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Internationalizing Domestic Arbitration: How International Arbitration Practices Can Improve Domestic Construction Arbitration

Albert Bates, Jr.* R. Zachary Torres-Fowler†

"There is a deceptive simplicity about the way in which arbitral proceedings are conducted . . . In fact, the appearance conceals the reality."[1]

*Albert Bates Jr., FCIArb, is a partner in the Construction Practice Group of Pepper Hamilton LLP, and leads the Group's International Construction Projects practice. While Mr. Bates focuses his practice on U.S. and international construction disputes, particularly in the areas of power generation, energy, infrastructure, and heavy industrial process facilities, he also regularly advises clients on project planning, project execution, and change management strategies on large engineering, procurement, and construction projects. Mr. Bates has advised clients on more than fifteen Megaprojects. Mr. Bates has a "Band 1" rating in Construction in Chambers USA and is a Fellow of the American College of Construction Lawyers. He is also recognized as a "Leading Lawyer" in Construction by The Legal 500 and is listed in The Best Lawyers in America, Who's Who Legal: Construction, and the International Who's Who of Construction Lawyers. In addition to serving as counsel in arbitration matters, Mr. Bates has served as an arbitrator or mediator on more than 150 U.S. and international construction and commercial disputes, including a number of matters in which the amount in controversy exceeded $100 million. Mr. Bates is a Fellow of the Chartered Institute of Arbitrators, formerly served as a member of the board of directors of the American Arbitration Association-International Centre for Dispute Resolution, is a Fellow in the College of Commercial Arbitrators, and is a Certified Mediator by the International Mediation Institute.

†R. Zachary Torres-Fowler is an associate in the Construction Practice Group of Pepper Hamilton LLP and a member of the Group's International Construction Projects practice. Mr. Torres-Fowler concentrates his practice in construction-related disputes and has extensive experience in international arbitration matters arising from projects located in Africa, the Middle East, and Latin America. He has represented owners, EPC contractors, and equipment manufacturers in disputes arising from a wide variety of construction projects including power plants, airports, commercial buildings, and other civil infrastructure works. Mr. Torres-Fowler is also a frequent author in the international arbitration field and has written on topics ranging from best practices in arbitration proceedings to the role of global anti-bribery statutes in international arbitrations.

[1]Alan Redfern, Martin Hunter, Nigel Blackaby & Constantine Partasides, *Redfern and Hunter on International Arbitration* 2 (1st ed. 2009) [hereinafter Redfern & Hunter].

Introduction

Arbitration is simple. Parties select a person or persons—the arbitrator(s)—whose expertise or judgment they trust to resolve their differences in a privatized forum. After each party puts on their case, the arbitrator(s) consider the arguments and evidence and renders a binding decision.[2]

Given the simplicity, informality, and efficiency offered by arbitration—as compared to courts of law—it is easy to understand why arbitration has been a readily accepted approach to dispute resolution around the world.[3] This appeal has been especially true for the construction industry, where arbitration has become the predominant form of dispute resolution because it offers a method that is better able to manage the complex, multi-faceted, and highly technical features of construction disputes than the U.S. federal or state courts.

But as the quote above indicates, notwithstanding arbitration's conceptual simplicity, in practice, arbitration proceedings vary widely depending on the legal traditions of the parties, counsel, and arbitrators. In other words, although arbitration is widely accepted in jurisdictions around the world, the practical reality is that not all arbitrations look the same. Accordingly, given that arbitration is part of a much broader global phenomenon, what can we learn about the practice outside the United States to help improve the U.S. approach to arbitration?

In that vein, this article questions some of the current norms associated with the management of U.S. domestic construction arbitrations and submits that international arbitration procedures may improve efficiencies and outcomes in many construction cases. This is particularly true for megaproject disputes,[4] where it is increasingly paramount for parties to carefully

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[2] *See, e.g.*, *id.* at 1-2.

[3] *Id.*; *see also* 1 Gary B. Born, *International Commercial Arbitration* 6-70 (2d ed. 2014) (describing the history of arbitration around the world).

[4] While many definitions of the term exist, a construction "megaproject" is typically defined as a project that is designed and constructed over a period of at least four years and at a cost of $1 billion (USD) or more. *See generally* Patricia Galloway, *Managing Gigaprojects: Advice from Those Who've Been There, Done That* 2 (2013).

present and organize their case in front of the arbitrator(s) given the significant complexities and facets associated with those arbitrations.

In the United States, there is no shortage of guidelines, protocols, or model rules, that aim to improve efficiencies associated with construction arbitration as compared to U.S. courtroom litigation. However, parties, counsel, and arbitrators in U.S. domestic arbitrations commonly utilize procedures that, more often than not, mimic the practices seen in the U.S. courts. Certainly, it is understandable that U.S. attorneys naturally gravitate toward U.S. federal and state court practices as a model for domestic arbitrations. But why is it necessary for U.S. litigation practice and procedure, in general, to so heavily influence U.S. domestic arbitrations?

As arbitration has become widely adopted in jurisdictions around the world, it has largely become a *lingua franca* for the resolution of transnational disputes. As a result, over the course of the last several decades, the modern practice of "international arbitration" has developed. International arbitration—generally arbitration involving parties from different countries, counsel from different legal traditions, and/or a dispute located outside the United States—blends common and civil law legal traditions into a single dispute resolution process.[5] Thus, despite falling under the broad umbrella of "arbitration," international arbitration retains characteristics that are noticeably distinct from practices utilized by most U.S. domestic arbitrations.[6]

This article introduces five distinct international arbitration procedures and explains how those practices might be utilized in U.S. domestic arbitration proceedings. In doing so, the authors hope to spark a broader debate about whether domestic arbitration practices in the United States should begin to shift away from typical U.S.-styled litigation practices in favor of a different model.

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[5] William K. Slate II, *Paying Attention to "Culture" in International Commercial Arbitration*, *in AAA-ICDR Handbook on International Arbitration Practice* 21, 21-29 (2010); Urs Martin Laeuchli, *Civil and Common Law: Contrast and Synthesis in International Arbitration Practice*, *in AAA-ICDR Handbook on International Arbitration Practice* 39, 39-49 (2010).

[6] *See generally* John W. Hinchey & Troy L. Harris, *International Construction Arbitration Handbook* 16-20 (2018) [hereinafter Hinchey & Harris].

The article is structured as follows. First, the authors provide a generalized introduction into international arbitration and highlight some of the conceptual features that make the dispute resolution process distinct from U.S. domestic arbitrations. Second, the authors outline five distinct procedures utilized in international arbitrations—(A) Statements of Claim / Memorials; (B) Witness Statements; (C) Document Disclosure; (D) Order of Evidence; and (E) Joint Expert Procedures—that parties, practitioners, and arbitrators should consider applying to U.S. domestic arbitrations when attempting to determine how best to manage the proceedings.

I. What is International Arbitration and How is it Different From U.S. Domestic Arbitration?

There is no universally accepted definition for "international arbitration." The meaning of the term varies widely depending on the relevant jurisdiction. One commonly utilized definition of international arbitration is from the UNCITRAL Model Law on International Commercial Arbitration which states that:

> An arbitration is international if:
>
> > (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States;[7] or
> >
> > (b) one of the following places is situated outside the State in which the parties have their places of business:
> >
> > > (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
> > >
> > > (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

[7]For the avoidance of confusion, the term "state" as used in the UNCITRAL Model Law refers to a country (e.g., United States, United Kingdom, China, Brazil, etc.) not individual U.S. states (e.g., New York, California, Texas, Pennsylvania, etc.).

