Best Practice in International Arbitration

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1 Introduction

International arbitration has essentially developed alongside international trade and investment. When parties from different countries enter into contracts, they will typically provide for arbitration as the means of dispute resolution. There are many reasons why arbitration is preferred over litigation in international commercial relations. The advantages offered by arbitration include international enforceability,[1] speed and flexibility of proceedings,[2] choice of procedural language,[3] privacy,[4] and the possibility to select arbitrators with knowledge and experience of a particular field of law or industry.[5] Additionally, in some states, litigation in the local courts may also appear unattractive due to lack of independence and risk of corruption.[6] As international trade and investment have grown, so has international arbitration.[7]

To distinguish it from domestic arbitration, international arbitration is often defined as arbitration in which at least one of the parties is domiciled in a country other than

1 The New York Convention of 1958, with over 150 signatory states, affords almost world-wide recognition and enforcement to arbitral awards.

2 A commercial arbitration will typically be resolved within 1–2 years from initiation. By contrast, in many jurisdictions a comparable proceeding before a court of law will last longer in the first instance alone, with time being added for any appeals. In addition, as will be further touched upon in the following, arbitrations are burdened by very few mandatory rules, thus catering for the possibility to adapt the proceedings to fit the individual case. Proceedings before national courts are often subject to detailed regulation.

3 Litigation before local courts will generally have to be conducted in the local language, whilst in arbitration it is left to the parties to decide on the procedural language. In most cases, that decision will come down in favour of English.

4 Litigation before local courts will generally be public. By contrast, arbitration is a private means of dispute resolution (and also considered to be confidential in some jurisdictions).

5 See also Ola Ø. Nisja in *Avtalt prosess* pages 259 ff.

6 See, for example, Transparency International's corruption index. (http://www.transparency.org/cpi2013/results).

7 When referring to international arbitration in this article, we mean primarily international commercial arbitration. Investment arbitration, conducted under bilateral and multilateral investment protection treaties, has many commonalities with international commercial arbitration, but also certain differences which will not be addressed here.

the place (or seat) of arbitration.[8] Usually, the place of arbitration will either be the home state of one of the parties or a third state chosen as a neutral venue by the parties.

In domestic arbitration, parties, counsel and arbitrators will generally be from one and the same state which is also the seat of the arbitration. They will thus typically share a common language, culture and legal background. Based on this, they are able to model a proceeding with relative ease, with which they will all be familiar and comfortable (not uncommonly a light version of the practices before the local courts). Their procedural expectations are, to a large extent, inherently aligned.

By contrast, in international arbitration, parties, counsel and arbitrators will typically come from different states, or even different continents, and may have widely differing expectations based on their individual cultural and legal background. This can easily lead to misunderstandings, unwelcome surprises and clashes over procedural issues.

One potential solution could be to adopt whatever domestic procedure prevails at the seat of arbitration for international arbitrations as well. However, this would present problems in addition to hampering the opportunity to shape the proceedings to fit the individual case. When a third country is chosen by parties as the seat of arbitration, it is seldom because of any profound understanding or preference for the local practices, but rather for reasons of perceived neutrality, convenience and reputation as being «arbitration friendly».[9] If the domestic practices and peculiarities of various seats were to prevail also in international arbitration, this would result in significant variations from one seat to the next, causing considerable uncertainty for foreign parties. It may also severely limit the parties' choice of counsel and arbitrators.

The solution has instead been for international arbitration to become increasingly «de-localised». Over time, subject to such parts of the arbitration law at the particular seat which may be mandatory, procedures and practices have thus developed within international arbitration, which experienced practitioners will expect to apply more or less regardless of where an arbitration takes place.

In this article, we will endeavour to set out some of those procedures and practices and explain their purpose and use in international arbitration. In so doing, we will focus on practices which we believe have reached a sufficiently high level of acceptance

8 This definition is used by many arbitral institutions, including the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), to distinguish their case loads of domestic and international arbitrations, respectively.

9 The «arbitration friendliness» of a seat may include factors such as absence of peculiarities and conformity with international standards in relevant legislation, willingness of local courts to support arbitrations and uphold arbitral awards, level of corruption, convenience for foreign lawyers to visit and practice as counsel or arbitrator, long-standing recognition as an often-used arbitration venue, the existence of a reputable arbitration institution, etc.

with the international arbitration community to be termed «best practice». Some of these practices are evident from the work done by international working groups such as the Arbitration Committee of the IBA. Others are less evident and are primarily based on our own experience. Although that experience includes numerous international arbitrations – seated in various countries and under various institutional rules and ad hoc regimes[10] – the majority is drawn from SCC,[11] ICC[12] and UNCITRAL[13] arbitrations seated in Western Europe and particularly in Stockholm. A degree of regional and institutional bias on the part of the authors must therefore be recognized.

2 Sources of best practice

Best practice may be defined as the solutions to procedural issues typically adopted by experienced practitioners, i.e. what they will generally expect to apply unless mandatory rules at the seat or the agreement of the parties dictate otherwise.

By its very nature, best practice will seldom be codified and knowledge of it has largely to be acquired through actual work as counsel or arbitrator in international arbitrations. However, over the last decade, efforts have increasingly been made to reduce at least parts of it to writing in the form of non-mandatory, «soft law» rules and guidelines. One should beware that the quality of these efforts and the extent to which they truly reflect the majority view of international arbitration practitioners may vary. While some are the result of genuinely international working groups with a high degree of acceptance throughout the arbitration community, others appear more as attempts by local organizations or individuals to promote their own, particular version of «best practice» or to regulate what they perceive to be gaps in the arbitral procedure. Whilst the former will typically be based on surveys of actual international practices and reflect compromise – bridging at least parts of the differences between, for example, Anglo-Saxon and Continental European legal traditions – the latter will often have a very distinct cultural flavour.

10 A distinction is generally made between arbitrations conducted under the auspices of an arbitral institution such as the SCC, ICC or LCIA («institutional arbitration») and arbitrations conducted under the arbitration law of the seat without any institutional involvement («ad hoc arbitration»). By way of example, the vast majority of arbitrations in Norway are ad hoc, whereas institutional arbitration is far more common in Sweden.

11 The Arbitration Institute of the Stockholm Chamber of Commerce (www.sccinsitute.se).

12 The International Chamber of Commerce (www.iccwbo.org/products-and-services/arbitration-and-adr).

13 Ad hoc arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (www.uncitral.org).

Among the international efforts that stand out in particular is the work of the Arbitration Committee (including its sub-committees and task forces) of the International Bar Association («IBA»).[14] By way of example, the 2010 IBA Rules on the Taking of Evidence in International Arbitration and the IBA Guidelines on Conflicts of Interest in International Arbitration have both reached a very high level of acceptance and are regularly referred to in international arbitrations.

