

Best Practices for First Procedural Orders

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Arbitrations, properly designed and managed, can offer substantial time and cost efficiencies compared to traditional litigation. A comprehensive first procedural order made early in the proceeding, which sets the procedural expectations for the entire arbitration, is a key tool in realizing these efficiencies.

What is the First Procedural Order?

The first procedural order is a case management tool that should cover a range of practical matters that may arise during the arbitration. The terms may be set by consent or after contested submissions. The parties are bound by the order.

Whether institutional rules apply or the arbitration is *ad hoc*, the first procedural order will usually include terms related to document production, form of materials to be exchanged, hearing logistics, jurisdiction, interim or emergency measures, and costs and, most importantly, a procedural timetable. It is also good practice to include any agreements or orders relating to confidentiality.¹

A comprehensive first procedural order forces the parties and the tribunal to consider the specifics of the dispute at the outset and enables the parties to budget for the time and potential costs likely to be incurred. A good first procedural order provides the parties and tribunal with a clear and efficient framework for the conduct of the proceeding.

Best Practices for First Procedural Orders

Be realistic and practical, bearing in mind the scope of the dispute and the quantum of the claims. Below are some of the most common terms found in first procedural orders, but whether to include each should be considered in the context of the dispute.

A. *Procedural Timetable*

The first procedural order should set the date for the merits hearing and dates for other contemplated procedural steps. Accordingly, parties – in consultation with the tribunal – should seek to identify the steps needed and the period of time to be allocated to each.

Setting a date for the merits hearing early in the process is important because it allows participants to set aside time in their calendars and discourages unexpected or dilatory procedural conduct.

¹ Some institutional rules, such as the *ADRIC Arbitration Rules*, prescribe how some of these matters are to be handled and may be supplemented or, in appropriate cases, modified in the first procedural order to best suit the dispute.

B. Confidentiality

Procedural orders can incorporate terms governing confidentiality of documents and information related to the arbitration. Confidentiality issues may be complex enough to warrant either a standalone agreement between the parties or a separate procedural order.

In some cases, it will be important to restrict who may view the exchanged documents. One restriction for commercially sensitive documents is a “lawyer’s eyes only” category, which restricts access of the documents to only specific members of the legal team. These terms require careful drafting, as their effect can be cumbersome because of the necessary special handling of the documents. If such terms are adopted, allow each party to challenge the “lawyer’s eyes only” designation and describe how the documents should be handled if they are to become exhibits.

C. Materials to be Exchanged

The first procedural order should include a description of the parties’, and tribunal’s, expectations for the form and substance of materials to be exchanged.

Generally, parties exchange detailed submissions of their cases prior to the hearing. These “memorials” often include the parties’ respective positions on the facts and law, supported by documentary and, often, fact and expert evidence. In setting the procedural timetable, consider how many rounds of memorials submissions are needed (often two rounds are contemplated). Consider also terms prescribing the format (electronic or paper), page limits, and method of filing (email, other electronic, or physical delivery). In some cases, the parties may decide to submit arguments separately from the supporting evidence, although efficiencies can be lost in taking this approach.

Include a requirement for unique numbering of documentary evidence. If documents must be translated into the language of the arbitration, prescribe the form, *e.g.*, only the relevant pages of longer documents and whether translations need to be certified (often they are not in arbitration). Finally, if there are likely to be disputes about document disclosure, dates for motions should be reserved.

For both lay and expert witness statements, the usual practice is to have written statements stand as the witnesses’ direct testimony.

Also consider whether a simultaneous or sequential exchange of materials is most appropriate, and whether time of day and time zone should be specified.

D. Hearing Particulars

Consider terms such as the hearing location and requirements for the hearing room, who may attend the hearing, whether witnesses must appear in person, the materials to be provided to the tribunal for use at the hearing, and the scope of the hearing (for instance, if the matter is bifurcated).

Whether there will be an oral opening, an oral closing, and post hearing briefs are matters often left to a later procedural order, but contemplation of the options can be incorporated in the first procedural order.

The first procedural order is a powerful tool to manage and shape an arbitration, and using it effectively can provide parties with the cost and timing efficiencies associated with, and expected from, the arbitral process.

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