> (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.[8]

In truth, however, most practitioners in the field of international arbitration find the definition above to be somewhat unsatisfying because it fails to account for the difference between international arbitration as a *technical* or *legal* matter and international arbitration as a *practical* matter. Certainly, a determination that an arbitration is "international" under state specific arbitration laws (e.g., arbitration laws that follow the UNCITRAL Model Law on International Commercial Arbitration) could have significant implications for how the arbitration proceedings are addressed by the laws of the seat.[9] However, simply because an arbitration meets the legal definition of an "international arbitration" does not necessarily mean that the arbitration itself will retain the features/procedures that practitioners would actually consider part and parcel of international arbitration.

The authors submit that the concept of international arbitration is much broader than a technical determination over whether the matter satisfies the legal definition of "international arbitration." Instead, "international arbitration" reflects a fundamentally distinct practice that utilizes procedures and concepts that make the process different from most forms of domestic arbitration.[10] Certainly, while international arbitration, much like U.S. domestic arbitration, prides itself on the virtues of flexibility, efficiency, and cost effectiveness, there are three additional reasons why parties turn to international arbitration: (i) *universality*; (ii) *neutrality*; and (iii) *enforceability*. These additional features shape international arbitrations and, while

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[8] United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, art. 1(3), U.N. Doc. A/40/17, annex I and A/61/17, annex I (1985, rev. 2006), https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf [hereinafter UNCITRAL Model Law]; *see also* Redfern & Hunter, *supra* note 1, at 75-77.

[9] UNCITRAL Secretariat, *Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006,* ¶ 11, U.N. Doc. A/40/17, annex I and A/61/17, annex I (1985, rev. 2006), https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

[10] *See generally*, Hinchey & Harris, *supra* note 6.

not all directly relevant to the specific practices that parties adopt to manage the proceedings, are critically important to understand the context out of which international arbitrations arise.

First, international arbitration procedures address the need for *universality*. Specifically, international arbitration is a dispute resolution process that has been designed for use by multiple legal traditions.[11] While there remains a great deal of variability in international arbitration proceedings, often a product of the legal traditions of the parties, counsel, and the arbitrators, over time, international arbitration proceedings have come to represent a blend of legal procedures from jurisdictions around the world—but most specifically practices from common law and civil law legal traditions. This feature of international arbitration means that the procedures that the parties utilize during the course of the dispute are not entirely foreign to any individual party.

Second, international arbitration addresses the need for *neutrality* by providing parties a neutral forum to resolve their disputes.[12] In international business contracts, there is a concern that if the parties elect to resolve their disputes before the courts of a local jurisdiction, that the local courts and the local practices may favor the party of that country. International arbitration addresses this concern by permitting the parties to select their tribunal (often of different nationalities) in order to curb favoritism and to adopt neutral procedures that limit the disadvantage of forcing a party to litigate a dispute according to foreign procedural rules.[13]

Third, international arbitration procedures are designed to address the problem of *enforceability* by ensuring that arbitral awards can be recognized and enforced in practically any foreign jurisdiction in the world, regardless of where the arbitration took place.[14] Indeed, what good is an arbitration

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[11] Slate, *supra* note 5, at 21-29; Laeuchli, *supra* note 5, at 39-49.

[12] *See, e.g.*, Redfern & Hunter, *supra* note 1, at 31-32.

[13] *See* White & Case, *2018 International Arbitration Survey: The Evolution of International Arbitration* 7 (2018), https://www.whitecase.com/sites/default/files/files/download/publications/qmul-international-arbitration-survey-2018-19.pdf (citing avoidance of legal systems/national courts as the second most valuable characteristic of international arbitration).

[14] *See, e.g.*, Redfern & Hunter, *supra* note 1, at 32-33; *see also id.*

award if the winning party cannot use the award to collect? Where the parties are located in the United States or retain assets in the country, a successful party can avail itself to the U.S. courts to compel the losing party to comply with a judgment or award.[15] As a result, in U.S. domestic disputes, where the losing party's assets are located in the United States, enforceability is not a determining factor for choosing domestic arbitration over federal or state court litigation.

However, in the case of international commercial contracts, parties are frequently from different jurisdictions and retain assets outside the country where the subject matter of the contract is located or where the arbitral tribunal is situated. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Award of 1958 (the "New York Convention") was enacted and has since been adopted by the vast majority of countries in the world to specifically address this concern.[16] In simplest terms, under the New York Convention, international arbitration awards should be readily enforceable in the courts of every signatory country provided that the awards/proceedings comply with the Convention's basic requirements.[17] While the requirements of the New York Convention are not controversial (e.g., international arbitration procedures must afford each party the right to present his or her case), international arbitration proceedings have been heavily influenced by the need to comply with the Convention's terms and, thus, may adopt norms not always utilized in the United States (e.g., the International Chamber of Commerce's approach to "scrutiny").[18]

II. Five Practices in International Arbitration That Parties May Utilize in U.S. Domestic Arbitrations

Below, the authors outline five practices that are unique to international arbitrations which parties, counsel, and arbitrators might utilize in U.S.

[15] *See* U.S. Const., art. IV, § 1; 9 U.S.C. § 9.

[16] Convention on the Recognition and Enforcement of Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 [hereinafter New York Convention].

[17] *See generally* Hinchey & Harris, *supra* note 6, at 67-68; *see also* Redfern & Hunter, *supra* note 1, at 634-62.

[18] International Chamber of Commerce, Arbitration Rules, in force as from 1 March 2017, art. 34 (2018) [hereinafter ICC Rules].

domestic arbitration proceedings—(A) Statements of Claim / Memorials; (B) Witness Statements; (C) Document Disclosure; (D) Order of Evidence; and (E) Joint Expert Procedures.

At the outset, and as will be made clear, the international arbitration procedures below each tend to emphasize the need to "frontload" the arbitration with additional information (e.g., positions, arguments, evidence) prior to the hearing and/or improve the ability of the parties to identify the very precise dipositive issues in the case. In theory, doing so enables the parties and the arbitrators to better understand the dispute earlier in the process which, in turn, reduces the need for U.S.-styled discovery, can save time and costs, and may lead to more precise outcomes.

That said, there are costs and benefits to each of the approaches, which parties should weigh in each case. As a result, while the authors submit that these procedures may be well-suited for many complex arbitrations—particularly megaproject cases where there are significant amounts in controversy—they may not be appropriate in all instances.[19]

A. Pleadings, Statements of Claims, and Memorials

1. U.S. Domestic Arbitral Practice: High-Level Pleadings

Most U.S. domestic arbitrations follow a similar pleading standard that, in many ways, mimics practices utilized in the state and federal courts.

At the outset of an arbitration, the claimant files a "demand for arbitration" that typically sets out a relatively short series of allegations/claims against the respondent.[20] Commonly, these documents contain limited specifics on the precise facts of the dispute and are intended to put the

[19]It must be recognized and clearly stated that arbitration is not a "one size fits all" solution to dispute resolution. The flexibility that arbitration provides is one of its greatest attributes. This flexibility allows the parties and the arbitrators to be creative in defining the arbitration processes and procedures that allow the fair, efficient, and cost effective resolution of the dispute. Further, the arbitrator generally has broad authority to manage the dispute before her, and there is no single approach that suits every case. Rather, the manner in which a case is managed depends on the facts and circumstances of that particular case. *See generally* Albert Bates, Jr., *Arbitration in a Global Economy: Managing Information Exchange to Expedite International Commercial Arbitration Hearings* (2005).

[20]*See, e.g.*, American Arbitration Association, Construction Industry Arbitration Rules and Mediation Procedures, Rule R-4(a) (2016) [hereinafter AAA Construction Rules].