In addition to the IBA, organizations such as UNCITRAL, ICC and CIArb[15] have also published notes, guidelines and reports, which aim to reflect or establish best practices. In particular, CIArb has been a prolific publisher of guidelines, although most of these have not reached anything near the international recognition afforded to the above-mentioned rules and guidelines of the IBA. The ever increasing number of rules, notes and guidelines has raised concerns over the potential for «soft law» over-regulation of international arbitration.[16]

A further source of best practice is books and articles by distinguished practitioners and scholars. However, as with guidelines, notes and reports, the extent to which such works actually reflect the majority view of international arbitration practitioners or just the view of the individual author(s) who are writing from a distinct cultural or institutional perspective, may differ.[17]

Finally, a less obvious source of best practice can be found in the specific procedural rules that are typically prepared by tribunals in international arbitrations and, following consultation with the parties, adopted to govern the ensuing proceedings (often by way of inclusion in the tribunal's first procedural order – the «PO1»). The aim of such rules is to create a level of order and an increased alignment of the parties' expectations, thereby limiting the scope for future misunderstandings and disputes over procedural issues. To achieve this, the rules will typically provide in some detail what shall apply in relation to each aspect of the arbitral proceedings, from the submission of written briefs and evidence, to the conduct of hearings, etc. Specific procedural rules adopted in one arbitration will often subsequently serve as inspiration in other arbitrations. In

14 International Bar Association (www.ibanet.org).

15 Chartered Institute of Arbitrators (www.ciarb.org).

16 See, for example, Schneider, *The Essential Guidelines for the Preparation of Guidelines, Directives, Notes, Protocols and Other Methods Intended to Help International Arbitration Practitioners to Avoid the Need for Independent Thinking and to Promote the Transformation of Errors into 'Best Practices'*, Liber Amicorum en l'honneur de Serge Lazareff (2011) at pages 563–567, and Landau QC & Weeramantry, A Pause for Thought, 2013, International Arbitration: The Coming of a New Age?, ICCA Congress Series, Volume 17 at pages 496–537.

17 Among the books that have gained a high degree of international recognition and to which reference will often be made in international arbitrations are Blackaby et al., *Redfern & Hunter on International Arbitration* (2009) and Born, *International Commercial Arbitration* (2014).

this way, the rules will evolve and be improved upon as, over time, they are subjected to scrutiny and input from various practitioners. Through this continuous, iterative process, such procedural rules will, by and large, come to both drive and reflect best practice in international arbitrations.[18] We will revert to the use and significance of procedural orders in Section 3.2 below.

3 Best practices applied

3.1 COMMENCING ARBITRATION

3.1.1 General

Best practices do not only exist in relation to the conduct of arbitral proceedings, but apply also to the drafting of arbitration agreements, the selection of arbitrators and other measures preceding the actual arbitration.

3.1.2 Drafting the arbitration agreement

The 2010 IBA Guidelines for Drafting International Arbitration Clauses aim to reflect best, current international practices with regard to arbitration agreements. The Guidelines provide practical information not only with regard to some of the choices available, but also with regard to some of the most common pitfalls to be avoided. As such the Guidelines can be a useful reference both for the drafting of international arbitration clauses and, to a certain extent, for the subsequent interpretation of such clauses.

3.1.3 Duties of counsel

The 2013 IBA Guidelines on Party Representation in International Arbitration (the «IBA Guidelines on Party Representation») indicate the existence of certain duties of counsel in an international arbitration. Although these Guidelines were only recently adopted and have been met with criticism from several distinguished practitioners,[19]

18 One should naturally be careful in drawing conclusions from any individual example of such specific procedural rules and, rather, look for commonality in larger samples.

19 On the side of those offering criticism, one may note, for example, such distinguished practitioners as Toby Landau QC and Michael Schneider of Lalive in Switzerland (see footnote 16 above). For a slightly more positive approach to the IBA Guidelines on Party Representation, see for example William Park, *A Fair Fight: Professional Guidelines in International Arbitration*, Arbitration International, Volume 30, 2014 at pages 409–428 and Waincymer, *Regulatory Developments in the Control of Counsel in International Arbitration – The IBA Guidelines on Party Representation in International Arbitration and the New LCIA Rules and Annex*, Arbitration International, Volume 30, 2014 at pages 513–551.

our experience is that they are already being referred to in international arbitrations. Even if one may agree with some of the criticism, counsel in an international arbitration who ignores the Guidelines may be at risk of having particular behaviour labelled as contrary to best practice or, worse, unethical. It is thus likely better to err on the side of caution and act in accordance with the guidelines. Fortuitously, this should not be difficult given that most of that which is stated in the Guidelines should be easily acceptable, for example, the duty «not to make knowingly false submissions of fact to the Arbitral Tribunal». This is so, not least, because the same or similar duties would apply in any event to the majority of counsel as members of regulated bar associations.

However, one of the indicated duties of counsel according to the IBA Guidelines on Party Representation which may come as a surprise to counsel from civil law jurisdictions follows from guideline No 12:

> «When the arbitral proceedings involve or are likely to involve Document production, a Party Representative should inform the client of the need to preserve, so far as reasonably possible, Documents [...]»

In essence, this calls for counsel to communicate to his or her client what in common law countries is typically referred to as a «document hold», i.e. a written notice informing the client that all documents of potential relevance in a forthcoming arbitration must be preserved. In order to be effective, such a notice should preferably be sent to all identified holders of potentially relevant documents within the client's organization, asking them to confirm receipt and that they have understood and will adhere to the document hold.

There are also other duties indicated by the IBA Guidelines on Party Representation, which we will touch upon later in this article.

3.1.4 Selection of arbitrators

One of the main advantages of arbitration over litigation is that a party may, as a general rule,[20] nominate an arbitrator of its choice. In taking advantage of this opportunity, many parties go to great lengths to assess the suitability of candidates, from reviewing prior publications and other available information to the conduct of regular interviews. Although some may question whether such interviews are at all appropriate, provided that they are not conducted in a manner which jeopardizes

20 The agreement of the parties, for example, to have a sole arbitrator or to have an arbitral institution appoint the entire three-member tribunal, may of course exclude a party's choice in this regard.

the independence and impartiality of the prospective arbitrator, they have long been accepted by the majority of the arbitration community.[21] Thus, early on the 1987 IBA Rules of Ethics for International Arbitrators stated that, when approached with a view to appointment, an arbitrator may:

> «[...] respond to enquiries from those approaching him, provided that such enquiries are designed to determine his suitability and availability for the appointment and provided that the merits of the case are not discussed.»

The IBA Guidelines on Party Representation provide some further guidance stating that, as an exception to the general rule of no ex parte communications with an arbitrator:[22]

> «A Party Representative may communicate with a prospective Party-Nominated Arbitrator to determine his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest.
>
> [...]
>
> While communications [...] may include a general description of the dispute, a Party Representative should not seek the views of the prospective Party-Nominated Arbitrator [...] on the substance of the dispute.»

