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Contrasting U.S. Litigation and International Arbitration

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American litigators know that there is often a tortuous road between the filing of the complaint and trial. The parties' positions, and how each side views the facts, tend to evolve through the initial pleadings, amended pleadings, motions to dismiss, documentary discovery, depositions, summary judgment motions, pretrial submissions, motions in limine, pretrial statements, trial briefs, and the course of trial itself. It is often not until after discovery is completed and summary judgment motions are decided that lawyers and their clients decide what facts they will actually try to prove at trial. And even then, they strive to preserve flexibility to respond to what occurs immediately prior to and during trial. This luxury of not having to commit to a position until well into the process is not available to lawyers in international arbitrations. To the contrary, in most international arbitrations, parties and their counsel are required to commit firmly and early on to the facts they expect to prove to the arbitrator, and their cases often stand or fall based on these decisions. Understanding the essential differences between domestic litigation and international arbitration is critical for both lawyers and their clients. **Pleadings**

First, some general background for those not steeped in international arbitration. Although the procedure differs somewhat among the various arbitration tribunals, in the overwhelming majority of cases the arbitral process begins with the filing of a "Notice of Arbitration" or "Request for Arbitration." The purpose of these filings is to inform the respondent that arbitration proceedings have been started and that a particular claim has been alleged, to "apprise the respondent of the general context of the claim asserted against him," and "to enable him to decide on his future course of action." Gary B. Born, *International Commercial Arbitration* 1795 (2009). The notice or request is thus similar to a complaint in litigation, and, like the complaint, it is prepared and signed by a lawyer. Following the notice, the respondent has the opportunity, within a prescribed time frame, to file a response and to assert any counterclaims. These are similar in scope and substance to the request for arbitration. The claimant may then reply to the counterclaims. Pleadings in international arbitration, however, are expected to be much more precise and fact-focused than their more familiar counterparts in domestic litigation. For example, when handling an international arbitration, you will not be permitted to employ the cryptic, boilerplate language that you may resort to in a

federal or state court civil complaint. There your goal, after all, is far more modest; it is to allege enough facts to survive a motion to dismiss, while taking care not to commit to a specific position before you learn the lay of the land. You may even indulge in well-informed conjecture, "on information and belief," that you hope to substantiate later through discovery. In international arbitration, by contrast, pleading facts based on information and belief falls short of the mark when it comes to acceptable practice. Also, initial pleadings in international arbitration are amended very infrequently—so you need to get it right the first time around. They do not tend to evolve with the evidence, as is the case in litigation, where pleadings are almost always amended at least once, and sometimes three or four times, during the litigation process to fit the evidence as it develops. After the parties have submitted their pleadings in an international arbitration, the next step is the constitution of the arbitral tribunal. This stage includes the selection of arbitrators and the assertion of any challenges and jurisdictional objections. The selection process may be as brief as one week or, in cases with significant disputes or challenges, may take up to two months. Once constituted, the tribunal will set a detailed procedural schedule. In most cases, absent the parties' agreement (which is rarely reached), the arbitral tribunal has virtually unfettered discretion to determine the arbitral procedure. For example, under Article 15(1) of the United Nations Commission on International Trade Law Rules, "the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceeding each party is given a full opportunity to present its case." The major arbitral bodies—the International Chamber of Commerce, the International Centre for Dispute Resolution of the American Arbitration Association, and the London Court of International Arbitration—all have similar provisions in their rules. Statutory regulations of arbitration procedures likewise do not significantly limit the arbitral tribunal's autonomy to conduct the arbitration as it deems appropriate. The requirements of the Federal Arbitration Act, 9 U.S.C. § 1 et seq., for example, as interpreted by courts, will generally be satisfied upon a showing of procedural fairness, equal treatment, and adequate opportunity to be heard. As a practical matter, short of trial by ordeal, almost any procedure will do.
The procedural schedule set by the arbitral tribunal will typically provide for some discovery. Discovery in international arbitration, however, is nothing like the discovery that you normally experience in domestic litigation. **Discovery**
Depositions, of course, are one of the two pillars of domestic discovery (the other being document production). In theory, the purpose of depositions is to uncover the truth, but the reality is that they tend to be cat-and-mouse games, conducted in an adversarial atmosphere, often contentiously so, with the two sides having conflicting goals. As the examining lawyer on either side, you want to extract from the witnesses information that advances your case. Within the confines of the rules, the witness and counsel defending the deposition want to withhold as much harmful information and to provide as much selfserving testimony as possible. The measure of your success as examining counsel is whether you are able to lock the witness into a position that helps you at trial or, even better, in your effort to obtain summary judgment. From the deponent's perspective, by contrast, a successful deposition is one in which the examining lawyer "got nothing"—nothing that would harm defending counsel's case and limit the witness's ability to testify effectively at trial when it really