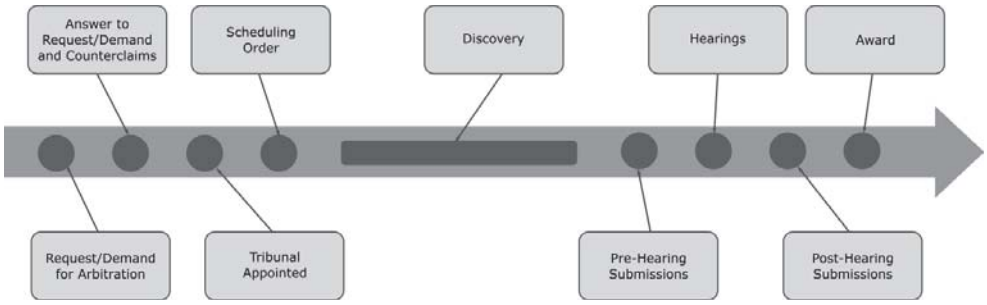

Figure 1. U.S. Domestic Arbitral Practice

respondent on notice, at a very high level, of the claimant's contentions. Shortly thereafter, the respondent will have approximately two weeks to submit an answering statement and any counterclaims[21] that, similar to the demand, typically only contain high-level descriptions of the allegations and claims.[22] Thereafter, the parties appoint the arbitral panel, set out a scheduling order, and proceed to document exchange and other forms of discovery.[23] In most cases, it is relatively late in the arbitration proceedings that each party specifically sets out its case in detail, through a combination of expert reports, pre-hearing submissions, and presentation of evidence at the arbitration hearing. A basic timeline of the process commonly utilized in U.S. domestic arbitrations is outlined in Figure 1.[24]

[21] *See, e.g.*, *id.* Rule R-4(c).

[22] Arbitration rules like the AAA's Construction Arbitration Rules recognize this fact when setting out a 14-day deadline to file an answering statement because, as a practical matter, there is relatively little a party can do within a 14-day period to prepare and present a robust defense and counterclaim. The clear intent is to put the other side on generalized notice of the allegations and nothing more.

[23] *See, e.g.*, AAA Construction Rules, Rules R-14, R-15, R-16, R-23, R-24.

[24] This approach is epitomized by Rule R-4(a) of the AAA Construction Arbitration Rules, which states that a claimant's demand for arbitration shall include, among other things, "a statement setting forth the nature of the claim including the relief sought and amount involved." Thereafter, according to Rule R-4(c), the respondent will have 14 days to file an "answering statement" and any counterclaims. Both submissions, if any are filed at all, are much like a demand for arbitration in that, practically speaking, they provide only high-level details.

The high-level pleading approach typically followed in U.S. domestic arbitrations is derived from U.S. litigation procedures. Parties commonly have little interest in providing more than a bare bones "notice-pleading" demand, answering statement, or counterclaim. In fact, some parties view the practice of pleading specific facts or allegations early in the proceedings as against their interests for fear that such statements could be used against them later on, especially if those allegations turn out to be incorrect or misplaced. In all too many cases, U.S. practice assumes that information will be gained through discovery which will allow a party to more fully understand the facts of their case before presenting their position to the arbitrator(s).

This process creates inefficiencies because neither side is forced to carefully particularize their claims until just before or during the arbitration hearing. First, the lack of particularized claims means that the parties generally seek broad discovery in an effort to bolster their case and weaken that of their opposition, leading to increased time and costs. Second, U.S. domestic arbitrations are framed with the assumption that each party will present its entire case in chief live during the arbitration hearing. As a result, domestic arbitrations often require longer hearings (again, meaning increased costs). Third, because the hearing may be the first real opportunity to hear the parties' specific cases, there may not be an adequate opportunity for the parties or arbitrators to objectively evaluate the strengths and weaknesses of the competing positions sufficiently in advance of the arbitration hearing.

2. International Arbitral Practice: Robust Written Submissions

International arbitration often follows a different pleading approach that frontloads the proceedings by requiring parties to more carefully particularize their case and supply evidence earlier in the process. While short arbitration demands and answering statements/counterclaims are still utilized in international arbitrations, they are often followed by a second round of robust written submissions—typically filed months after the initial no-

tice/demand for arbitration—which set out the parties' specific allegations and evidence.[25]

The UNCITRAL Arbitration Rules offer a helpful example of this process.[26] First, according to Articles 3 and 4 of the UNCITRAL Rules, to initiate an arbitration, the claimant must file a "notice of arbitration" that, much like a demand for arbitration under U.S. domestic arbitration rules, sets out "[a] brief description of the claim and an indication of the amount involved."[27] Within 30 days of the notice of arbitration, the respondent must file a "response" that briefly addresses the claimant's allegations and sets out any counterclaims.[28] The process, up to this point, is very similar to the rules under the AAA.[29]

However, the process begins to diverge from U.S. domestic arbitral practice following the initial pleadings. Specifically, as set out in Articles 20 and 21, the UNCITRAL Arbitration Rules call for the parties to submit separate statements of claim and of defense following the initial notice of arbitration and response.[30] Article 20 of the UNCITRAL Arbitration Rules is provided below:

> 1. The claimant shall communicate its statement of claim in writing to the respondent and to each of the arbitrators within a period of time to be determined by the arbitral tribunal. The claimant may elect to treat its notice of arbitration referred to in article 3 as a statement of claim, provided that the notice of arbitration also complies with the requirements of paragraphs 2 to 4 of this article.

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[25] *See generally* 2 Born, *supra* note 3, at 2250-55.

[26] United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules as revised 2010 (2011) [hereinafter UNCITRAL Arbitration Rules].

[27] *Id.* art. 3; *see also* ICC Rules, art. 4; International Centre for Dispute Resolution, International Dispute Resolution Procedures, Arbitration Rules, art. 2 (2016) [hereinafter ICDR Rules]; London Court of International Arbitration, LCIA Arbitration Rules, art. 1 (2014) [hereinafter LCIA Rules].

[28] UNCITRAL Arbitration Rules, art. 4; *see also* ICC Rules, art. 5; ICDR Rules, art. 3; LCIA Rules, art. 2.

[29] *See, e.g.*, AAA Construction Arbitration Rules, Rule R-4.

[30] UNCITRAL Arbitration Rules, arts. 20-21.

> 2. The statement of claim shall include the following particulars:
>
> a. The names and contact details of the parties;
>
> b. A statement of the facts supporting the client;
>
> c. The points at issue;
>
> d. The relief or remedy sought;
>
> e. *The legal grounds or arguments supporting the claim.*
>
> 3. A copy of any contract or other legal instruction out of or in relation to which the dispute arises and of the arbitration agreement shall be annexed to the statement of claim.
>
> 4. *The statement of claim should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them.*[31]

According to Article 21, after the submission of the statement of claim, the respondent will have an opportunity to submit a similarly detailed statement of defense within a timeframe established by the panel.[32]

Importantly, the UNCITRAL Arbitration Rules require that statements of claim or defense contain robust legal submissions where, consistent with international arbitration practice,[33] (i) the parties set out their *prima facie* case in writing[34] and (ii) include all supporting evidence alongside the submission.[35] However, as explained below, the robust submissions described in the UNCITRAL Rules can take different forms which commonly vary in

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[31] *Id.* art. 20 (emphasis added).

[32] *Id.* art. 21.

[33] *See, e.g.*, Hinchey & Harris, *supra* note 6, at 517-20, 522-25 ("The clear trend and best practice in international construction arbitration is for each party to each state their claims, defenses, controlling authorities and, to the extent known, the proofs, on which each side will rely, at the highest possible and practical level of detail at the earliest stage in the arbitration."); *see generally* 2 Born, *supra* note 3, at 2250-55; Redfern & Hunter, *supra* note 1, at 378-84.

[34] UNCITRAL Arbitration Rules, art. 20(2)(a)-(e).

[35] *Id.* art. 20(4).

terms of the timing and extent to which supporting evidence accompanies the submissions.

3. International Arbitral Practice: Statements of Claim and Memorial Submissions

There are many different terms used in international arbitration rules and proceedings to describe the robust additional written submissions like those described in Article 20 of the UNCITRAL Arbitration Rules—statements of claim, statements of case, points of claim, memorials, etc. While there are no real definitive definitions of each of these types of submissions, each have different connotations.[36] The most common types of written submissions in international arbitration are referred to as "Statements of Claim" (or "Statements of Defense") and "Memorials" (or "Counter Memorials").