In order to provide a framework to which both the party conducting the interview and the interviewee can refer for comfort and structure, CIArb has published «Practice Guideline 16: The Interviewing of Prospective Arbitrators». In essence, this guideline provides a set of recommendations in the nature of «do's and don'ts». However, parts of the guideline have been criticized for going beyond best practice. One criticism is that either a tape recording or a detailed note should be made of the interview by the prospective arbitrator and disclosed to the opposite side in the dispute at the earliest available opportunity following a subsequent appointment. Distinguished practitioners have found the recording of interviews to be intrusive and the unsolicited disclosure of notes to be excessive.[23] This criticism also accords with our own experience in which we have never encountered any tape recording being made or note being disclosed,

21 See also Ola Ø. Nisja in *Avtalt prosess* pages 265–267.

22 Ex parte communications means communication between one of the parties and an arbitrator without the presence or knowledge of the other party.

23 See, for example, Born (2014) at page 1685 and Friedman, *Regulating Judgment: A Comment on the Chartered Institute of Arbitrators Guidelines on the Interviewing of Prospective Arbitrators*, Dispute Resolution International 2008 at pages 289–290.

although interviews of party-appointed arbitrators have in many cases undoubtedly taken place as part of the nomination process.

In light of the criticisms voiced against parts of the guideline, it should be used with caution, including exceptions and additions being made where appropriate according to the user's own best judgment. As pointed out by CIArb itself, the Guidelines are mere «recommendations and do not carry any implication of being mandatory». Notwithstanding their shortcomings, they may serve as a starting point and inspiration for parties and arbitrators faced with the sensitive issue of interviews.

Having chosen the co-arbitrators, parties will often wish to also have an influence over the choice of the third arbitrator, i.e. the future chair of the arbitral tribunal. Among all of the factors that may have an impact on the proceedings, including their outcome, the chairperson is perhaps the single most important.

Since most arbitration laws[24] and institutional rules[25] do not provide for the parties to have any direct involvement in the selection of the chairperson, the parties' ability to nonetheless exert influence over this issue will typically presuppose that they are able to reach some sort of agreement. Such agreements may come in various shapes and forms and there is, at least in our experience, no particular best practice in this regard.[26]

As part of the process of selecting a chair, the IBA Guidelines on Party Representation provide that the parties may engage in ex parte communications with their respective party-appointed arbitrators and, subject to agreement, also with prospective chairpersons, as follows:

> «A Party Representative may communicate with a prospective or appointed Party-Nominated Arbitrator for the purpose of the selection of the Presiding Arbitrator.
>
> A Party Representative may, if the Parties are in agreement that such a communication is permissible, communicate with a prospective Presiding Arbitrator to determine his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest.»

It should be noted that these communications are naturally all subject to the general prohibition in the Guidelines against seeking the views of the party-nominated arbitrator or prospective chairperson on the substance of the dispute.

24 See, for example, Article 11.3(a) of the Model Law (as defined below).

25 See, for example, Article 12.5 of the 2012 ICC Rules and Article 13.3 of the 2010 SCC Rules.

26 The parties may, for example, agree that the two party-appointed arbitrators shall come up with a shortlist of candidates in respect of which the parties may offer their comments or some other procedure.

3.1.5 Conflicts of Interest

Whether appointed by the parties or through some other means, all arbitrators in an international tribunal are expected to be independent and impartial. To facilitate the use of a common measure for assessing whether there may exist justifiable doubts in any of these respects, reference is commonly made to the 2004 IBA Guidelines on Conflicts of Interest in International Arbitration (the «IBA Guidelines on Conflicts»). These Guidelines are commonly referred to in decisions by arbitral tribunals, arbitral institutions, and even by national courts.[27]

The IBA Guidelines on Conflicts first set out general standards reflecting best practice in international arbitration with regard to independence, impartiality and disclosure. To this end, the general standards include, among other provisions, the following:

> «An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator if he or she has any doubts as to his or her ability to be impartial or independent.
>
> The same principle applies if facts or circumstances exist, or have arisen since the appointment, that, from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator's impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard 4.
>
> [...]
>
> If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and to the co-arbitrators, if any, prior to accepting his or her appointment or, if thereafter, as soon as he or she learns about them.
>
> [...]
>
> Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure.»

27 See, for example, the Swedish Supreme Court case, Anders Sillén v. Ericsson AB (NJA 2007, p. 841), in which the Court made reference to the IBA Guidelines on Conflicts and stated: «Even if the case is to be assessed on the basis of the provisions in the [Swedish Arbitration] Act, it may, in view of the similar rules and the often recurring international elements in [arbitration], be appropriate to look also at the application of rules and guidelines.»

The guidelines then go on to list a number of typical situations in which an arbitrator's independence or impartiality may potentially be called into question. These situations are grouped into four lists, reflecting the severity of the situation, going from the non-waivable red list (calling for the prospective arbitrator to decline appointment), through the waivable red and orange lists (with a duty to disclose to the parties, who may then choose whether to accept or challenge the appointment) and ending with the green list (with no duty to disclose). These lists are by no means exhaustive. There may thus exist circumstances which, although not listed, would nevertheless create justifiable doubts as to an arbitrator's independence or impartiality as per the general standards, being the core of the guidelines. In addition to the general standards set forth in the guidelines, a prospective arbitrator may of course be subject to additional standards for conflicts of interest following from applicable law or from membership in a bar association or other regulated organization.

In addition to the above and to avoid any justifiable doubt as to the impartiality of the chairperson, best practice – as reflected in most leading institutional rules[28] – provides that he or she should not, as a general rule, be of the same nationality as either of the parties.

3.2 CONDUCT OF THE ARBITRATION

3.2.1 General principles

Once the arbitral tribunal has been constituted and in receipt of the case file, the manner of conducting the proceedings must be determined. There are very few statutory rules in this respect, leaving great discretion to the parties and, failing their agreement, the arbitral tribunal to determine the procedure. In the UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006 (the «Model Law»), this is expressed in Article 19 as follows:

> «(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
>
> (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.»

28 See, for example, Article 13.5 of the 2012 ICC Rules and Article 13.5 of the 2010 SCC Rules.

Similar provisions are found in most arbitration acts.[29] With respect to more detailed rules of procedure, most arbitration acts merely indicate that, unless otherwise decided by the parties, the parties are to submit their first written submissions indicating the facts they rely on and the relief sought,[30] that a hearing is to take place,[31] and provide a few other provisions relating primarily to evidence.[32] All combined, the Model Law like the Norwegian Arbitration Act contains only ten articles under the heading, Conduct of Arbitral Proceedings. The Swedish Arbitration Act's chapter on the proceedings, contains a mere eight articles. This can be compared with the far-more-detailed regulation found in most jurisdictions with respect to court proceedings. By way of example, the Swedish Code of Judicial Procedure deals with the proceedings in first instance alone in no less than 38 chapters (Chapters 10–48) and a total of 574 articles.

Institutional arbitration rules usually provide some detail in addition to that found in arbitration acts as to how to conduct the proceedings. The Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the «SCC Rules»), for example, provide some general, additional guidance with respect to the first two written submissions,[33] witnesses and experts,[34] interim measures,[35] and communications from the arbitral tribunal.[36] Still, in terms of scope, volume and specificity, also institutional rules are a far cry from the kind of detailed regulation found in the domestic litigation regimes.

