Conducting a Preliminary Hearing in U.S. Arbitration: The Arbitrator's Perspective

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This practice note discusses the preliminary hearing process in a domestic arbitration proceeding, including the hearing agenda and how to prepare for and handle the hearing. The preliminary hearing in an arbitration proceeding (also known as a management conference or an initial conference) establishes a fair and orderly exchange of information between the parties throughout the arbitration and identifies early in the proceedings any issues that might frustrate the arbitration process. This practice note explains the rules governing preliminary hearings, the hearing format, and what counsel can expect from the hearing. This note also provides practical tips on how to prepare for the hearing to maximize your client's benefits from this stage in the arbitration process and identifies areas where you can better manage the costs of an arbitration.

The key to realizing the promise of arbitration as a dispute resolution mechanism lies in the flexibility of the process. By avoiding common errors and openly discussing time and cost efficiencies, the parties can satisfy their expectations about the arbitration process, including due process and fairness.

For more information on domestic arbitration proceedings managed by arbitral organizations, see JAMS Arbitration Resource Kit, AAA Arbitration Resource Kit, and CPR Arbitration Resource Kit.

Governing Rules

A preliminary hearing is similar to a Rule 16(b) conference in federal court or an initial or preliminary conference in state court. During the hearing, parties generally provide the tribunal—generally a single arbitrator or a panel of arbitrators—with a brief introduction of the dispute. The tribunal will then set a case management schedule, in consultation with the parties and/or their counsel, that will govern the parties' exchange of documents and information (i.e., discovery) in advance of the scheduled evidentiary hearing.

If an arbitral organization (e.g., the American Arbitration Association (AAA), JAMS, the International Institute for Conflict Prevention & Resolution (CPR)) is administering your arbitration, the administering authority's rules typically cover the preliminary hearing. See, e.g., AAA Commercial Arbitration Rules (Oct. 1, 2013), at Rule R-21; CPR Administered Rules (Mar. 1, 2019) at Rule 9.3; JAMS Comprehensive Arbitration Rules & Procedures (July 1, 2014) at Rule 16; Resolute Systems Commercial Arbitration Rules (Sept. 1993) at Rule 6.

Some organizations also have templates, checklists, and other tools to help guide the discussion at the preliminary hearing. See, e.g., AAA Commercial Arbitration Rules (Oct. 1, 2013), at Rule P-2 (setting forth checklist of subjects that parties and tribunal should address at preliminary hearing); CPR Administered Rules (Mar. 1, 2019) at Rule 9.3(a)–(h) (delineating non-exhaustive list of matters to consider at the preliminary hearing, including procedural issues; early identification and narrowing of issues; stipulations of fact; tribunal's appointment of a neutral expert; settlement negotiations; implementing steps to address cybersecurity

and information protection issues; and setting the case schedule); JAMS Comprehensive Arbitration Rules & Procedures (July 1, 2014) at Rule 16(a)–(i) (delineating suggested topics to address at the preliminary conference, including exchange of information and discovery schedule; any agreement to clarify/narrow issues or structure the evidentiary hearing; scheduling matters and attendance of witnesses; pre-marking exhibits; and final award form).

If your arbitration is not administered (i.e., an ad hoc arbitration), you may choose to conduct your arbitration pursuant to a set of ad hoc arbitration rules. The two most prominent sets of rules are:

- CPR Non-administered Arbitration Rules (Mar. 1, 2018)
- United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules (2010)

Both contain provisions for holding a preliminary hearing, with the latter being more open-ended and leaving much to the tribunal's discretion. See CPR Non-administered Arbitration Rules (Mar. 1, 2018), at Rule 9.3; UNCITRAL Arbitration Rules (2010), at Article 17.

Setting the Agenda

The tribunal often will provide the parties with a tentative agenda for the preliminary hearing. The goal of supplying the agenda is for the parties to confer in advance of the hearing and reach agreement on as many of the agenda topics as possible.