Although the term "Statement of Claim" can be used in a variety of contexts (such that parties to an international arbitration should be careful to precisely define the meaning of the term), in most instances, a Statement of Claim refers to a robust written submission, typically issued several months after the demand/request/notice of arbitration has been filed.[37] The Statement of Claim effectively sets out the parties' *prima facie* cases and attaches all supporting documentary evidence as exhibits.[38] However, Statements of Claim are usually submitted before any form of document exchange takes place. Further, witness statements and expert reports are usually filed after the Statements of Claim and Statements of Defense are submitted. For U.S. practitioners, a Statement of Claim looks something like a summary judgment submission which anticipates that further evidence will be supplied at a later stage in the arbitration proceedings. An example of an arbitration timeline that utilizes the Statement of Claim approach is presented in Figure 2.

The "Memorial" approach (also sometimes referred to as "Statements of Case") is possibly the most common approach to written submissions in

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[36] *See generally* Redfern & Hunter, *supra* note 1, at 378-84; 2 Born, *supra* note 3, at 2252.

[37] Redfern & Hunter, *supra* note 1, at 383. The authors acknowledge that there may be variability over the precise meaning of a statement of claim.

[38] *Id.*

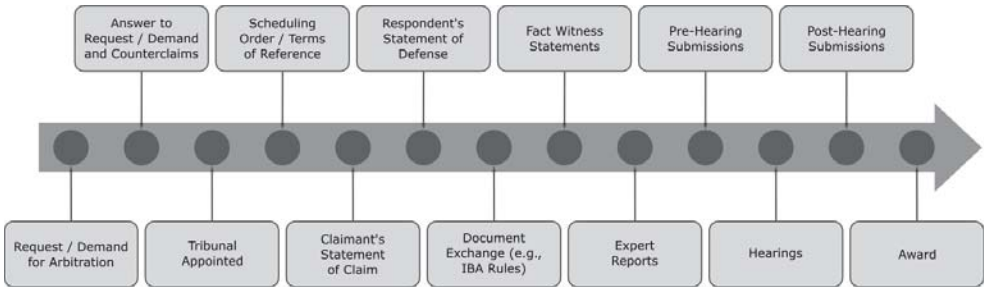

Figure 2. International Arbitral Practice: "Statements of Claim"

international arbitration.[39] Like Statements of Claim, Memorials aim to set out each party's *prima facie* case with all legal arguments, facts, and supporting documents.[40] The principal difference between a Memorial and a Statement of Claim is that Memorials will also typically include written witness statements and expert reports that are cross-referenced in the submission.[41] As a result, Memorials are slightly more comprehensive submissions than Statements of Claim. After parties exchange an initial round of Memorial submissions, the parties typically engage in a form of document exchange to investigate issues raised in the earlier submissions. The documents that are disclosed as part of the document exchange process can be used in later reply or sur-reply memorials or pre-hearing submissions. An example of an arbitration timeline that utilizes the Memorial approach is presented in Figure 3.

4. Advantages and Disadvantages of International Arbitral Practice

In many ways, the written submission approach used in international arbitrations can combat the inefficiencies caused by the high-level pleadings often utilized in U.S. domestic arbitrations.[42]

[39] *Id.* at 382.

[40] *Id.*

[41] *Id.*

[42] *See* Hinchey & Harris, *supra* note 6, at 525-28.

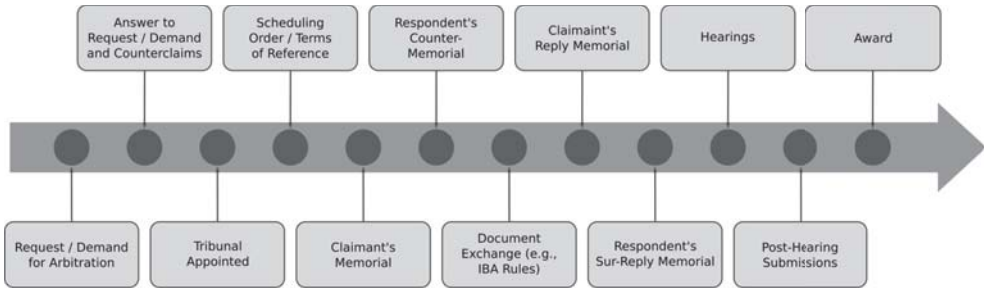

Figure 3. International Arbitral Practice: "Memorials"

First, earlier particularized pleadings help to better define the issues in dispute and limit the need for expansive discovery. Specifically, because the parties have already laid out their cases in detail and supplied much of their supporting evidence, the parties are typically better able to understand what the critical issues in dispute are and what additional documentary evidence they require. As a result, parties are generally able to identify single documents or narrow categories of documents in their document requests, as opposed to U.S. practice where parties generally seek very broad groups of documents in the hopes of collecting some helpful information.

Second, because the parties have already fully set out their positions and evidence well in advance of the hearings, each party understands the key issues of the case. As a result, less time is wasted at the hearing debating issues, facts, or arguments that eventually prove to have limited significance to the outcome of the case. Relatedly, the robust legal submissions also mean that less time should be spent orienting the arbitrators on the key facts of each party's position. Consequently, the approach used in international arbitration may result in shorter hearings, meaning increased cost savings.

Third, the tribunal is generally provided with a better opportunity to fully understand each party's case when the parties comprehensively set out their positions and evidence well in advance of the arbitration hearing. This approach, in turn, leads to a better understanding of the parties' positions and, theoretically, to more accurate outcomes.

The disadvantage of the international arbitration approach, however, is that Statements of Claim and Memorials are time intensive submissions that

require significant planning and coordination.[43] Thus, while Statements of Claim and Memorials may curb the need to have lengthy arbitration hearings and expansive discovery, there may be a concomitant increase in costs associated with the preparation of these submissions. Legal and expert costs may also be incurred earlier in the process, which might affect settlement decisions along the way. Further, given that parties often need a significant amount of time to gather all of the information required to prepare these submissions, Statements of Claim or Memorials could, in some cases, elongate the arbitration timeline—especially if the arbitration schedule envisions replies and sur-reply submissions. As a result, the international arbitration approach to written submissions may not always be necessary or helpful, especially in relatively straightforward or low value disputes.

B. Witness Statements

1. U.S. Domestic Arbitral Practice: Depositions and Direct Examinations

Witness testimony plays a significant role in U.S. domestic arbitrations.

Typically, U.S. domestic arbitrations include a discovery phase during which the parties are permitted to depose a limited number of potential witnesses from third parties or the opposing party.[44] Many U.S. practitioners view depositions as an indispensable tool that enables a party to better understand the opposing party's case and what the opposing side's witnesses intend to say during a direct examination. If a deponent veers from the testimony he or she provided during the deposition, the deposition transcript provides the examining attorney valuable evidence to impeach the witness and challenge the witness' credibility.

In addition, typical U.S. arbitral practice involving witness testimony follows the same pattern seen in the U.S. courts: (i) direct examination; (ii) cross-examination; and (iii) re-direct examination.[45] Most significantly, according to U.S. norms, direct examination—the process by which the party's

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[43] *See* 2 Born, *supra* note 3, at 2252-53.

[44] *See, e.g.*, Fed. R. Civ. P. 30; *see also* 2 Born, *supra* note 3, at 2354-56.

[45] *See, e.g.*, Fed. R. Evid. 611.

counsel questions a friendly witness to elicit evidence in support of the party's affirmative case—is the most significant component of a witnesses' testimony because it enables the arbitral panel to understand the relevant facts of the dispute from the perspective of an individual with personal knowledge of the events and fills in gaps in the story that the documentary evidence cannot readily convey.

As explained below, international arbitrations commonly take a different approach.