Thus, with so little mandatory guidance, an arbitral tribunal may, subject to the parties' agreement, tailor the procedure in any way it sees fit. There is only one general

29 See, for example, section 21 of the Norwegian Arbitration Act («Innenfor rammen av partenes avtale og loven her skal voldgiftsretten behandle saken på den måte den finner hensiktsmessig.»), section 19 of the Danish Arbitration Act, which has fully adopted the Model Law regulation («Parterne kan aftale, hvilken fremgangsmåde voldgiftsretten skal følge under behandlingen af voldgiftssagen. I mangel af en sådan aftale kan voldgiftsretten behandle voldgiftssagen på den måde, som voldgiftsretten finder hensigtsmæssig. […]») and, less clearly expressed but with the same intended meaning, section 21 of the Swedish Arbitration Act («Skiljemännen skall handlägga tvisten opartiskt, ändamålsenligt och snabbt. De skall därvid följa vad parterna har bestämt, om det inte finns något hinder mot det.»)

30 Article 23 of the Model Law, section 23 of the Swedish Arbitration Act, section 25 of the Norwegian Arbitration Act and section 23 of the Danish Arbitration Act.

31 Article 24 of the Model Law, section 24 of the Swedish Arbitration Act, section 26 of the Norwegian Arbitration Act and section 24 of the Danish Arbitration Act.

32 Articles 26–27 of the Model Law, sections 25–26 of the Swedish Arbitration Act, sections 28–30 of the Norwegian Arbitration Act and sections 26–27 of the Danish Arbitration Act.

33 Article 24 of the 2010 SCC Rules.

34 Articles 28–29 of the 2010 SCC Rules.

35 Article 32 of the 2010 SCC Rules.

36 Articles 8 and 33 of the 2010 SCC Rules.

limitation to this: the procedure must comply with basic due process requirements. In short, due process requirements entail:

(1) that each party must be afforded a reasonable opportunity to present its case and to respond to the other party's case; and
(2) that the parties must be treated equally.[37]

As a part of the requirement of due process, the parties will also have a strong interest in the proceedings being conducted in a stringent and foreseeable manner, with no unnecessary procedural surprises for the parties. An unpredictable procedure which allows surprises will likely limit a party's ability to present its case and to respond to the other party's case. Accordingly, such a procedure would not meet the requirements of due process. Finally, there is an expectation from parties, as well as from society and industry in general, that arbitration should provide for more effective and quicker settlement of commercial disputes than litigation in the ordinary courts.[38]

In order to devise a procedure which meets all of these expectations – i.e. a procedure which is fair, predictable and thus able to guarantee due process, whilst maintaining speed and flexibility – the arbitral tribunal may want to seek guidance somewhere. However, as concluded above, arbitral legislation and institutional rules do not provide much in the way of guidance. In domestic arbitration, arbitrators therefore often find inspiration in the principles expressed in the relevant domestic litigation regime. As a result and as mentioned above, domestic arbitration is often carried out as a lighter version of the relevant domestic court proceedings. In international arbitration, that is most often inappropriate,[39] not least due to the resulting unexpected solutions for foreign parties not accustomed to that domestic procedure.[40]

37 See Article 18 of the Model Law. See further: Brocker & Löf, *Chapter 8 of International Arbitration in Sweden, A Practitioners' Guide* (2013); Blackaby et al. chapter 5 and Born chapter 15.

38 In the Swedish Arbitration Act, this expectation is expressed in the requirement in section 21 according to which the arbitral tribunal must handle the dispute in a practical and speedy manner.

39 Notably, however, Article 19 of the 2012 ICC Rules makes reference to national laws of procedure as one option for the arbitral tribunal when determining the applicable procedural rules: «The proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.» Notwithstanding the fact that the 2012 ICC Rules mention this possibility, we submit that it would be highly unusual, and likely viewed by many as improper, to do so in any international context. This is not to deny that it also happens that international arbitrations are conducted with extensive reference to (sometimes conflicting) domestic customs of one or several of the arbitrators and the parties. Indeed, it happens quite frequently, and the results are equally surprising each time.

40 See also Section 1 above.

Arguably, reference to the domestic judicial rules is a questionable approach also in purely domestic arbitration, not least because the principles of litigation and litigation's inherent inflexibility may have been precisely what parties wanted to avoid when opting for domestic arbitration.

In order to render the procedure robust without having to resort to principles of domestic procedure, a pattern has evolved over time for the conduct of arbitrations under international best practice. This arbitral practice has in some respects been analysed and put to paper in non-binding rules and guidelines.[41]

However, these attempts have not (yet) achieved the supposed goal of creating authoritative rules for the conduct of international arbitration in general. Instead, as will be described in the following, a practice with respect to the conduct of the proceedings has evolved without much reliance on any such formal codification initiatives. There are, however, two important exceptions.

First, the 2010 IBA Rules on the Taking of Evidence in International Arbitration (the «IBA Rules on Evidence») have had a profound impact on the conduct of international arbitration. In particular when it comes to questions of production of documents/discovery, the Rules are being referred to in virtually every international arbitration. We will come back to the IBA Rules on Evidence below.

Second, the UNCITRAL Notes on Organizing Arbitral Proceedings[42] have, at least in an indirect way, likely impacted the manner in which international best practice has developed. This is so not because the Notes provide specific answers and solutions to procedural issues, but because they identify the procedural issues as such which the arbitral tribunal ought to raise with the parties at the outset of the arbitration. Arbitral tribunals will thus often unknowingly follow the UNCITRAL Notes, since they have provided for a best practice, as well as a checklist, with respect to which issues the arbitral tribunal is to address with the parties and include in a first procedural order.

41 As mentioned in Section 2 above, the most prolific contributor in this respect is the Chartered Institute of Arbitrators (CIArb). CIArb has issued a wide range of guidelines and protocols, addressing broad subjects such as interim measures (Guideline 2) and multi-party arbitration (Guideline 15), as well as attempting to regulate more narrowly defined areas such as how to formulate orders relating to the costs of arbitration (Guideline 9) and interest (Guideline 13). However, although the CIArb guidelines may sometimes be useful to arbitrators for reference for examples, they have in most instances not reached the widespread use as some other guidelines (in particular the IBA Rules on the Taking of Evidence) and it would not be correct, at least not at the moment, to treat the CIArb guidelines as authoritative.

42 United Nations: United Nations Commission on International Trade Law. Latest edition issued in March 2012 and previously in 1996.

As mentioned above,[43] the basic framework for the proceedings is typically determined in the first procedural order issued by the arbitral tribunal (the «PO1»).[44] The first draft of the PO1 is presented to the parties by the arbitral tribunal and is commonly based on procedural orders that the arbitrators have issued as arbitrators or come across as counsel in previous international arbitrations. The parties are then invited to comment on the draft PO1. They will do so by drawing on their own experiences from previous international arbitrations, thus adding procedural rules to address issues with respect to which they have experienced disagreement in the past and deleting or amending proposed rules which they have found unworkable. In most cases, this exercise will result in an agreed document that provides for a procedure with which all parties are comfortable from the perspective of their individual expectations.

