

REPORT BY ARBITRATION COMMITTEE OF DISPUTE RESOLUTION SECTION:

Unanimously Approved by
NYSBA Executive Committee and
House of Delegates, November 2010

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

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. However, there has 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 conducted in accordance with internationally accepted practices. The Arbitration Committee of the New York State Bar Association's Dispute Resolution Section has prepared the following Guidelines regarding pre-hearing proceedings in international arbitration 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.¹

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

¹ 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. The New York State Bar Association ("NYSBA") has relied on some of this prior work in drafting these 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. These NYSBA Guidelines complement and in some cases supplement the IBA Rules that deal with pre-hearing disclosure. Among the areas in which these NYSBA Guidelines supplement the provisions of the IBA Rules regarding pre-hearing disclosure 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."

- 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 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 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.

- 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.

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.

Exhibit A

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

Agreement of the Parties

- 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.