If the tribunal does not issue an agenda, consider:

- Consulting any of the arbitral organization checklists to identify potential matters the tribunal may address at the preliminary hearing
- Requesting an agenda from the tribunal

Once you have a tentative idea of the topics the tribunal will cover at the hearing, contact your adversary in advance to discuss possible areas of agreement. This will allow the tribunal to streamline the preliminary hearing and focus on any complex or disputed issues. Your preliminary hearing will run smoother and take less time if the parties agree on issues in advance, where possible, and prepare to discuss areas of disagreement with the tribunal.

Hearing Format

Notwithstanding any specific agenda, the preliminary hearing usually begins with a roll call of:

- The parties
- Counsel –and–
- Members of the tribunal

After the roll call, the tribunal likely will cover the following topics with the parties:

- The applicable law
- An overview of the dispute
- Jurisdictional or arbitrability issues
- Mediation
- Case management scheduling

Applicable Law

As a threshold matter, it is critical to confirm the following with all parties:

- The applicable arbitration statute (e.g., the Federal Arbitration Act (9 U.S.C. § 1 et seq.), Article 75 of the N.Y. Civil Practice Law and Rules)
- The background procedural rules (e.g., AAA Commercial Arbitration Rules, employer-sponsored dispute resolution program rules) –and–
- The substantive law governing the claims, counterclaims, and defenses in the proceeding

Some of these inquiries may be obvious from the parties' arbitration agreement or clause. If not, make sure you explicitly discuss these topics, and that the tribunal memorializes the parties' responses in the ensuing case management order. This will ensure there is no confusion or uncertainty later in the proceedings about the applicable substantive and procedural law.

For more information on the Federal Arbitration Act, see Federal Arbitration Act Fundamentals.

Overview of Dispute

Depending on the level of detail in the parties' pleadings, the tribunal may ask you to provide a brief summary of the dispute outlining the claims and defenses at issue and articulating the damages or other relief sought. You should seize this opportunity to frame the facts and the issues for the tribunal, even if the tribunal does not affirmatively request this detail.

The tribunal may also catalog the documents received to date from the parties. To ensure the pleadings are timely closed, the tribunal also will set deadlines for the submission of any answering statements or replies and for interposing new claims, adding parties, or otherwise amending the pleadings.

Jurisdictional or Arbitrability Issues

The tribunal may also address any jurisdictional or arbitrability questions, as these issues have an enormous impact on the parties' ability to move forward with the proceedings and enforce an ultimate award. Depending on the applicable law, the tribunal alone may resolve such issues. In other cases, the parties must raise these issues separately in court, which will necessarily delay the arbitration proceedings. See, e.g., Contec Corp. v. Remote Solution, Co., 398 F.3d 205, 208 (2d Cir. 2005) (holding that parties may delegate arbitrability questions to the tribunal by adopting background procedural rules that do so, thereby satisfying the requirement that they express that intention clearly and unmistakably); see also Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 67–70 (2010); First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943–44 (1995).

For more information on arbitrability issues, see Arbitrability in U.S. Arbitration.

Mediation

As part of the tribunal's obligation to promote a quick resolution of the dispute, it may ask you if you are interested in mediation. Indeed, the tribunal may encourage you to consider this option. A mediation could take place either as an initial step before any document or information exchange or—more commonly—in parallel with the arbitration proceeding. In many cases, the administering authority can assist the parties in selecting a mediator. Alternatively, the parties may choose a mediator on their own.

For more information on mediation in arbitration, see Mediation-Arbitration Considerations. For a relevant annotated form, see Mediation and Arbitration Agreement.

Case Management Schedule

The preliminary hearing will provide the parties with a clear idea of the overall case management schedule and how the parties will move forward in the arbitral forum. The resulting case management order (also known as a scheduling or procedural order) will set forth how and when the parties will exchange documents and information, as well as prepare materials for the evidentiary hearing. More generally, the order will establish deadlines with which the parties must comply and provide a mechanism for involving the tribunal when and if issues arise necessitating its intervention.