The process of developing a PO1 in each arbitration, employing the knowledge and experience gained from previous arbitrations, has resulted in a certain robustness and predictability in the procedural rules adopted. Despite the fact that arbitrations are not public and are not conducted under any detailed regulatory regime, there is thus a connection between them through the use and re-use of PO1s. The PO1s have thereby come to institutionalise the combined experience of a large number of practitioners. A best practice has developed.

By looking at a number of PO1s in our own drawers, we can thus get an indication of how international arbitrations are currently structured in general and in Northern Europe in particular.[45] On this basis, and combined with our own experience and understanding of the current state of best practice in the conduct of international proceedings, the following observations can be made:

3.2.2 A front-loaded procedure with few submissions on the merits

Most international arbitrations are conducted with a limited number of written submissions on the merits. Substantially all evidence, including witness statements and expert reports, on which a party relies is expected to be integrated and submitted with the party's first submission. This results in a front-loaded procedure which may

43 See Section 2 above.

44 In ICC arbitrations, the procedural framework can also be included in the Terms of Reference; see Articles 19, 23 and 24 of the 2012 ICC Rules. However, also in arbitrations with Terms of Reference, the more detailed procedural rules are preferably included in the PO1.

45 An analysis of this kind can hardly be made on a sample that can be said to be statistically significant so as to represent international arbitration in general. However, by looking at a number of PO1s drafted by parties, counsel and arbitrators from a wide range of jurisdictions, trends and common features can be seen.

differ significantly from domestic practices in many jurisdictions in which the case may be allowed to develop and be added to substantially during the course of the proceedings.[46] In principle, most PO1s provide that the parties submit only two briefs on the merits each before the hearing, leading to a total of four briefs: the statement of claim; the statement of defence; claimant's reply; and respondent's rejoinder.[47]

If there is a counterclaim, that claim is usually dealt with in parallel with the main claim, such that the «statement of defence» is also the «statement of counterclaim», and the «reply» serves also as the «statement of defence to counterclaim». The counter-respondent is usually afforded the opportunity to conclude the pre-hearing phase, by filing its «rejoinder to counterclaim». In those instances, the PO1 usually requires the party to limit the brief to the counterclaim, so as not to create any perception of imbalance in that the same party gets to have both the first and the last word.

The obvious benefit of a «front-loaded» procedure, where the majority of facts and arguments are made known as early on in the arbitration as possible, is that it promotes speed. It also promotes due process, since surprise tactics are not rewarded. The possible downside is that it drives costs, since evidence will be submitted with respect to all facts, also those which ultimately will not be contentious. In most instances, however, the cost savings that result from a swift and predictable procedure should compensate for the additional costs that may result from heavy first submissions.

3.2.3 Rules with the effect of precluding late submission of evidence and facts

In order to achieve a front-loaded procedure, the procedural rules typically provide that the parties set out their cases in full – to the extent possible – already in their first written submissions to the arbitral tribunal (i.e. in the statement of claim and the statement of defence, respectively). Thus, a party will not be given the option to hold back on factual allegations or evidence for tactical reasons, or because the case

46 On a general level, this approach may be said to correspond more closely to the litigation practices in civil law jurisdictions than to the practices in common law jurisdictions. In US litigation, the first submissions may be just a page or two and the case theory will not be fully developed until the evidentiary situation is known, which may take several years of «discovery» to determine. However, litigation in civil law jurisdictions may also be considerably «back-loaded». In Sweden, for example, the factual allegations of legal relevance for the claim are expected to be made already in the first submission, but the evidence relied upon in support of those allegations will usually come in later and may not be finally presented and specified until shortly before the hearing.

47 In addition, so-called «skeleton arguments» (from English procedure), as well as written opening submissions (from some Continental European procedures), are occasionally seen also in international arbitration. However, we would not see that as being reflective of international best practice, but rather a reflection of the relevant arbitrators' own domestic practices.

theory is not sufficiently developed at the outset of the case. The following typical extract from a PO1 may serve to illustrate this practice:

> «The Statement of Claim and the Statement of Defence, respectively, shall set out in full each Party's case and contain all the facts and the legal arguments relied upon by a Party in support thereof. Written evidence, witness statements, expert reports and legal authorities (statute, court cases and literature) relied on by a Party shall accompany the Statement of Claim and Defence. The evidence shall be referenced in direct connection with the factual allegations which the evidence is intended to prove.
>
> The scope of the Statement of Reply and Rejoinder, respectively, and any subsequent Party submissions, including any rebuttal written evidence and rebuttal witness statements, shall be limited to address new facts and arguments in the other Party's submission.»

Most PO1s also authorise the arbitral tribunal to reject unsolicited submissions, i.e. submissions which do not follow from the agreed timetable or which are not specifically requested by the arbitral tribunal. Moreover, in order to be effective, such authority relates not only to full submissions, but also to parts of submissions that do not comply with the PO1s specifications as to the scope of the submissions. This may be expressed in the following way:

> «In case the Arbitral Tribunal requests the Parties to file submissions on particular issues as defined by the Arbitral Tribunal, the Parties shall address these issues only, unless leave be granted by the Arbitral Tribunal for good cause upon reasoned application of a Party. In so far as the Parties go beyond the scope of a submission as defined by the Arbitral Tribunal, the Arbitral Tribunal may treat such submissions as unsolicited with the consequence that they may be rejected by the arbitral tribunal.»

The three paragraphs quoted above give the arbitral tribunal sufficient powers to fend off most attempts by parties to apply, for whatever reason, a back-loaded procedure with a late introduction of facts and evidence. In the examples given above, each party's second submission (the reply and rejoinder, respectively), must «be limited to address new facts and arguments in the other Party's submission.»

Accordingly, any facts and evidence which could reasonably have been included at the outset, and which are not provoked by the other party's submission, may potentially be deemed «unsolicited» and thus outside the scope of the submission as defined

by the arbitral tribunal in the PO1. Consequently, such new facts and evidence may potentially be dismissed by the arbitral tribunal. Another example of a PO1 offering succinct wording as regards this issue, as follows:

> «The Parties shall file all relevant documents at the earliest opportunity with their submissions and relevant evidence shall not be held back for later introduction. Documents presented at a later time may only be admitted with the permission and at the discretion of the Tribunal and only for good cause shown in exceptional circumstances.»

In practice, however, we find that arbitral tribunals are usually cautious not to dismiss evidence introduced with the second round of submissions, provided that there is time enough in the timetable so as to allow the other party to respond to the evidence before the hearing. To provide for such additional submissions, provisions of the kind set out above are typically supplemented by a somewhat later, but firm, cut-off date in the procedural timetable:

> «No further evidence will be admitted after the Cut-off Date.»