2. International Arbitral Practice: Written Witness Statements

In international arbitration, U.S.-centric practices such as depositions and direct examinations are not the norm.[46] Given that international arbitration is a blend of legal traditions, international arbitration practices have accounted for the fact that witness evidence plays a much more limited role for many civil law jurisdictions.[47] Civil law practitioners commonly view documentary evidence as the preferred, and more reliable, form of evidence.[48] Moreover, civil law traditions view the use of witnesses—and especially witness examination—as exceedingly confrontational and unnecessary.[49] To bridge the gap, international arbitration proceedings commonly use written witness affidavits called "witness statements" to set out a party's direct witness evidence in lieu of oral direct testimony, and subject to a right of cross-examination during an arbitration hearing.[50]

Practically all international arbitration rules accept the use of witness statements. For example, according to Article 23(4) of the International

[46]Hinchey & Harris, *supra* note 6, at 504; Fed. R. Evid. 611; *see also* 2 Born, *supra* note 3, at 2354-56.

[47]John A. Wolf & Kelly M. Preteroti, *Written Witness Statements: Practical Bridge of the Cultural Divide*, *in AAA Handbook on International Arbitration Practice* 209, 209-19 (2010); *see also* 2 Born, *supra* note 3, at 2257-60, 2282-88.

[48]Wolf & Preteroti, *supra* note 47, at 210-11.

[49]*Id.* at 211-14; International Bar Association, IBA Rules on the Taking of Evidence in International Arbitration, art. 4 (2010) [hereinafter IBA Rules]; International Bar Association, *Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration*, 14-18 (2010) [hereinafter IBA Rules Commentary].

[50]UNCITRAL Arbitration Rules, art. 27(2); ICC Rules, art. 25; ICDR Rules, art. 23.4; LCIA Rules, art. 20.

Centre for Dispute Resolution's Rules of Arbitration: "Unless otherwise agreed by the parties or directed by the tribunal, evidence of witnesses may be presented in the form of written statements signed by them."[51] Similarly, according to Article 27(2) of the UNCITRAL Arbitration Rules: "Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, may be presented in writing and signed by them."[52]

While the format of witnesses statements can vary, according to Article 4 of the IBA Rules—arguably the most influential set of non-binding guidelines for managing international arbitration proceedings—witness statements must include the following pieces of information:

> (a) the full name and address of the witness, a statement regarding his or her present and past relationship (if any) with any of the Parties, and a description of his or her background, qualifications, training and experience, if such a description may be relevant to the dispute or to the contents of the statement.
>
> (b) a full and detailed description of the facts, and the source of the witness's information as to those facts, sufficient to serve as that witness's evidence in the matter in dispute. Documents on which the witness relies that have not already been submitted shall be provided;
>
> (c) a statement as to the language in which the Witness Statement was originally prepared and the language in which the witness anticipated giving testimony at the Evidentiary Hearing;
>
> (d) an affirmation of the truth of the Witness Statement; and
>
> (e) the signature of the witness and its date and place.[53]

[51]ICDR Rules, art. 23.4.

[52]UNCITRAL Arbitration Rules, art. 27(2).

[53]IBA Rules, art. 4.

Witness statements are typically issued well in advance of the arbitration hearing and are often followed by responsive witness statements from the opposing party.[54] Importantly, witness statements are not intended to serve as a means of advancing legal arguments.[55] Instead, parties use witness statements to set out the relevant facts that a party will use to support their affirmative case. In addition, witness statements are commonly prepared with the assistance of counsel (and sometimes interpreters) and are based on the facts of which the witness has direct personal knowledge. As a result, special care must be taken when preparing witness statements to ensure that the statement can stand up to scrutiny during cross-examination.

3. Advantages and Disadvantages of Written Witness Statements

Written witness statements are not totally foreign to U.S. practitioners and have been a source of much debate within U.S. domestic arbitration circles.[56] Nevertheless, the authors submit that written witness statements offer a number of advantages that, on balance, would be beneficial in many U.S. domestic arbitrations, specifically including large and complex construction arbitrations.[57]

First, much like international arbitration's approach to written submissions, the advanced issuance of witness statements helps to crystalize the issues that will ultimately be decided at the arbitration hearing. As the prominent international arbitrator V.V. Veeder explained: "the written witness statement allows much of the factual brushwood to be cleared from the arbitral stage, leaving only the critically important issues to be addressed orally at the main hearing."[58] The ultimate result is, typically, shorter and more focused hearings.

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[54] Wolf & Preteroti, *supra* note 47, at 213-14.

[55] *Id.*

[56] *See, e.g.*, Raymond G. Bender, *Presenting Witness Testimony in U.S. Domestic Arbitration: Should Written Witness Statements Become the Norm*, 69:4 Disp. Res. J. 39 (Dec. 2014). Written witness statements are also frequently used in various types of administrative proceedings in the United States.

[57] *See also* Wolf & Preteroti, *supra* note 47, at *215-16;* 2 Born, *supra* note 3, at 2257-60, 2282-88.

[58] V.V. Veeder, *Introduction*, *in Arbitration and Oral Evidence* 7, 7-8 (2005).

Second, as explained below, another advantage of witness statements is that they can generate cost and time savings by doing away with the need for depositions and lengthy direct examinations.

- For one, depositions can be costly and inefficient tools to collect evidence during an arbitration. Depositions require significant preparation both by the party taking the deposition and the party defending the deposition, and require a day or more of actual examination. Moreover, while the examiner likely has a general understanding of the opposing side's position, he or she can be forced to seek information from a deponent who is often unwilling to provide clear defined positions on the questions asked. This game of cat and mouse is largely obviated when the witness takes pen to paper and writes the precise facts to which they are testifying.

- Further, depositions often significantly lengthen the arbitration timeline given the added need to prepare for, schedule, and conduct depositions. By contrast, while written witness statements still require time to prepare, the time to do so is often shorter than the time spent coordinating significant numbers of depositions among the calendars of busy arbitration counsel.

- Finally, doing away with direct examinations during an arbitration hearing by the use of witness statements can enable the parties to cut down on hearing time and, therefore, generate cost savings. Instead, as is commonly the case in international arbitration hearings, parties can almost exclusively focus their efforts on cross-examination.

The authors wholly acknowledge, however, that witness statements are not without drawbacks.

First, some U.S. practitioners argue that witness statements are inferior substitutes to live, direct testimony because they limit the arbitrator's ability to assess the witness' credibility.[59] Indeed, live direct examination offers the witness the opportunity to speak directly to the tribunal in his or her

[59] *See also* Wolf & Preteroti, *supra* note 47, at 215-16.

real voice. In cases of particularly compelling witnesses, witness statements may diminish the ability of the witness to present their own version of events to the tribunal, or the tribunal's ability to truly assess the witness' credibility. Certainly, tribunals will have the opportunity to assess the credibility of a witness during cross-examination, but a witness statement in some ways may deprive the tribunal of the complete picture.[60]

Second, based on experience, because witness statements are often prepared with the assistance of counsel, there is a concern by arbitrators that witness statements can be "overly lawyered" and, as a result, will not represent the true testimony of the witness.[61] That said, while there is always a risk that an "overly lawyered" witness statement will result in a less open or fair portrayal of the facts, the aid of a lawyer makes sure that witness statements are precise and speak to the exact issues that the arbitrators have to assess. Indeed, based on experience, witness statements prepared without the assistance of counsel tend to be long-winded and less precise, which can actually lead to greater confusion. Further, even overly lawyered witness statements must withstand the scrutiny of cross-examination. As a result, a careful cross-examination should enable the tribunal to assess whether the witness statement reflects the witness' true testimony.[62]

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[60] Gamesmanship can also be an issue. While each witness must be available for cross-examination, the opposing party may waive cross on one or more witnesses, such that the tribunal will not have the opportunity to meet such witnesses unless the tribunal has specific questions for such witnesses. Some U.S. practitioners argue that in this way an opponent can keep the tribunal from meeting and assessing on a first-hand basis the credibility of an important witness.