For an annotated form scheduling or procedural order, see Preliminary Hearing Report and Scheduling Order for U.S. Arbitration.

Preparing for the Preliminary Hearing

To prepare for your preliminary hearing, you should:

- Review your applicable arbitration agreement or clause.
- Identify the objectives you want to achieve. –and–
- Determine who should attend the preliminary hearing.

Review the Arbitration Agreement or Clause

Generally, there are three sources of authority that govern arbitration proceedings:

- The parties' arbitration agreement or clause
- Any applicable rules of the arbitral organization administrating your arbitration –and–
- The governing federal or state arbitration statute (e.g., the Federal Arbitration Act (9 U.S.C. § 1 et seq.), Article 75 of the N.Y. Civil Practice Law and Rules)

The primary authority is the parties' arbitration agreement or clause, which expresses the parties' intention to have disputes heard and decided in an arbitral forum. For example, a very simple and standard arbitration clause might read:

> Any dispute or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by [provider] under its commercial arbitration rules then in effect, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Arbitration clauses come in a multitude of forms. Some can be quite detailed, specifying things such as the scope of the document and information exchange, the types of relief available, the required qualifications of the arbitrator(s), and the form of the award.

Thus, before participating in the preliminary hearing, you should know the answers to questions such as:

- What disputes can the parties arbitrate?
- What triggers (or conditions precedent) does the clause incorporate?
- Does the clause provide for mediation?
- Is the arbitration clause part of a larger clause or a separate clause?
- What arbitration statute will govern the proceeding?
- What procedural rules will apply to the proceeding?

- What qualifications or credentials of the arbitrator(s) does the clause require?
- Have all the relevant parties been identified and should they be included in the proceeding?
- Are there any limits on the documents and information the parties may exchange?
- Are there any constraints on motion practice?
- Are there any limits on the tribunal's powers?
- Is there a provision for attorney's fees or cost-shifting?
- Is a particular form required for the final award (e.g., standard, reasoned, findings of fact, and conclusions of law)?
- Does the clause provide for optional appellate proceedings?

For more information on drafting arbitration agreements, see Pitfalls in Drafting a Private Arbitration Agreement and Agreements to Arbitrate in the United States: Drafting a Pre-dispute Arbitration Agreement.

Identify the Objectives You Want to Achieve

As with any litigated matter, involving the client and ascertaining their objectives in the arbitration proceeding—including preparing and maintaining a sufficiently itemized and clear budget—is an essential preparatory step. You should also consider the following as you prepare for the preliminary hearing:

- **Investigate the underlying facts of the dispute.** Understanding the facts underlying your client's dispute will help you formulate your overall case strategy and develop a theme for the case. This will allow you to better frame the issues for the tribunal in your initial pleadings (i.e., demand for arbitration or answering statement) and preliminary hearing presentation.
- **Identify the necessary evidence.** Try to identify the evidence you will need to prosecute your client's case-in-chief and defend against your adversary's case. This includes identifying potential custodians of relevant documents and information. Note, absent a contrary provision in your arbitration clause, the scope of disclosure in an arbitration is typically far less than the scope of discovery in a court proceeding and is usually confined to what is relevant and material to the dispute. To the extent possible, gather documents that support your client's positions and refute your adversary's arguments before the preliminary hearing. This will serve as a useful guide for the tribunal during the hearing.
- **Evaluate your discovery needs.** Once you understand the facts of the case and the evidence you will need, think through how to obtain that evidence during the document and information exchange period. Depositions are becoming increasingly more common in arbitration proceedings, but they are still more the exception than the norm. You should discuss with your client, opposing counsel, and the tribunal the need to balance the time and expense involved in taking depositions with the relative speed, efficiency, and cost-effectiveness of arbitration. Other discovery devices—such as interrogatories and requests for admission—remain exceedingly rare absent a contrary provision in the arbitration clause.
- **Identify potential witnesses.** To help you develop the strategic positions you will take during the preliminary hearing, you should identify your potential witnesses and interview them—if possible—to obtain their statements in advance. Ascertaining the witnesses' locations and availability to appear at the evidentiary hearing also will assist with the scheduling issues you will discuss during the preliminary hearing.
- **Consider expert testimony.** As in civil litigations, many parties rely on expert witnesses in arbitration. Try to identify any potential experts early in the arbitration proceeding. Doing so will allow you to use the experts to refine your client's positions. Your client may be a good source of potential candidates for industry or business custom experts. Scheduling dates for the identification of such experts and the exchange of expert reports (or another disclosure mechanism) also is prudent. Again, whether the parties should engage in costly and time-consuming expert depositions is something you should discuss with your client, opposing counsel, and the tribunal
- **Determine the need for third-party subpoenas.** The need for documents or testimony from third parties is an often overlooked and misunderstood area of arbitration practice. Not only is third-party discovery more limited in scope than in court proceedings, but it can differ markedly depending upon whether the governing arbitration statute is under federal or state law. Ascertaining that discovery need well in advance will assist you in planning the overall case management, particularly since third-party discovery can have a marked effect on the arbitration proceeding's cost and efficiency.
- **Assess the need for interim relief.** Some disputes call for interim, provisional, or conservatory relief (e.g., an injunction or an attachment). You should inform the tribunal of your client's need for such relief at the preliminary hearing.

Try to anticipate and think through other issues that might come up at the preliminary hearing, such as the need for

motion practice, the use of interpreters, and scheduling constraints. Preparing for these issues in advance will help ensure that the arbitration proceeding unfolds smoothly, efficiently, and cost-effectively.

For more information on discovery in arbitration, see Limiting Discovery in U.S. Arbitration.

Determine Who Should Attend the Preliminary Hearing

The preliminary hearing is usually the first contact you will have with the tribunal. Thus, much like an initial conference in court, the question of who should attend the preliminary hearing with you is a strategic one.

Clients need not sit idly by at a preliminary hearing. Even if your client does not affirmatively speak during the preliminary hearing, he or she should be familiar with the background facts of the dispute. They should also be able to answer questions posed by the tribunal and consult with you on case management issues. Thus, your client's presence during the preliminary hearing undoubtedly will be useful.

Your client's active participation can convey to the tribunal and the opposing side their seriousness about the dispute and the arbitration proceeding. You also can have your client directly make proffers to the tribunal or participate in discussions about case management issues and how to conduct the matter to achieve a cost-effective and expedient resolution. Having the tribunal hear directly from your client is a powerful way to help humanize the dispute, convey your client's interests and concerns, and frame the issues for the tribunal.

Before deciding to have your client present, consider whether the hearing will take place:

- In person
- By telephone –or–
- By videoconferencing

Before the advent of clear and effective audio and videoconferencing technologies, tribunals always held preliminary hearings in person with everyone physically present in a single room. Like their court counterparts, in-person preliminary hearings afford the parties and the tribunal the opportunity to interact more naturally and to engage each other in ways that telephone and video conferences do not. However, due to time restrictions and cost concerns—as well as to avoid travel and lodging issues—tribunals increasingly favor scheduling preliminary hearings by telephone or videoconferencing. Depending upon the complexity of the dispute and whether visual aids might assist the tribunal in better appreciating the nature and scope of the dispute, the tribunal nevertheless may schedule an in-person preliminary hearing.