The cut-off date, after which the parties are thus precluded from adding to their cases, is often scheduled a couple of weeks before the hearing starts.

3.2.4 The taking of evidence largely guided by the IBA Rules on the Taking of Evidence in International Arbitration

Almost all PO1s provide that the arbitral tribunal, in its procedural decisions with respect to the taking of evidence, is to be «guided» or «inspired» by the IBA Rules on Evidence. The Rules thus become applicable by way of non-mandatory reference. It is unusual that the IBA Rules are fully applicable by way of a wholesale, binding adoption in the PO1. The reason for this is likely that neither the arbitral tribunal nor the parties want to be formally bound by the IBA Rules on Evidence, should a situation arise during the proceedings that requires a solution not foreseen by the Rules. In practice, however, it makes no significant difference whether the arbitral tribunal is bound by the IBA Rules on Evidence or merely is to be guided or inspired by them. In either case, the parties may be expected to argue their respective positions on evidentiary matters with reference to the IBA Rules on Evidence. And even if the PO1 contains no reference to the IBA Rules on Evidence at all, they will be relevant as an expression of best practice. Accordingly, a party's objection to the applicability

of the IBA Rules on Evidence does not prohibit the arbitral tribunal from turning to them for guidance on certain issues, in the same way as the arbitral tribunal, in its discretion, may seek guidance from other sources when the parties cannot agree on how to resolve a certain procedural issue and where no mandatory rules apply.

In addition to the reference to the IBA Rules on Evidence, most PO1s set out the general rules to apply with respect to the taking of evidence as follows:

(a) Production of documents

With respect to the production of documents, the starting point is that each party is to produce the documents on which it wishes to rely in support of the factual allegations made in the submissions.[48] Accordingly, there is no duty for parties to disclose documents which are unhelpful to them (unless specifically ordered to do so; see below).

It is also common for the PO1 to detail how and when the evidence relied on by a party is to be referenced and submitted. As explained above, the usual PO1 provides that evidence is to be referenced in connection with the factual allegation for which it is relevant and submitted as exhibits together with the relevant brief. Most PO1s require the exhibits to be numbered consecutively throughout the proceedings, starting with C1, C2, C3, etc., for the claimant's exhibits and R1, R2, R3, etc., for the respondent's exhibits. Some PO1s require different number series for different kinds of exhibits, typically by distinguishing between documents submitted as legal authorities (court cases, extracts from literature, etc.) and as factual evidence. The documentary evidence will then often use the C and R number series, whilst the legal authorities are referenced, for example, as CLA1, CLA2, CLA3, etc., and RLA1, RLA2, RLA3, etc. Increasingly, PO1s also identify the form in which the exhibits are to be submitted. Although most arbitral tribunals still wish to have all exhibits in paper format, it is typically required that they also be submitted electronically (on a memory stick or uploaded to a database).

With respect to production of documents requested by the other party («disclosure orders» in British terminology and, although implying something more extensive, «discovery» in US terminology), recent years have seen a development towards a more formal procedure for this. Today, first drafts of PO1s routinely make room for requests for production of documents in the procedural timetable.[49] The requests are

48 Article 3.1 of the 2010 IBA Rules.

49 In our view, this practice could be questioned since it risks provoking the parties to make use of that time by making overly extensive requests for documents from the other party even though there is no clear need for them (i.e. «fishing expeditions»). However, if a party has identified a clear need for production of documents before the parties have made their submissions, it is advisable to provide time for that in the timetable.

usually to be made in the form of a so-called Redfern Schedule.[50] A Redfern Schedule is essentially a table which contains the following four columns: (1) identification of document(s) or categories of documents requested; (2) short presentation of the reasons for each request; (3) summary of objections by the other party to production of the document(s) requested; and (4) the arbitral tribunal's decision on each request.

There appears to be no consensus as to the exact timing for when requests for production of documents are to be made, but time for that is commonly provided for after the first round of submissions. Orders to the effect that requests for production of documents may be made «at any time», without any specific timing, are also seen.

With respect to the scope of a request for production of documents, the IBA Rules have sought to find a middle ground between the expectations of common law lawyers (who are accustomed to generous rules for production of documents) and civil law lawyers (who are accustomed to restrictive rules for production of documents). Importantly, under the IBA Rules on Evidence, a request for production of documents must contain:[51]

(1) a description of each requested document sufficient to identify it, or a description in sufficient detail of a narrow and specific requested category of documents; and
(2) a statement as to how the documents requested are relevant to the case and material to its outcome.

As a result of these requirements, US-style discovery is virtually unheard of in international arbitration.[52] In practice, however, lawyers from different backgrounds can read and interpret the above requirements very differently. If one were to generalise, a common law lawyer will likely have a relatively low threshold for when a document may be deemed potentially «relevant to the case and material to its outcome». Conversely, a civil law lawyer may understand the requirement to entail that the document should be (a) relevant to a factual allegation which the requesting party has made and for which it has the burden of proof and (b) that factual allegation, if found correct, will prima facie be material to the outcome of the case. Which interpretation of the IBA Rules is correct will depend on, amongst other things, the background of the arbitrators in the specific case and in particular the chairperson.

50 Named after Alan Redfern, who introduced the idea of using such schedules.

51 Article 3.3 of the 2010 IBA Rules on Evidence.

52 Indeed, the International Arbitration Rules of the International Centre for Dispute Resolution (the international arm of the American Arbitration Association) contain express disclosure rules very similar to those found in the 2010 IBA Rules (see Article 21.4 of the 2014 ICDR Rules), thereby effectively excluding US-style discovery also in international arbitration conducted in the US (or elsewhere) under the 2014 ICDR Rules.

(b) Witness statements

Pursuant to the IBA Rules, the arbitral tribunal may order each party to submit within a specified time witness statements by each witness on whose testimony it intends to rely.[53] Indeed, provisions to that effect are found in virtually all PO1s, signalling that the use of written witness statements has become standard practice in international arbitration.

As noted above, most PO1s provide that the witness statements are to be submitted together with each party's first written submission on the merits. A second round of witness statements (so-called rebuttal witness statements) is then provided for in connection with the claimant's reply and the respondent's rejoinder, respectively. The witness statements are referenced in the submissions in connection with the factual allegations which they are intended to support. The formal requirements applicable to witness statements usually follow what is set out in the IBA Rules.[54]

The most common practice is that the written witness statements stand in lieu of direct examination/examination-in-chief. For this reason, PO1s often require the witness statements to be detailed enough so as to not require any supplementing testimony at the hearing (see further under 3.2.5 (c) below).

