**Written Skills in International Arbitration**

**Cours 1**

Timeline of an Arbitration Agreement:

* Request for arbitration
* Constitution of the Arbitral Tribunal
* Terms of Reference:
  + Generally contains some rules
* Statement of Claim (4/6 months)
* Statement of Defence (4/6 months)
* Document production phase:
  + today became a standard, because after the statements the TA generally knows what the Parties are standing for
* Reply (2/3 months)
* Rejoinder (2/3 months)
* Hearings
* Post Hearing Briefs
* Award

It is possible to have other phases with regards of the specification of the arbitration.

In Investment Arbitration: possible to divide the proceedings between the jurisdiction and the merits of the case.

Between the request for arbitration and the answer you will have only two months.

* Research of documents: need to investigate the facts, gets the correspondence from the clients, the draft history of the contract… the search for documents is very important and is key.
  + People don’t like to give documents
    - It is often what people have done in their corporation and as they will be afraid not to have done the right thing, will not give the documents nor factual elements.
  + Need to get the objective facts: in order to be able to have an overview of the case
  + Very important to have the history backed up by the facts
* Comply with the Rules:
  + There are very specific things to include in the various steps of the procedure and in the written elements as well
  + Be careful to draft as the Tribunal expects it
  + Evolution: also before the TA gave the Parties to draft as they wanted, but now TA have developed their own preferences and at the stage of Terms of Reference the TA will explain its preferences and the councils to apply these recommendations

The writing is an exercise of strategy: Cf. examples

Written advocacy:

* How to present a good argument? Format need to be respected, spell checks, foot notes…
* Regarding the content: it’s the way you write and present your arguments.
  + The TA will go back to your writings.
* Explain and convince the TA of your position.
  + Find the facts, the argument and write an outline.
  + Also witnesses: best strategy is to address the witnesses.
    - You do that with your clients, even thought need to dig.
* Investment arbitration: an investor and a case, the investor need to have a qualified investor actually making an investment.
* The way you raise issues must be extremely careful, because the proceedings might go back on it later on.
  + Very strategic matters
    - Build your theory!
  + The way the claims are drafted: clearly sets up the case.
* Need to make the most compatible defence with regards to the fact and your regard on the case
  + You tell a story including the “bad facts”: need to address them

Need to address all the claims:

* Answer to the Request for arbitration: just put an hint, not display the all case: it is not your statement
* Corruption: possible to argue fraud and that consequently the contract is null and void and therefore non enforceable, you can go as well to a criminal court
* However, in case you loose on that argument, need to argue on alternatives at the same time
* Statement of reply: need to appoint an expert to deconstruct the remedies.
* And then you address what you have to say.
* Also it is important not to right the same things depending on the judges
  + The TA does not like last minute surprises: so very early in the procedure all the elements must be displayed.
* Request for relief

Finally an important element is that you have to do every thing under the applicable law.

Regarding the costs of arbitration: share of the costs or possible to put the costs on to the losing party.

Corruption: International Public policy: bribery, corruption…Regarding all these elements, you need to look at the international public policy into the domestic law to have the details about how it is forbidden an sanctioned.

Request for relief:

Terms of reference:

UNCITRAL proceedings :

* language,
* confidentiality,
* calendar,
* everything about written submissions,
* document production,
* cost: institutional arbitration, ad hoc differen
  + in institutional arbitration: arbitration stops if the parties do not pay
  + ad hoc: advanced on cost payed by one party only and at the end, allocation on costs
    - it goes into the award and is therefore enforceable

Tribunal likes to start a process by knowing what the rules of the game will be: bible that will be the reference throughout the arbitration. Orders in general stating that if something raises: power given to the tribunal.

* counter claims on jurisdictions : convincing…
* table of content

Witness: statement and cross examination:

The US government

As a matter of strategy, it is often better to be the claimant. In Investment arbitration: generally the investors start the arbitration but counterclaims are allowed.

**Statement of Claim / Defence**

Statement of claim: assess the evidence you have.

In the US the discovery is pre-trial: you start the case by doing discovery: extremely aggressive and invasive but effective: even before any written submission

In Arbitration: used to be called discovery but as we don’t want a confusion: not going to be pretrial: it is generally after the first round of submissions

Supposed to give everything and then if something is missing you are supposed to hand it out

You want to put out the entire case

After this is done, then first: second round is a rebuttal of what as been said in the first instance

You hand out your documents and then ask what is missing : and the AT determines if it is relevant, can also require the production of it at any point

Only rebuttal afterwards

Document production: request, objections or production, decision of the AT and the for the party who loses production

Statement of claim: need to put the full case, experts reports, witness

Make sure the witness will make a statement that is not detrimental to him or others

And tribunals don’t like

The minister engages the responsibility of the state

Credibility: background, …

Religious oath ? a formal oath is not always taken

Make sure you render an enforceable award

Fifteen years ago, the principle evidence would have been documentary, today things have shifted: it has became much more

Experts you do have, but facts witnesses are often use to give some color to your case.

Evolving process: that takes time

And if no one is good given that credibility is key, then no fact witnesses

Claim: you cannot keep a key argument for later

However, according to the document production: possible to change your case

Anticipation of the witness statement: it is okay for lawyers to draft the statement

Possible to have a sentence at the end

Basically you seat down with the witness and take notes: possible to record and on the basis of that you can structure: but it has to be their word and their position

They have to go through the document and say every single word is theirs

Cannot twist

It can be sophisticated : you can make it simpler in ideas but not in the wording

No need to put 50 pages: the more you put the maximisation of chances

Sometimes: tactics; 2/3 pages

One important point: general in PO: prehearing teleconference

Question of the scope of examination : key

There is no rule, the assumption before was that not possible to examine it outside the scope of his statement, but for exports the assumption was that experts could be asked on outside questions : therefore principle shifted:

Now it is reversed: you can ask the witness about pretty much everything

Was much easier when keeping the cross examination in the scope: now very complicated

For instance a letter submitted but not comprehended in the witness statement

Human psychology;

Make sure he is willing to go through

Job to try to convince: tricky issue

Need to do it before filing the witness statement

If a very strong witness on an issue, no need of two more, depends however, of the position,…

There has been a shift: 15 years ago: was interesting to have witnesses, but today more a show: expect the show, so give it to them but you don’t want to bore them and need to be efficient

As a matter of tactic: other side wanted to burry them: on a vey narrow subject: 5 experts reports, then you select

Be careful: cross examination as a way of challenging

One of the type of provision : acceptation is no question during the cross examination

The AT wanted to be able to call pretty much anyone: pretty dangerous

But more and more: TA can appeal pretty much who they want

But possible to imit the scope of that provision : becoming the trend

Expert report: the principle is the same

Amicus curiae: can come to the assistance of the court

Can u examine amicus curiae?

Possible that the expert refuses to change a statement but negociation, if still refuses;, the decision is on you

Document production : the more you can target the better

No fishing expedition

And if you can match two letters: very difficult to object to the production on a meeting, or minutes of a meeting…

Read the IBA guidelines: relevance and materiality is the test, no fishing expedition and no burdensome documents

And then the priviledge: you can raise attorney/ client, when with a secret: defence document

Priviledge needs to be demonstrated

If you have given a document : waiver of priviledge : be careful

The documents: defence secrery: cannot even be spoke about

Also business secret: especially if competitors on the other side

Can be estimated by the Tribunal

Key timing: very technical and very aggressive

Civil law countries or asia: don’t want to produce the documents : teach to the clients

Anticipation is key