[61] *See also* Wolf & Preteroti, *supra* note 47, at 215-16.

[62] Witness statements can also be particularly useful in the case of witnesses who are unable to be questioned in the language of the arbitration. Direct testimony through an interpreter can be lengthy and cumbersome, particularly on technical issues where translation can be more difficult. Use of written witness statements provides a succinct statement of the testimony of the witness and, with live testimony through an interpreter limited to cross-examination and questioning from the tribunal, a witness statement materially shortens the time required for the taking of testimony through an interpreter.

C. Document Disclosure

1. U.S. Domestic Arbitral Practice: Document Exchange

Document exchange is among the most controversial features of the U.S. legal system. Although recent revisions to the Federal Rules of Civil Procedure in the United States have aimed to curtail some of the most problematic features of U.S. discovery caused by the rise of electronically stored information,[63] the U.S. legal system still permits expansive document exchange practices as compared to most other legal systems.[64]

U.S. domestic arbitration, by its nature, was intended to represent a more efficient dispute resolution process and, as a result, commonly curtails the use of expansive document exchange compared to what is normally seen in U.S. federal and state courts.[65] Nevertheless, in the absence of an agreement between the parties concerning document exchange, U.S. domestic arbitration rules commonly defer to the arbitrators' preferred approach and, given the prevailing practices in the United States, document exchange in U.S. domestic arbitration tends to remain relatively expansive.[66] As a result, document requests, objections, productions, electronically stored information protocols, etc. serve a prominent role in U.S. domestic arbitrations and frequently generate significant costs and delays.

2. International Arbitral Practice: Document Disclosure

Much like U.S. domestic arbitration rules, international arbitration rules commonly defer to the judgment of the arbitrators to determine the scope and extent of pre-hearing document exchange.[67] However, international arbitration takes a much different approach to document exchange (referred to as "disclosure") and has been heavily influenced by the need to balance

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[63] *See* Joseph F. Marinelli, *New Amendments to Federal Rules of Civil Procedure: What's the Big Idea?*, American Bar Association, Business Law Today (Feb. 20, 2016), https://www.americanbar.org/groups/business_law/publications/blt/2016/02/07_marinelli/.

[64] *See* Hinchey & Harris, *supra* note 6, 544-47.

[65] *Id.*

[66] *Id.*

[67] *Id.* at 544-52; *see* UNCITRAL Rules, art. 27; ICC Rules, art. 25; ICDR Rules, art. 21; LCIA Rules, art. 22.

common law and civil law disclosure practices.[68] Indeed, given the prominent influence of civil law legal traditions in international arbitration, it is relatively well accepted, by common law and civil law practitioners alike, that expansive document disclosure (like that seen in the United States) is inappropriate in international arbitration.[69] Indeed, the recent 2019 ICC Commission Report on Construction Industry Arbitrations underscored the dynamics associated with disclosure practices in international arbitration:

> Turning to requests for disclosure, the composition of the tribunal and their legal backgrounds are likely to influence how a tribunal will approach disclosure and its extent. Arbitrators with a civil law background (such as those from France, Germany, and Switzerland, where there is typically very limited disclosure and where court procedures for disclosure as understood in common law countries do not exist) may be less inclined to order extensive disclosure than those with a common law background (such as those from England, Australia, and the United States). Although very few are still in favour of the wholesale and indiscriminate production of documents by means of the common law process of discovery, such a process must be justified if it is to be applied to an international arbitration. Otherwise, it has no place in ICC arbitrations.[70]

It would be futile to outline all of the complexities associated with document disclosure in international arbitration. However, there are two distinct concepts concerning the scope and procedures of document disclosure in international arbitration of which U.S. domestic practitioners should take note.

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[68] *See* Hinchey & Harris, *supra* note 6, 544-47; IBA Rules Commentary, 6-8; 2 Born, *supra* note 3, at 2344-46.

[69] *Id.*

[70] International Chamber of Commerce, *ICC Commission Report: Construction Industry Arbitrations Recommended Tools and Techniques for Effective Management, 2019 Update* 22 (2019).

3. Scope of Disclosure: IBA Rules Approach

As alluded to in the 2019 ICC Commission Report, document disclosure practices can vary widely in international arbitration.[71] In cases where civil law arbitrators make up the tribunal, it is very possible for the tribunal to decline to permit any disclosure whatsoever.[72] Nevertheless, the general consensus among international arbitration practitioners is that some disclosure should be allowed, and the most common set of procedures used to govern disclosure in international arbitration can be found in the IBA Rules.[73]

Specifically, according to Article 3(3) of the IBA Rules, parties may request documents so long as the requests satisfy three general criteria:

> (a) (i) a description of each requested Document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a ***narrow and specific requested category*** of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner;
>
> (b) a statement as to how the Documents requested are ***relevant to the case and material to its outcome***; and
>
> (c) (i) a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably bur-

[71] *Id.*

[72] *Id.*; 2 Born, *supra* note 3, at 2344-46.

[73] IBA Rules, art. 3; IBA Rules Commentary, at 7-8; *but see* R. Zachary Torres-Fowler, *The Prague Rules: What U.S. Practitioners Need to Know About the Civil Law World's Answer to the IBA Rules on the Taking of Evidence in International Arbitration*, 39 The Construction Lawyer 18 (Spring 2019).

> densome for the requesting Party to produce such Documents[74], and (ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party.[75]

To summarize the above, document disclosure may only occur if the requesting party sets out a request for: (i) a specific document or narrow category of documents; (ii) that are ***relevant to the case and material to the outcome***; and (iii) that are in the possession, custody, and control of the opposing party. As explained below, taken together, Article 3(3) seeks to restrict the exchange of documents to those that satisfy a very narrow set of criteria.[76]

First, the requirement that the requesting party may only seek a specific document or *narrow* category of documents means that the documents requests must be carefully and precisely described.[77] In doing so, the IBA Rules attempt to prohibit expansive document requests more common to U.S. proceedings (e.g., all documents related to, arising from, or in connection with the disputed project).[78]

Second, and arguably the most important feature of the IBA Rule's approach to disclosure, is the "relevant and material" standard outlined in Article 3(3)(b). In contrast to standards used in the United States, such as Fed. R. Civ. P. 26(b)(1)'s standard ("any nonprivileged matter that is relevant to any party's claim or defense and proportionate to the needs of the case"), the "relevant and material" standard is intended to connote an

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[74]As explained in the IBA Rules Commentary, the requirement that a party establish the reasons why it would be unreasonably burdensome for a requesting party to produce the requested documents was intended to address situations where the requested documents could be archived on back-up drives that might be difficult to access. IBA Rules Commentary, at 10.

[75]IBA Rules, art. 3(3) (emphasis added).

[76]IBA Rules Commentary, at 8-9; 2 Born, *supra* note 3, at 2357-66; Redfern & Hunter, *supra* note 1, at 394-99.

[77]IBA Rules Commentary, at 9; 2 Born, *supra* note 3, at 2357-62.

[78]IBA Rules Commentary, at 8-9 ("The Working Party and the Subcommittee did not want to open the door to 'fishing expeditions'.").

increased burden on the requesting party.[79] Not only must the requested documents be "relevant," they must be "***material to the outcome of the case***."[80] While the IBA Rules have intentionally declined to define the meaning of the term "material to the outcome of the dispute," the clear intent is the document must be highly probative, if not dispositive, of a disputed issue. In other words, even if a document or category of documents is relevant to the dispute, the tribunal can still deny the request if the production of that document or category of documents will not affect the outcome of the dispute.[81]

Third, and lastly, Article 3(3)(c) requires the parties to explain why the opposing party has access to the requested document. This requirement is intended to prevent cases where a party issues speculative document requests for categories of documents that they do not actually know exist.[82]

4. Disclosure Procedure: Objections and Redfern Schedule

The process that international arbitrations use to manage document requests and exchanges is similarly divorced from practices in the United States. Typically, in the United States, parties produce the requested documents subject to standing objections concerning relevance, scope, etc. of the request without seeking input or relief from the arbitrators. In international arbitration proceedings, the default approach is for the parties to engage in a series of written requests and objections that, following multiple exchanges, are typically issued to the tribunal for its final determination and order.[83]

This general process is outlined in Article 3 of the IBA Rules.[84] First, the parties must set out their requests in accordance with the three criteria described above (i.e., (i) a specific document or category of documents; (ii) that are relevant and material to the outcome of the case; and (iii) that

[79] *See* 2 Born, *supra* note 3, at 2262-63.