Within a defined period of time following the last written submission, the parties are usually required to notify the arbitral tribunal and the other party of the names of the other side's witnesses who are requested to appear for cross-examination at the hearing.[55] If a witness is not asked to appear, that is not seen as an stipulation by the other party to the correctness of the content of that person's witness statement.[56] Since there is generally no right for a party to present its own witnesses in direct examination, this practice effectively entails that it is in the hands of the party not relying on the witness in question to decide whether that witness will at all appear before the arbitral tribunal. Although this must be said to constitute present best practice, it should be noted that, not long ago, direct examinations were routinely used in many international arbitrations, also in cases in which witness statements had been submitted. Today, some shorter form of direct examination, limited in time and sometimes in scope, is still often seen. Many counsel, but arguably not that many arbitrators, consider it to be an important part of presenting the case to let their own witnesses – often party representatives – get their «day in court». It could be that we are starting to see a movement towards allowing more direct examination such that witnesses may be allowed to appear for at least some limited direct examination even if cross-examination has not been requested.

53 See Article 4.4 of the 2010 IBA Rules on Evidence.
54 See Article 4.5 of the 2010 IBA Rules on Evidence.
55 Cf. Article 8.1 of the 2010 IBA Rules on Evidence.
56 Cf. Article 4.8 of the 2010 IBA Rules on Evidence.

(c) Experts

The adversarial procedure – according to which the parties, not a judge or an arbitrator, are responsible for finding and presenting the facts of the case – constitutes the norm in international arbitration. Accordingly, although most arbitral rules allow tribunal-appointed experts,[57] very rarely do we see them in international arbitration.[58] Instead, the claimant normally appoints its own experts to provide evidence on technical, economic and legal issues, whose findings are then scrutinized by experts engaged by the respondent.

Experts are sometimes asked to provide a joint statement, identifying the issues upon which they disagree. This may be covered in the timetable, or agreed at a later stage of the proceedings.

What is stated above with respect to witnesses largely applies also regarding the submission of expert reports and expert testimony at the hearing. One difference can be seen, however, and that is that experts are given time more often than witnesses for direct examination, even if they have submitted written expert testimony together with the submissions. This is so as most arbitrators will see a value in having the often quite complex issues which are the subject of the expert's report also explained orally at the hearing.

3.2.5 The hearing

The vast majority of all international arbitrations include a merits hearing (in addition to potential procedural meetings, jurisdictional hearings, etc., as the case may be). During the merits hearing, the parties are given the opportunity to present their respective cases by giving an oral account of their request for relief, factual and legal arguments, as well as presenting written and oral evidence. Unless the parties agree otherwise, the arbitral tribunal may give directions limiting the scope of the merits hearing. Within the confines provided by the principles of procedural equality and the parties' right to a reasonable opportunity to present their cases, an arbitral tribunal may, for example, impose time limits for oral arguments.

There are typically no provisions in arbitration laws or institutional rules that regulate the conduct of a hearing, providing great leeway for the arbitral tribunal and the parties to set up a tailor-made schedule for the merits hearing. Despite this,

57 See, for example, Article 29.1 of the 2010 SCC rules and Article 25.4 of the 2012 ICC Rules. The use of tribunal-appointed experts is also anticipated in the 2010 IBA Rules on Evidence (Article 6.1).

58 We expect, however, that tribunal-appointed experts may be more commonly seen in arbitrations involving parties, arbitrators and counsel who all have a background in legal systems with a more inquisitorial tradition in which courts routinely appoint their own experts.

a rather distinct pattern or structure exists for merits hearings which is more or less closely followed:

(a) Practical arrangements

At least in larger international arbitrations, court reporters are typically used to provide a verbatim transcript of all that is being said at the hearing. The parties normally agree to pay for the service to have full transcripts delivered at the end of each hearing day (same-day transcripts). It has also become standard practice in most large arbitrations to have «live notes», thus showing the transcript on screens in real time at the hearing.

Many PO1s provide rules with respect to how to organise the case file at the hearing; whether to use a so-called «common bundle», with the core documents in the case, or whether to simply refer to the exhibit binders. If the exhibits are properly numbered in a consecutive order and put in separate binders, common bundles are perhaps not so necessary. Instead, a joint list of exhibits may suffice. These issues may be addressed as in the following, somewhat formalistic, example from a PO1:

> «The Parties shall, after prior consultation by the Arbitral Tribunal as to the necessity of such, submit a Joint Chronological List of Exhibits ('CL') and a Joint Common (Core) Bundle of Documents ('CB') based on the CL and including witness statements and expert reports, if any. The CL and CB shall be served in double-sided A5 format with one extra copy for the Administrative Secretary to the Arbitral Tribunal. The contents of the CL and the CB shall be determined by the Arbitral Tribunal after consultation with the Parties during the Pre-Hearing Conference.»

(b) Opening statements

The merits hearing is typically initiated by the parties' opening statements.[59] In this first stage of the hearing, each party – usually beginning with the claimant, unless otherwise agreed – gives an account of its request for relief as well as the facts and legal arguments relied upon in support thereof. The central written evidence relied upon by the party is also presented and commented upon. However, there is no requirement that a document must be exhibited or referred to at the hearing in order for it to be relied upon as evidence. It suffices that the document has been filed with the written submissions and that its relevance as evidence has been explained there. There is therefore no need to refer to each and every document of potential relevance, as is done under some domestic procedures and legal traditions.

59 If the arbitration, despite being international, is influenced more or less by some domestic rules and principles of litigation, alterations to this may be seen; see also footnote 47 above.

The time allowed for opening statements is usually agreed between the parties. Failing such agreement, arbitral tribunals typically impose time limits taking into account the overall hearing schedule. A tendency can perhaps be seen that very busy arbitrators, or arbitrators with training in a procedure that favours written over oral presentations,[60] try to restrict the opening statements quite drastically, or even skip them altogether, with reference to the arbitral tribunal having read the file. However, with several long, written submissions, even the best prepared arbitrator probably benefits from being educated about the case for a day or a half. In many jurisdictions (in which the award may be challenged or enforcement may be sought), it may also be viewed as a fundamental due process right of a party to be afforded a reasonable opportunity to present its case orally, if it so requests.

In giving their opening statements, the parties' counsel usually try to summarise the most important parts of the written material already submitted to the arbitral tribunal. Counsel frequently use technical aids, display sketches, photographs, films and the like to explain the relevant circumstances for the arbitral tribunal. Importantly, however, in order to allow the other party to prepare its case without the risk of surprises, no new evidence and no new factual allegations are expected to be made or presented at the hearing. If, for example, a picture is used during the opening statement to describe a company structure, the information as such contained in that picture should already be in the case file, albeit perhaps in writing and not previously depicted in that way. PO1s typically provide that such «demonstrative exhibits» are to be submitted a day or two in advance of the hearing so as to give the other party time to check the record to verify that the documents contain nothing new.

(c) Examination of witnesses and experts

The parties' opening statements are followed by examination of witnesses and experts.[61] Since written witness statements are commonly used instead of direct examination (see above), oral testimony is essentially limited to cross-examination and, possibly, re-direct examination and questions from the arbitral tribunal. Some PO1s

60 At the risk of generalising, the focus of the hearing under many Continental European traditions is to take evidence. Not much time, if any, is devoted to counsel's oral submissions and arguments. Under the Nordic and Anglo-Saxon traditions, however, counsel is usually afforded more time to make a detailed presentation of the case, in a way which goes beyond a mere introduction of the evidence. Best practice in international arbitration is, as it should be, probably somewhere between these two traditions.

