns are not justified. Rather, unless the parties agree otherwise, international arbitration in New York is normally conducted in accordance with internationally accepted practices.

The International Guidelines set forth below are intended to provide guidance to arbitrators as to how best to conduct arbitrations consistent with international arbitration practice and to provide a better understanding to the international arbitration

community of the prevailing practices in international arbitration proceedings which are sited in New York.<sup>2</sup>

## The Key Element – an Arbitrator’s Sound Judgment Informed By an International Perspective

- While some international cases may have similarities, for the most part each case involves unique facts and circumstances. As a result, pre-hearing arbitration proceedings including whether any pre-hearing exchange of information or taking of evidence will be allowed and, if so, how much, must be adapted to meet the unique characteristics of the particular case. There is no set of objective rules which, if followed, would result in one “correct” approach for all international cases.

Pre-hearing exchange of information and taking of evidence are collectively referred to in these Guidelines as “Pre-Hearing Disclosure.”

- In international arbitrations, documents on which parties intend to rely are exchanged. However, beyond that exchange, there is a strong presumption against Pre-Hearing Disclosure which in any way approaches the scope of discovery which one might expect in a case which is litigated in a U.S. court. The same presumption applies in international arbitration proceedings pending in New York

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2. A number of arbitration tribunals and organizations have in recent years developed proposed rules and protocols regarding the collection, disclosure and examination of evidence in international arbitrations. Parties arbitrating in New York are free to be guided by any of these rules. NYSBA has relied on some of this prior work in drafting these International Guidelines. Among the best known of these prior contributions are the Rules on the Taking of Evidence in International Arbitration (“IBA Rules”) which were adopted by the Council of the International Bar Association on May 29, 2010 and which are used in many international arbitrations around the world. The within NYSBA International Guidelines complement and in some cases supplement the IBA Rules. Among the areas in which these NYSBA International Guidelines supplement the provisions of the IBA Rules are: the first preliminary conference, electronic discovery, disputes regarding pre-hearing disclosure, adjournments, dispositive motions and the factors to be considered in determining the appropriate scope of pre-hearing disclosure.



subject to the considerations discussed in these Guidelines.

- The experience, talent and preferences brought to arbitration will vary with the arbitrator. It follows that once the arbitrator is chosen, the framework of pre-hearing procedures will always be based on the judgment of the arbitrator, brought to bear in the context of variables such as the arbitrator's background, applicable rules, the custom and practice for arbitrations in the industry in question, and the expectations and preferences of the parties and their counsel. To the extent that the parties seek Pre-Hearing Disclosure, arbitrators must exercise that judgment wisely, to produce a protocol for such disclosure that is specific and appropriate to the given case and is consistent with the accepted norms of international arbitration practice. The arbitrator's exercise of judgment should be directed to ensure there has been enough Pre-Hearing Disclosure to permit a fair result consistent with the expectations and legal traditions of the parties, balanced against the need for a less expensive and more efficient process than would have occurred if the case had been submitted to a U.S. court.
- Attached as Exhibit A is a list of factors which, if taken into consideration by an arbitrator when addressing the type and breadth of Pre-Hearing Disclosure, should assist the arbitrator in exercising judgment in a way that will limit such disclosure to the extent possible while taking into account all relevant factors.

### **Early Attention to The Pre-Hearing Process by the Arbitrator**

- It is important that the ground rules governing an arbitration are clearly established in the period immediately following the initiation of the arbitration. Therefore, following appointment, the arbitrator should promptly study the facts and the issues and be fully



prepared to preside effectively over the early, formative stages of the case in a way that will ultimately lead to an expeditious, cost-effective and fair process.