[80] IBA Rules, art. 3(3)(b).

[81] Redfern & Hunter, *supra* note 1, 394; IBA Rules Commentary, 8-9.

[82] *See* 2 Born, *supra* note 3, at 2265-66.

[83] IBA Rules, art. 3.

[84] *Id.*

are in the possession, custody, or control of the opposing party).[85] Upon receipt of the opposing party's requests, the party may review the request and decide whether to produce the requested document(s) or object on the basis that the requesting party failed to satisfy the criteria of Article 3(3) or on one of the following grounds set out under Article 9(2)[86]:

> (a) lack of sufficient relevance to the case or materiality to its outcome;
>
> (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;
>
> (c) unreasonable burden to produce the requested evidence;
>
> (d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred;
>
> (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;
>
> (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or
>
> (g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.[87]

Once a party submits its objections, the requesting party may have a chance to reply to the objections. Thereafter, the parties submit the remaining requests to the tribunal for the tribunals' final determination.[88] According to

[85]IBA Rules, art. 3(3).

[86]IBA Rules, art. 3(5).

[87]IBA Rules, art. 9(2).

[88]IBA Rules, art. 3(7).

Article 3(7), the tribunal may order a party to produce any of the requested documents in its possession if the tribunal determines "(i) the issues that the requesting Party wishes to prove are relevant to the case and material to its outcome; (ii) none of the reasons for objection set forth in Article 9.2 applies; and (iii) the requirements of Article 3.3 have been satisfied."[89] Notably, unlike U.S. practice where the parties rarely involve the court or tribunal in document requests,[90] it is very common for the tribunal to decide many, if not the majority, of the parties' document requests in international arbitration.

Typically, the requests, objections, replies, and tribunal's orders are all set out in tabular format that many practitioners refer to as a "Redfern Schedule."[91] Although many tribunals use different formats, a Redfern Schedule is effectively a table, created in a modifiable document (like Microsoft Word format), that is exchanged between the parties and usually contains four to six columns which the parties fill in during the course of the exchanges.[92] The first three columns, typically filled in by the requesting party, include (i) the request number; (ii) a description of the document or category of documents sought; and (iii) a justification for why the documents requested are relevant and material to the outcome of the case (and often, a basis for concluding that the documents are in the possession of the opposing party). In the fourth column, the responding party sets out the extent to which it will produce the requested documents or object, with the grounds for the objection described. In the fifth column, the requesting party will have an opportunity to reply to any of the objections raised by the responding party. The sixth column is then left blank for the tribunal to fill in its decision on each request. An example of a Redfern Schedule has been included in **Annex 1** to this article.

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[89] *Id.*

[90] According to Article 3(6) of the IBA Rules, the tribunal may request that the parties make a final effort to consult regarding their differences to try to further refine the disputed requests.

[91] Redfern & Hunter, *supra* note 1, at 395.

[92] *See id.*

If the tribunal orders a party to produce a document or category of documents, the party must do so. If the party refuses to abide by the tribunal's order, then Article 9(5) of the IBA Rules permits the tribunal to "infer that such document would be adverse to the interests of that Party."[93]

5. Advantages and Disadvantages of Document Disclosure in International Arbitration

The advantages of the document disclosure approach used in international arbitration proceedings should be relatively straightforward.

First, by limiting the scope of document requests to documents that are "relevant and material" to the dispute, document disclosure in international arbitration proceedings substantially reduces both the cost and time of discovery, as compared to the expansive disclosure seen in U.S. domestic arbitrations. This is particularly the case for the time and costs associated with ESI in domestic U.S. construction megaprojects. The selling feature of the IBA Rules' approach that U.S. practitioners should keep in mind is that when used appropriately (especially in connection with a "Statement of Claim" or "Memorial") it can generate a highly responsive and targeted document exchange that satisfies the needs of both parties while simultaneously limiting the expense and delays associated with the collection, review, and production of thousands upon thousands of emails and other electronic documents. For megaproject disputes, where expansive discovery could prove to be prohibitively expensive or time consuming, the IBA Rules' approach offers a more tailored alternative that may accomplish the same objectives as expansive U.S.-styled discovery.

Second, the procedural approach used to address document disclosure requests and objections, through a series of consolidated exchanges, creates a streamlined record of the parties' positions and gives the tribunal an opportunity to quickly address each of the requests in a single instance. This process ensures, as much as possible, that arbitration proceedings do not get bogged down in protracted discovery disputes.[94] Indeed, parties

[93]IBA Rules, 9(5); *see also* 2 Born, *supra* note 3, at 2391-94.

[94]Redfern & Hunter, *supra* note 1, at 395.

can typically progress through the document request and objection phase in approximately two months.

The principal disadvantage, however, is the risk that limiting discovery may limit the stated truth-seeking objective of the U.S. discovery process—arguably limiting some areas of cross-examination and potentially affecting case outcomes. The authors submit that tailoring a document exchange program to resemble the IBA Rules, as appropriate for the specific case, should be carefully calibrated to ensure that the parties receive the information they require to present or defend their cases. However, the authors acknowledge that opinions of U.S. practitioners may vary dramatically depending on their own experiences and backgrounds.

D. Order of Evidence

A relatively minor, but important, distinction between U.S. domestic and international arbitration is the order of evidence during an arbitration hearing. As is common in U.S. litigation practice, U.S. domestic arbitration hearings are typically organized in a way that would permit the claimant to first present its case in full—fact witnesses followed by expert witnesses—and then permit the respondent to present its case—again, fact witnesses followed by expert witnesses. Conceptually, this approach generally permits the respondent to move for a directed verdict following the close of the claimant's case-in-chief if the respondent believes that the claimant has not met its burden of proof.[95]

Directed verdicts are exceedingly unusual in international arbitration proceedings and, as a result, there is no need to organize the arbitration hearing such that the claimant presents all of its evidence first followed by the respondent. Instead, the more common approach in international arbitrations is to organize the hearing so the claimant and respondent present their fact witnesses first, respectively, followed by each party's expert witnesses—i.e., claimant's expert witnesses followed by respondent's expert witnesses.[96]

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[95] Fed. R. Civ. P. 50.

[96] *See* IBA Rules, art. 8.

Indeed, the IBA Rules provide helpful guidance on this issue. According to Article 8 of the IBA Rules:

> (a) the Claimant shall ordinarily first present the testimony of its witnesses, followed by the Respondent presenting the testimony of its witnesses;
>
> (b) following direct testimony, any other Party may question such witness, in an order to be determined by the Arbitral Tribunal. The Party who initially presented the witness shall subsequently have the opportunity to ask additional questions on matters raised in the other Parties' questioning;
>
> (c) thereafter, the Claimant shall ordinarily present the testimony of its Party-Appointed Experts, followed by the Respondent presenting the testimony of its Party-Appointed Experts. The Party who initially presented the Party-Appointed Expert shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties' questioning;
>
> (d) the Arbitral Tribunal may question a Tribunal-Appointed Expert, and he or she may be questioned by the parties or by any Party-Appointed Expert, on issues raised in the Tribunal-Appointed Expert Report, in the Parties' submissions or in the Expert Reports made by the Party-Appointed Experts;
>
> (e) if the arbitration is organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability and damages), the Parties may agree or the Arbitral Tribunal may order the scheduling of testimony separately for each issue or phase;
>
> (f) the Arbitral Tribunal, upon request of a Party or on its own motion, may vary this order of proceeding, including the arrangement of testimony by particular issues or in such a manner that witnesses be questioned at the same time and in confrontation with each other (witness conferencing);

> (g) the Arbitral Tribunal may ask questions to a witness at any time.[97]

The theory is that by presenting the parties' fact witnesses before expert witnesses, the parties allow the experts to adapt or adjust their testimony in light of the factual record presented by the witnesses. For example, if a fact witness changes position in a manner that affects the expert's findings, the expert will have the opportunity to address the issue during his examination. This ensures that the panel receives from the experts the most up-to-date and helpful testimony possible.