61 As alluded to in the previous footnote, in arbitrations conducted in jurisdictions that traditionally have had a strong emphasis on the written part of the proceedings, the hearing of witnesses may be the only purpose of the hearing (which is then often referred to as an «evidentiary hearing», as including no oral arguments by counsel).

provide for limited flexibility to hear a witness on issues not included in a witness statement, as in the following example:

> «Witness evidence and expert opinions shall stand as direct evidence at the Hearing. Accordingly, at the Hearing no witnesses will be heard who have not provided a written witness statement in advance and there will be no direct examination of witnesses without the prior permission of the Tribunal, which will only be granted if the Tribunal is persuaded that this evidence could not have been given earlier or as part of the witness statement. Accordingly, all witnesses and experts should be available for cross-examination at the Hearing, unless expressly released by agreement of the Parties or by the Tribunal.»

Notably, this kind of provision is somewhat in conflict with, and seeks to soften, the principle discussed under 3.2.3 above, that it is in the hands of the party not relying on the witness in question to decide whether that witness will at all appear before the arbitral tribunal.

When hearing witnesses, the usual order is to start with the claimant's fact witnesses and proceed with the respondent's fact witnesses. Alterations to this order are often seen if the case is better presented in other ways, for example by hearing the witnesses in a topical or chronological order, depending on the issues about which they testify. In most cases, the arbitral tribunal will endeavour to have the parties agree on the order of witnesses and experts to be examined. Experts are typically heard after all the witnesses of fact have been heard.

Leading questions are allowed in cross-examination, but not in re-direct examination. In re-direct, the questions must typically also be limited to relate to questions asked and answers given during cross-examination. If something new transpires during re-direct, the cross-examination may continue on those very points (so-called re-examination).

With respect to party-appointed experts who have submitted expert opinions on legal, technical, economic and other issues, the trend also seems to be to limit direct and focus on cross-examination. However, as mentioned above, this trend is not as pronounced as with witnesses of fact. Experts are thus typically allowed at least some time to explain their expert reports, which are often complex, even if no cross-examination has been requested.

If witnesses are not heard in the language of the arbitration, interpretation must be provided. In international arbitrations of any magnitude (which are large enough to carry the costs involved), this is normally done through simultaneous interpretation,

with the interpreters sitting in booths. Simultaneous interpretation gives a more precise, instant translation compared to consecutive interpretation which runs the risk of summarising the content of an answer rather than translating the exact answer. Simultaneous interpretation also saves considerable time compared to consecutive interpretation.

(d) Experts and witness conferencing

With respect to experts, alternatives to cross-examination are sometimes used; so-called experts conferencing or «hot-tubbing». The experts of both sides are then heard together, sometimes before or after having been cross-examined individually and sometimes not. However, a successful experts conference requires that the arbitral tribunal is prepared to control the exercise without going too far in taking charge of the fact finding (the presentation of evidence should still be in the hands of the parties). The arbitral tribunal also needs to be very knowledgeable about, and clear on, the precise issues on which the experts disagree, otherwise the conference can easily become slightly chaotic. A successful experts conference is often facilitated by the experts having prepared a joint statement on disagreements (see above).

Also, witnesses of fact are sometimes suggested to be heard in conference, particularly in arbitrations chaired by Swiss or German arbitrators. In our experience, however, that practice should be avoided unless two or more witnesses give evidence on precisely the same points. Even then is it often difficult to give any structure and control to the examination without getting too far away from the adversarial procedure, which ought to apply in international arbitration.

(e) Closing arguments and post-hearing briefs

The final stage of the merits hearing generally consists of the parties' closing arguments. In delivering their closing arguments, the parties are expected to argue their cases from a legal as well as a factual perspective. The parties are also expected to give their views on how the arbitral tribunal is to assess the written and oral evidence presented during the hearing or earlier in the proceedings, including issues of burden and standard of proof. The timetable sometimes allows a period of time to pass between the close of the taking of evidence and the oral closing arguments so as to give the parties sufficient time to prepare.

Sometimes the written phase of the arbitration resumes after the hearing, with the parties submitting post-hearing briefs. Post-hearing briefs serve largely the same purpose as the oral closing arguments. Despite this, some time for oral closing arguments is typically provided in the schedule also when post-hearing briefs are used. Although

post-hearing briefs will usually add to the overall time and cost of the proceedings, they enable the parties to devote more time to review the transcript from the hearing and carefully analyse all evidence. Post-hearing briefs may also assist the arbitral tribunal's drafting of the award.

If post hearing-briefs are to be submitted, the most common approach is that both parties submit their briefs simultaneously on a date either agreed between them or ordered by the arbitral tribunal. These first post-hearing briefs are sometimes followed, after a short period, by rebuttal post-hearing briefs which are also filed simultaneously. The rebuttal briefs are typically limited to comments on any errors or new arguments in the other party's first brief. It is also common for arbitral tribunals to limit the number of pages allowed for each round of post-hearing briefs.

As the last submission, the parties file their cost submissions. This is typically done simultaneously and in an agreed format. Sometimes the parties are also invited to comment on the other party's cost submission within a certain period of time.

4 Concluding remarks

To summarise, certain best practices for the conduct of international arbitration have developed over the years in the sense that there are recurring solutions to procedural issues in international arbitration that may be described as «typical». This development has made it easier for parties, counsel and arbitrators – coming from different corners of the world – to align their expectations and to limit the scope for misunderstandings and clashes over procedural issues.

Overall, this development has benefited international arbitration and reinforced its position as the primary – and often the only viable – form for resolving disputes arising out of international trade and investments. It has also enabled a more efficient procedure, since the solutions that have survived and thus have become embodied in current best practice, have been tested and found generally to work.[62]

The alignment of international arbitration has been aided by the use of non-mandatory «soft law» rules, notes and guidelines. In our experience, international arbitration has largely been able to combine this alignment with continued flexibility and potential for adaptations to fit the individual case.

62 As such, these procedures may just as well be applied in domestic arbitrations, which often borrow extensively from the local court procedures that the parties have tried to avoid by choosing arbitration in the first place.

However, particularly with the recent IBA Guidelines on Party Representation, some practitioners feel that this process has gone too far. Increasingly, practitioners are saying no to further «soft law», fearing that the ability for international arbitration to cater for flexibility, efficiency and differences in legal culture may become lost in a plethora of rules and guidelines providing «one size fits all» solutions. Underlying this is also a concern that, over time, international arbitration may come to increasingly resemble common law court litigation, as the development is primarily driven by the large US and English law firms which dominate the field.

We certainly share some of these concerns. One must accept, however, that international arbitration has since long ceased to be a gentlemanly pursuit of a select few. Instead it has become a global industry, involving ever larger and more complex cases and with practitioners coming from all corners of the world. Although there must be checks and balances against the proliferation of «soft law», in this continuously evolving environment there will undoubtedly be a need for continuously developing best-practice guidance.