Other Case Management and Organizational Matters

There are numerous other case management and organizational matters that the tribunal could raise during a preliminary hearing. Err on the side of caution and be prepared to address the following pertinent matters with the tribunal:

- Whether there is a need for any confidentiality or protective orders
- Whether and to what extent the chair of the tribunal should act on behalf of the entire tribunal
- Whether bifurcation or staging the dispute is either necessary or prudent
- Whether the parties anticipate dispositive motion practice and, if so, how the tribunal will handle that phase
- How many days to set aside for the evidentiary hearing and scheduling those dates
- The need for the tribunal to issue subpoenas for third-party witnesses to appear and provide documents or testimony at the evidentiary hearing
- The parties' preparation of final hearing materials (i.e., joint hearing exhibits, stipulations of uncontested facts, prehearing briefs, etc.)
- Scheduling a final prehearing conference
- Whether any site inspections by the tribunal are necessary
- Whether any witness needs to appear at the evidentiary hearing telephonically or by videoconferencing
- The use of a stenographer's services during the evidentiary hearing
- The use of an interpreter during the evidentiary hearing
- Whether any party will request attorney's fees and costs, and how to handle that request
- The parties' preparation of posthearing briefs
- The form of the final award to be issued by the tribunal

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Annotated Forms

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- AAA Demand for Arbitration
- CPR Notice of Arbitration
- Mediation and Arbitration Agreement
- Notice of Appointment for a Party-Nominated Arbitrator in Ad Hoc Arbitration
- Preliminary Hearing Report and Scheduling Order for U.S. Arbitration

Checklists

- Avoiding Delay and Excessive Cost in U.S. Arbitration Checklist
- Choosing an Arbitration Organization Checklist
- AAA, JAMS, and CPR Comparison Chart
- Finding, Vetting, and Selecting an Arbitrator in the United States Checklist

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Theo Cheng is an independent, full-time arbitrator and mediator, focusing on commercial, intellectual property (IP), technology, entertainment, and employment disputes. He has conducted over 500 arbitrations and mediations, including business disputes, breach of contract and negligence actions, trade secret theft, employment discrimination claims, wage-and-hour disputes, and IP infringement contentions. Mr. Cheng has been appointed to the rosters of the American Arbitration Association (AAA), the CPR Institute, FINRA, Resolute Systems, the American Intellectual Property Law Association's List of Arbitrators and Mediators, and the Silicon Valley Arbitration & Mediation Center's List of the World's Leading Technology Neutrals. He serves on the AAA's Council, and he is also the President of the Justice Marie L. Garibaldi American Inn of Court for ADR, the Immediate Past Chair of the New York State Bar Association (NYSBA) Dispute Resolution Section, and the Treasurer of the Copyright Society of the U.S.A. He has also been inducted into the National Academy of Distinguished Neutrals. Mr. Cheng received the 2020 James B. Boskey ADR Practitioner of the Year Award from the New Jersey State Bar Association Dispute Resolution Section, and the *National Law Journal* named him a 2017 ADR Champion.

Mr. Cheng has over 20 years of experience as an IP and general commercial litigator with a focus on trademarks, copyrights, patents, and trade secrets. He has handled a broad array of business disputes and counseled high net-worth individuals and small to middle-market business entities in industries as varied as high-tech, telecommunications, entertainment, consumer products, fashion, food and hospitality, retail, and financial services. In 2007, the National Asian Pacific American Bar Association named him one of the Best Lawyers Under 40.

Mr. Cheng received his A.B. *cum laude* in Chemistry and Physics from Harvard University and his J.D. from New York University School of Law, where he served as the editor-in-chief of the Moot Court Board. He was a senior litigator at several prominent national law firms, including Paul, Weiss, Rifkind, Wharton & Garrison LLP, Proskauer Rose LLP, and Loeb & Loeb LLP. He was also a marketing consultant in the brokerage operations of MetLife Insurance Company, where he held Chartered Life Underwriter and Chartered Financial Consultant designations and a Series 7 General Securities Representative registration. Mr. Cheng began his legal career serving as a law clerk to the Honorable Julio M. Fuentes of the U.S. Court of Appeals for the Third Circuit and the Honorable Ronald L. Buckwalter of the U.S. District Court for the Eastern District of Pennsylvania.

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