- It is imperative for the arbitrator to avoid uncertainty and surprise by ensuring that the parties understand at an early stage what the basic ground rules for Pre-Hearing Disclosure, if any, are going to be. Early attention to the scope of such disclosure increases the chance that parties will adopt joint principles of fairness and efficiency before partisan positions arise in specific procedural disputes.
- The type and breadth of Pre-Hearing Disclosure should be high on the agenda for the first pre-hearing conference at the start of the case. If at all possible, an early, formative discussion about Pre-Hearing Disclosure should be attended by in-house counsel or other party representatives with budget responsibilities, as well as by outside counsel. If practicable, it may also increase the likelihood of an early, meaningful understanding of the implications of Pre-Hearing Disclosure if the first pre-hearing conference is an in-person meeting, as opposed to a conference call.
- The arbitrator will enhance the chances for limited, efficient Pre-Hearing Disclosure if, at the first pre-hearing conference, he/she sets achievable but ambitious hearing dates and aggressive interim deadlines. The arbitrator should inform the parties at the time that the deadlines will be strictly enforced and, in fact, the deadlines should thereafter be strictly enforced except in the case of clear good cause.
- Where appropriate, the arbitrator should explain at the first pre-hearing conference that document requests:

should be limited in number.

should be limited to requests for documents which are directly relevant to significant issues in the case or to the case's outcome.

should be restricted in terms of time frame, subject matter and persons or entities to which the requests pertain, and

should not include broad phraseology such as "all documents directly or indirectly related to."

- In international arbitration, the prevailing practice is that depositions are not permitted. Provision of written direct testimony in advance of the witness' appearance at an arbitration hearing can go far in substituting for the deposition procedure.
- In international arbitration, there is a strong presumption against use of the American discovery devices of interrogatories and requests to admit.
- In international arbitration, when the parties, their counsel or their documents would be subject to different rules or other obligations with respect to things such as privilege, privacy or professional ethics, the arbitrator should



apply the same rule to both sides where possible, giving preference to the rule that provides the highest level of protection.

## Party Preferences

- Overly broad Pre-Hearing Disclosure can result when all of the parties seek such disclosure beyond what is needed to prepare the case for an evidentiary hearing. This unfortunate circumstance may be caused by parties and/or advocates who are inexperienced in international arbitration and simply conduct themselves in a fashion which is commonly accepted in United States court litigation. In any event, where all the party participants truly desire unlimited Pre-Hearing Disclosure, the arbitrator must respect that decision, since arbitration is governed by the agreement of the parties. In such circumstances, however, the arbitrator should ensure that the parties have knowingly agreed to such broad disclosure and that they have intentionally withheld from the arbitrator the power to limit Pre-Hearing Disclosure in any fashion. The arbitrator should also make sure that the parties understand the impact of an agreement for broad Pre-Hearing Disclosure by discussing the cost of the course on which the parties propose to embark and the benefit or negative consequences likely to be derived therefrom. The arbitrator should endeavor to have these communications with in-house counsel or other party representatives, as well as with outside counsel, to ensure that the party principals fully understand the decision taken with respect to Pre-Hearing Disclosure.
- Where one side wants broad Pre-Hearing Disclosure in an international arbitration and the other wants such disclosure to be narrow, the setting is ideal for the arbitrator to set meaningful limitations since the arbitrator has far more latitude in such circumstances than when all parties have agreed on broad, encompassing Pre-Hearing Disclosure.

## Arbitrator Tools

- While arbitrators are expected to act in a deliberate and judicious fashion, always affording the parties due process, it is also essential for the arbitrator to maintain control of the proceedings and to move the case forward to an orderly and timely conclusion. The arbitrator has many tools that can be used both to ensure the fairness of the proceedings and to prevent disruption in the rare case where one side may withhold its cooperation. Those tools may include, for example, sanctions such as the making of adverse factual inferences against a party that has refused to come forward with required evidentiary materials on an important issue.

## Written Witness Statements

- In international arbitrations, the use of written witness statements in lieu of direct testimony (“Witness Statements”) is a normal, broadly accepted practice. Arbitrators should be receptive to the use of Witness Statements in international arbitrations and should take full advantage of the efficiencies that can often be achieved through effective use of such statements. Arbitrators should, however, require that Witness Statements be furnished to opposing counsel and the arbitrators sufficiently in advance of the witness’ appearance for cross-examination at the arbitration hearing to permit proper preparation.

## “E-Discovery”

- “E-discovery” is the Pre-Hearing Disclosure of documentary evidence that is stored in electronic form. The use of electronic media for the creation, storage and transmission of information has substantially increased the volume and cost of discovery in cases litigated in U.S. courts.
- To be consistent with the prevailing standards and governing practice in international arbitration, Pre-Hearing Disclosure of information in electronic form must be narrowly circumscribed in order to protect the

efficiency and economy of the proceedings while allowing parties to obtain necessary and pertinent evidence. Narrowing the time fields, search terms and files to be searched, as well as testing for burden are some of the tools for controlling e-discovery that should be considered.