counts. If you typically defend cases, you have seen plaintiffs change their theory of the case as recently as the last day of the discovery cutoff, when plaintiffs' counsel files a supplemental expert disclosure, spinning out a new theory of causation. Conversely, if you are a plaintiffs' lawyer, you have seen this from the other side. The defense adapts to what you have painstakingly developed in deposition by "correcting" or "supplementing" sworn testimony in an errata sheet or through the testimony of later-testifying witnesses. Or defense counsel might seek to launch a new theory through experts disclosed late in the case. None of this is possible in international arbitration, for one reason: **Depositions are not permitted, period**. The first time that a lawyer examines the other side's witnesses, including experts, is at the hearing—at trial. For a lawyer this means several things. First, you do not have the benefit of being able to develop and mold your case based on the evidence adduced in depositions. None of the strategic maneuvering engaged in by lawyers with the aim of placing their clients in a better position for trial is available in international arbitration. Second, you have to cross-examine hostile witnesses at the hearing "cold." This is something particularly unsettling to litigators used to having a pulse on witnesses in the trenches of discovery. Third, you don't know until the hearing how your own witnesses stand up to the pressure of truly adverse cross-examination. If your client becomes nervous and shifty-eyed under scrutiny, you may find this out for the first time at the hearing, together with the tribunal. Documentary discovery, while available in international arbitration, is much more limited in scope than in U.S. civil litigation, requiring narrow and specific requests and a far more exacting showing of relevance and materiality than is the norm in litigation. The International Bar Association (IBA) Rules on the Taking of Evidence, for example, limit document requests to a "narrow and specific . . . category of documents that are reasonably believed to exist." It is not uncommon for tribunals in international arbitrations to allow for discovery of no more than a handful of documents. The same matters, if litigated, would result in massive productions of thousands of documents "reasonably calculated lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Requests that begin with the formulaic "all documents concerning" or "all correspondence relating to" will more often than not be rejected by the tribunal. International arbitrators never tire of pointing out to American lawyers that they are not in a U.S. court and need to curb their appetite for discovery. Also, other litigation discovery devices, such as interrogatories, depositions on written questions, requests for admissions, physical and mental examinations, are, as a rule, unavailable in international arbitration. **Evidence Preparation and Submission**

The most critical difference between litigation and international arbitration—and one that is intrinsically tied to the differences in the discovery processes—is the timing of both the preparation and the submission of evidence. As a domestic litigator, you normally get down to putting your case together for trial after discovery is completed and the court has decided motions for summary judgment. It is at that point that you begin to contemplate your most important decisions: who your witnesses will be and what they will say. Once you decide who your trial fact witnesses will be, you will outline their direct testimony and prepare each witness thoroughly. Your goal is to avoid surprises that will thwart your theory of the case, while ideally throwing up roadblocks that will frustrate your opponent's drive to the goalposts. As you prepare for trial, you will have the benefit of

all the documents produced in discovery by the other side, as well as the prior deposition testimony of your opponent's witnesses and any affidavits previously submitted by your opponent. If you have done your witness prep job well, you will have great assurance that your witnesses' direct testimony at trial will contain no surprises and will fully support your client's case. This sounds unremarkable, of course, to trial lawyers who work exclusively in state or federal court. The process in international arbitration is radically different. The schedule set by the tribunal at the very beginning of the arbitration typically provides for sequential written submissions by the parties. These are usually spaced several weeks apart: claimant's memorial, respondent's counter-memorial, claimant's reply, and respondent's rejoinder. Each submission is required to contain a brief setting forth the legal and factual arguments in support of the party's case; witness statements, both factual and expert; and documentary evidence on which the party relies. Each party thus gets two written submissions, each containing a legal brief, witness statements, and documents. Each subsequent submission is limited in scope to the issues raised in the opponent's prior submission. The claimant's initial submission is normally due about two months after the constitution of the tribunal. Witness statements function as the direct testimony of witnesses at the hearing. Thus, under Article 4(5) of the IBA's rules, a witness statement is required to provide "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." Witness statements are typically narratives that strive to tell the complete story from the witness's perspective and may run as long as 50 pages, with expert witness statements running even longer. At the time of the hearing, witness statements—often prepared several months earlier—will be offered into evidence as direct testimony, and the witnesses will be subjected to cross-examination on those statements by the opposing counsel. Oral direct testimony is virtually nonexistent in international arbitration (although some tribunals allow witnesses to supplement their written statements at the hearing, for a few minutes at the most). As a rule, an arbitral tribunal will not admit into evidence at the hearing any testimony of witnesses under the control of a party that was not contained in a witness statement and submitted as part of one of the sequential memorials. Similarly, the tribunal likely will not admit into evidence documents that were not produced with the parties' written submissions (or at least identified in them). These are two critical rules that draw the sharpest contrast between litigation and international arbitration. Although these rules normally carry a "reasonable cause" exception, tribunals tend to adhere to them strictly. The implications of these rules for counsel in international arbitration are obvious. Unlike in domestic litigation, where you can adopt a wait-and-see attitude and track the development of the evidence before having witnesses commit to specific testimony, in international arbitration you must land on your facts and the manner in which you will present them early in the process and without the benefit of a record to help you (especially if you represent the claimant, whose written submission comes first). You must make many key strategic decisions—including who will testify; what each witness will and will not say; how they will say it; how you will navigate the anticipated hazards and, indeed, what those hazards might be; what documents the witness will and will not be shown and asked to explain; and many others—virtually at the inception of the arbitration. In domestic litigation, you have the luxury of waiting to make these decisions until the weeks and days before the trial on the basis of a

substantial record. To a certain extent, this means you must lead with your chin in an international arbitration. If you do this carefully and well, you can hope to avoid the kind of knockout punch early in the fight that comes as a startling surprise to many U.S. litigators in international arbitration.

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