Further, the presentation of fact witnesses and expert witnesses together also better enables the tribunal to keep each witness'/expert's testimony fresh and to compare competing versions of the facts/opinions against one another.

E. Joint Expert Procedures

Much like the practice in the United States, party-appointed experts tend to be the norm in international arbitrations—although international arbitration procedures permit the use of tribunal-appointed experts in lieu of party-appointed experts.[98] Likewise, with relatively limited exceptions, the manner in which party-appointed experts are utilized and present evidence in domestic and international arbitration proceedings is largely the same.[99]

There is, however, a growing trend among international arbitral tribunals to utilize procedures, relatively uncommon to U.S. arbitral practice, that seek to curtail the risks associated with expert advocacy and ensure that the tribunal receives candid and independent opinions from the parties' experts: (i) joint reports and (ii) witness conferencing. Both procedures are described below.

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[97] *Id.*

[98] *See, e.g.*, IBA Rules, arts. 5-6.

[99] *See, e.g.*, IBA Rules, art. 5.

1. Joint Reports

Especially in complex construction arbitrations, it is not uncommon for an international arbitral tribunal to ask the parties' experts to independently meet and confer—outside the presence of the parties' counsel—in an effort to reach agreement on components of their respective opinions.[100] Thereafter, the experts issue joint reports that highlight the areas of agreement and disagreement.

Consistent with overarching tendency of international arbitration proceeding to endeavor to better define the issues in dispute well in advance of the arbitration hearings, the joint reporting process enables the experts to come to agreement on methodological or other relevant aspects of the reports. The process helps to prevent strained and long-winded battle-of-the-experts scenarios.

The process of joint reports is not, however, without risk. First, many parties may be unwilling to permit their expert to engage in unfettered exchanges with the opposing expert for fear that doing so will result in an unintentional admission. As a result, if the parties elect to engage in joint expert reports, the parties' counsel should ensure that the expert understands the scope of his or her testimony and does not render opinions concerning the parties' factual and legal positions. Second, unless both experts are given the genuine discretion to confer with the opposing expert on the scope their reports, the joint reporting process could be rendered futile—in other words, party or counsel interference in the joint reporting process can undermine the advantages offered by the approach. Third, by offering the experts another opportunity to document their opinions, the joint reporting process could be viewed by one or both experts as an oppor-

[100] International Chamber of Commerce, *ICC Commission Report*, *supra* note 70, at 27 (2019); *see also* Chartered Institute of Arbitrators, International Arbitration Practice Guideline: Party-Appointed and Tribunal-Appointed Experts, 8-9 (2015), https://www.ciarb.org/media/4200/guideline-7-party-appointed-and-tribunal-appointed-expert-witnesses -in-international-arbitration-2015.pdf; Nathalie Voser & Katherine Bell, *Expert Evidence in Construction Disputes*, *Global Arbitration Review, The Guide to Construction Arbitration* (2d ed. 2018) https://globalarbitrationreview.com/chapter/1175389/expert-evidence-in-construction-disputes.

tunity to advance new expert opinions not set out in their earlier reports and, in doing so, further divide the experts' positions.

2. Witness Conferencing or "Hot Tubbing"

In the same vein as joint reports, international arbitration tribunals have also increasingly utilized a practice called "witness conferencing" or "hot tubbing" for expert witnesses.[101]

According to the Chartered Institute of Arbitrators, "[w]itness conferencing can be described as any evidence-taking process whereby two or more witnesses give evidence concurrently before the tribunal"—much like two or more witnesses taking the stand at the same time.[102] Witness conferencing can take a variety of forms whereby the questioning is conducted exclusively by the tribunal or parties' counsel. During the session, each expert is offered an opportunity to answer the tribunal's/counsel's questions and respond to their counterparts in real time.[103]

This approach to expert examinations can have number of distinct advantages.[104] First, the presentation of expert testimony in a simultaneous format improves the ability of the tribunal and parties to appreciate and compare each expert's positions. Second, witness conferencing may improve the quality of the expert's testimony because an expert may be less willing to make an incorrect assertion for fear that he or she could be readily corrected by his or her counterpart during a witness conferencing session. Third, assuming that witness conferencing has been utilized in lieu of traditional, single-expert examinations, witness conferencing can actually save hearing time and, therefore, costs.

The witness conferencing approach is not, however, without drawbacks. Indeed, there is a risk that the experts might be overly argumentative and even hostile to one another, thus diminishing the clarity of their opinions

[101]Chartered Institute of Arbitrators, Guidelines for Witness Conferencing in International Arbitration, 13-14 (2019), https://www.ciarb.org/media/4595/guideline-13-witness-conferencing-april-2019pdf.pdf; *see also* 2 Born, *supra* note 3, at 2292-93; International Chamber of Commerce, *ICC Commission Report*, *supra* note 70, at 27 (2019).

[102]*Id.*

[103]*Id.*

[104]*Id.*

and delaying the proceedings. Furthermore, in the event the parties utilize witness conferencing in addition to standard examinations, an expert witness conference may further elongate the hearing and, thus, potentially lead to additional costs. Lastly, for strategic reasons, the use of witness conferencing may, in some cases, unintentionally elevate the status or lend more credibility to experts whose opinions are inherently flawed or misguided.

Conclusion

There are many reasons why U.S. domestic arbitrations continue to utilize U.S.-styled practices. They are well known by U.S. practitioners and often result in relatively quick and efficient awards. However, at least to some degree, U.S. domestic arbitrations continue to mimic U.S.-styled litigation practices simply because it is how U.S. domestic arbitrations have always been conducted. In other words, old habits die hard.

While the practices outlined above will not be appropriate for all circumstances, when the relative complexity and value of a dispute reaches a certain threshold (in cases such as megaproject disputes), real efficiencies could be achieved by adopting practices more often seen in international arbitrations. As parties, arbitrators, and arbitral institutions continue to assess how best to improve efficiencies, costs, and outcomes in arbitration, they should think creatively about the procedures and guidelines they utilize and promote. In doing so, individuals and entities should take a second look at the practices outlined above.

Annex 1—Redfern Schedule Template

No.	Document(s) or Category of Documents Requested	Reasons Why Document(s) Are Relevant and Material to the Outcome of the Case	Response to the Request	Reply	Tribunal's Ruling
1	All documents concerning employer's appointment of the Engineer, including (but not limited to) prequalification, tender documents, the contract between the employer and Engineer, and the qualifications and experience of key individuals.	The Engineer was appointed by the Owner to provide services including design and project management services for the Works. From design stage to construction, the consultant advised the employer on the number of key issues in this case and made key determinations on disputed claims. Given the central role of the consultant, Contractor is entitled to see information to establish the scope of the Engineer's appointment.	Respondent objects pursuant to Article 9(2)(a) and (e) of the IBA Rules. Claimant's request fails to establish that the requested documents are "relevant" *and "material"* to the outcome of the dispute. Claimant's request is overly broad, even were this issue relevant and material to the issues in dispute in this arbitration.	In light of the Respondent's objection, Claimant **narrows** its request for only documents concerning the prequalification, tender documents, and contract between the consultant and employer. On this narrowed basis, the request is **maintained.**	Request Denied