- To be able appropriately to address issues pertaining to Pre-Hearing Disclosure of electronically stored documentation, arbitrators should at least familiarize themselves generally with the technological issues that arise in connection with electronic data. Such issues include the format in which documents are produced, and the availability and need (or lack thereof) for production of “metadata.” A basic understanding by the arbitrator of the pertinent technology and terminology can place the arbitrator in a better position to assist the parties in containing the attendant costs and potential delays associated with the retrieval and exchange of electronic data.
- While there can be no objective standard in all cases for the appropriate scope of Pre-Hearing Disclosure of electronic information, an early order along the following lines can be an important first step in limiting such disclosure in a large number of cases:

There shall be production of electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, no such documents are required to be produced from back-up servers, tapes or other media.

Absent a showing of compelling need, disclosure of electronic documents shall normally be made at the option of the producing party either (a) in native form; or (b) on the basis of generally available technology in a searchable format which is usable by the party receiving the e-documents and convenient and

economical for the producing party. Absent a particularized showing of compelling need, the parties need not produce metadata.

## **Disputes Regarding Pre-Hearing Disclosure**

- It is essential that disputes as to Pre-Hearing Disclosure be resolved promptly and efficiently since exhaustive objections and related applications to the arbitrator can unduly extend the pre-hearing period and significantly add to the cost of the arbitration. In addressing such disputes, the arbitrator should consider the following practices which can increase the speed and cost-effectiveness of the arbitration:
- Where there is a panel of three arbitrators, the parties may agree, by rule or otherwise, that the Chair or another member of the panel, acting alone, is authorized to resolve disputes as to Pre-Hearing Disclosure. While the designated panel member may still wish to consult the other arbitrators on matters of importance, the choice of a single arbitrator to decide such issues can nonetheless avert scheduling difficulties and avoid the expense and delay of three people separately engaging in the laborious tasks related to resolving such pre-hearing disputes.
- Lengthy briefs on Pre-Hearing Disclosure matters should be avoided. In most cases, a prompt discussion or submission of brief letters will sufficiently inform the arbitrator with regard to the issues to be decided.
- The parties should be required to negotiate Pre-Hearing Disclosure differences in good faith before presenting any remaining issues for the arbitrator's decision.
- The existence of Pre-Hearing Disclosure issues should not impede the progress of Pre-Hearing Disclosure in other areas where there is no dispute.



## Requests for Adjournments

- Adjournments of the hearing dates can cause inordinate delay and detract from the cost effectiveness of the proceeding. While the arbitrator may not ultimately reject a joint application of all parties to adjourn the hearing, the arbitrator should nonetheless ensure that the parties understand the implications of the adjournment they seek and, if possible and except for exceptional circumstances, the arbitrator should try to dissuade them from the adjournment in a way that would still accommodate their perceived needs. The arbitrator may request that the represented parties attend any conference to discuss these subjects if, in the arbitrator's judgment, the presence of clients may facilitate the adoption of a practical solution.
- If one party seeks a continuance and another opposes it, the arbitrator then has discretion to grant or deny the request. In international arbitrations, a party seeking an adjournment should be required to establish clear good cause for the delay. In general, courts are well aware that a core goal of arbitration is speed and cost-effectiveness and will not disturb an arbitrator's rejection of an unpersuasive request for an adjournment.

## Dispositive Motions

- In international arbitration, "dispositive" motions can cause significant delay and unduly prolong the proceeding. Such motions are commonly based on lengthy briefs and recitals of facts and, after much time, labor and expense, are generally denied on the ground that they raise issues of fact and are inconsistent with the spirit of arbitration. On the other hand, dispositive motions can sometimes enhance the efficiency of the arbitration process if directed to discrete legal issues such as statutes of limitations or defenses based on clear contractual provisions. In such circumstances an appropriately framed dispositive motion

can eliminate the need for expensive and time consuming discovery. On balance, the arbitrator should consider the following procedure with regard to dispositive motions:

Any party wishing to make a dispositive motion must first submit a brief letter (not exceeding five pages) explaining why the motion has merit and why it would speed the proceeding and make it more cost-effective. The other side would have a brief period within which to respond.

Based on the letters, the arbitrator would decide whether to proceed with more comprehensive briefing and argument on the proposed motion.

If the arbitrator decides to go forward with the motion, he/she would place page limits on the briefs and set an accelerated schedule for the disposition of the motion.

Under ordinary circumstances, the pendency of such a motion should not serve to stay any aspect of the arbitration or adjourn any pending deadlines.

## Conclusion

Arbitrators who serve in international cases sited in New York should continue to employ the best of the ever-developing international case management techniques so as to keep faith with New York's traditional respect for international norms and to preserve the essential nature of the arbitral process as a balanced, fair, cost-effective and highly distinctive alternative to litigation.

### **Relevant Factors in Determining the Appropriate Scope of Pre-Hearing Disclosure in International Arbitration**

#### **Agreement of the parties, if any, with respect to the scope of Pre-Hearing Disclosure.**

- Agreement, if any, by the parties with respect to duration of the arbitration from the filing of the arbitration demand to the issuance of the final award.
- The parties' choice of substantive and procedural law and the expectations under that legal regime with respect to Pre-Hearing Disclosure.

#### **Characteristics and Needs of the Parties**

- The nationalities of the parties, the legal tradition of the parties' home states, and the parties' expectations with respect to the arbitration process.
- The financial and human resources the parties have at their disposal to support Pre-Hearing Disclosure, viewed both in absolute terms and relative to one another.
- The financial burden that would be imposed by Pre-Hearing Disclosure and whether the extent of the burden outweighs the likely benefit.
- Whether injunctive relief is requested or whether one or more of the parties has some other particular interest in obtaining a prompt resolution of all or some of the controversy.

- The extent to which the resolution of the controversy might have an impact on the continued viability of one or more of the parties.

## **Nature of the Dispute**

- The factual context of the arbitration and of the issues in question with which the arbitrator should become conversant before making a decision about Pre-Hearing Disclosure.
- The amount in controversy.
- The complexity of the factual issues.



- The number of parties and diversity of their interests.
- Whether any or all of the claims appear, on the basis of the pleadings, to have sufficient merit to justify the time and expense associated with the requested Pre-Hearing Disclosure.
- Whether there are public policy or ethical issues that give rise to the need for particularized Pre-Hearing Disclosure.
- Whether it might be productive to initially address a potentially dispositive issue which does not require Pre-Hearing Disclosure.

## **Relevance and Reasonable Need for Pre-Hearing Disclosure**

- Whether the requested information is directly relevant to significant issues in dispute or to the outcome of the case.
- Whether the requested Pre-Hearing Disclosure appears to be sought in an excess of caution, or is duplicative or redundant.
- Whether there are necessary witnesses and/or documents that are beyond the tribunal's subpoena power.
- Whether denial of the requested Pre-Hearing Disclosure would, in the arbitrator's judgment (after appropriate scrutinizing of the issues), deprive the requesting party of what is reasonably necessary to allow that party a fair opportunity to prepare and present its case.
- Whether the requested information could be obtained from another source more conveniently and with less expense or other burden on the party from whom the Pre-Hearing Disclosure is requested.

- To what extent the requested Pre-Hearing Disclosure is likely to lead, as a practical matter, to a case-changing “smoking gun” or to a fairer result.
- Whether broad Pre-Hearing Disclosure is being sought as part of a litigation tactic to put the other side to great expense and thus coerce some sort of result on grounds other than the merits.
- Whether all or most of the information relevant to the determination of the merits is in the possession of one side.
- Whether the party seeking Pre-Hearing Disclosure is willing to advance the other side’s reasonable costs and attorneys’ fees in connection with furnishing the requested materials and information.

## **Privilege and Confidentiality**

- Whether the requested information is likely to lead to privilege disputes as to documents not likely to assist in the determination of the merits.
- Whether there are genuine confidentiality concerns with respect to documents of marginal relevance. Whether cumbersome, time-consuming procedures (attorneys’ eyes only, and the like) would be necessary to protect confidentiality in such circumstances.





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