



ARBITRATION HEARINGS: TOP 10 TIPS FOR JUNIOR ASSOCIATES

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The hearing is often the most significant—and exhilarating—part of any arbitration proceeding. It is usually the first time that the tribunal, parties, and counsel all meet in person (physically or through a videoconferencing platform). The hearing provides a critical opportunity for each party to highlight the strengths of its case and, conversely, to expose the weaknesses in the opponent's arguments. It is during the hearing that the tribunal will ask counsel difficult questions, assess the credibility of both sides' witnesses based on counsel's cross-examination, and potentially request opposing experts to identify areas of mutual agreement. Cases are often won, or lost, based on the events of the hearing.

The hearing is also frequently a highlight in an arbitration lawyer's practice. The legal team's advocacy skills, strategy, diligence, and sheer stamina are all tested. This is true not just for the senior lawyers, who will present the oral submissions and examine witnesses; but also for the associates, who will typically help write the opening presentations, prepare PowerPoint slides, draft cross-examination outlines, and assist with a multitude of other tasks without which no hearing could be successful.

In short, the hearing is, in many ways, the ultimate test for any international arbitration associate.

A virtual breakfast event, organised by Delos-Y on 2 October 2020, focused on this exact topic. Faithful to the signature format of the real-life Delos-Y breakfasts, the event featured six mid- to senior-level associates (**Ana Coimbra Trigo** of PLMJ Law Firm, **Anna Chuwen Dai** of White & Case, **Bart Wasiak** of Arnold & Porter, **Flavio Ponzano** of ARBLIT, **Johanna Bustgens** of Hanefeld Rechtsanwälte, and **Matej Pustay** of Squire Patton Boggs), who discussed their hearing-related experiences and shared advice with a group of young and aspiring arbitration practitioners and students. Delos-Y's chair **Maria Poláková** of Squire Patton Boggs opened the event, which was moderated by **Camilla Gambarini** of Withers and **Sebastiano Nessi** of Schellenberg Wittmer.



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The speakers and the moderators have compiled the following list of top 10 tips for junior associates. This list is designed to provide practical advice for junior practitioners asked to assist with an arbitration hearing—to help them prepare for, survive, and even enjoy and shine at the hearing. The article also includes a “bonus” section, aimed at associates who act as tribunal secretaries.

1. Anticipate the hearing from the outset of the case

You should not think of the hearing as a discrete event, unconnected to the written phase of the arbitration. Instead, consider it as the climax of the case: an opportunity for the tribunal to test the evidence and arguments that the parties have presented in their briefs.

As an associate, you should anticipate, from the very outset of the arbitration, what might happen at the hearing. For example, when drafting the facts section of a written pleading, you should ensure that all your assertions are backed up by concrete evidence, to avoid the risk that the opposing counsel—or the tribunal—will point out the lack of evidentiary support at the hearing. When you develop legal arguments, avoid any logical fallacies that the opposing counsel could identify in their oral submissions at the hearing. And, when you are involved in the drafting of witness statements, ensure that they accurately reflect the witnesses’ recollection, to avoid the risk of a witness contradicting his or her own testimony on cross-examination.

In short, as an associate, you should ensure that your client’s case withstands scrutiny: be critical of your own arguments; discuss with the team how to address any weak points; choose experts and witnesses who you think will do well on cross-examination; guard against avoidable mistakes; and *never* misrepresent the evidence. That way, you will put yourself in the best possible position for the hearing.

2. Do not undervalue the importance of your role

As a junior member of the counsel team, you may feel that you have little to offer. That is not true; in fact, your contribution is invaluable.

Your senior colleagues, who will be playing a more active role in the hearing, will prepare carefully for the hearing and review all the key documents. But there is only so much that any single person can do; and, for time and budgetary reasons, the partners will not be able to read and memorise every single exhibit.

This is where you come in. As an associate, you are likely to be—and indeed may be *expected* to be—more familiar with the record than anyone else. You will have conducted the legal and factual research; checked citations; corrected translations; and sifted through the document production. You will have taken notes during witness interviews and reviewed early drafts of the expert reports.

Even if you are familiar only with certain discrete aspects of the case, you should think of yourself as an expert on those issues. For example, when preparing for your witness’s hearing testimony,



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remind the partner about any concerns that the witness long ago expressed about an aspect of his or her testimony. When the relevant subject comes up during the opening statements, pull out the useful admission that the opposing side made in its document production requests. And, when in the midst of a cross-examination the opposing counsel asserts something you know to be untrue, let your partner know (for example, by passing on a post-it note with the number and summary of the exhibit that undermines the other party's argument).

3. Be on top of practicalities

As an associate, you should anticipate any issues that may occur at the hearing and try to prevent them from occurring. This is especially true in relation to procedural and logistical issues, on which the partners may not have time to focus. In the current world of virtual hearings in particular, senior team members may rely on you for quick and reliable technical assistance (see point **8** below).

There are numerous practicalities that, as a junior associate, you should consider in advance of the hearing: Will it be possible to print out and copy documents at the hearing venue? Are there enough electric sockets for everyone's laptops? Has the necessary equipment, such as a podium or whiteboard, been placed in the hearing room?

You should also think about the needs of your team: Are the team members aware that they will need to bring to the hearing venue their IDs and/or security passes? Do you have the phone numbers of the witnesses and experts, in case it becomes necessary to contact them urgently? Will there be sufficient office supplies or snacks in the hotel conference room?

It is advisable and good practice to have a checklist that sets out all issues that you should consider in advance. If it is your first hearing, speak with your more experienced colleagues, including paralegals, and ask for their advice.

4. Get to know the lawyers you will be assisting

Everyone is different. To assist partners and senior associates effectively, you must get to know them and their expectations.

Ask your seniors directly and/or talk with your fellow associates. Some seniors are good at cooperating with others; others will want to work primarily on their own. Some will know the case well, whereas others will "parachute in" for the hearing (and will need significant help with the preparations). One partner will do his or her prep work weeks in advance; another, only a few days before the hearing. Some need their sleep and will check out at midnight; others will work seemingly non-stop. One partner may ask for a full cross-examination outline, whereas another will only scribble down a list of the key exhibits.

Depending on who you are dealing with, adjust your approach; find different ways of being helpful; and be respectful of people's peculiarities (which may become more pronounced due to stress!).



5. Be proactive with respect to the examination of witnesses

Cross-examination of witnesses is a key part of any merits hearing. While it is usually the partners, counsel, or senior associates who will conduct the cross-examination, this does not mean that, as a junior associate, you have no role to play. Be proactive and ask your senior colleagues if you can help them prepare the cross-examination outlines—after all, you already know the record and are very well positioned to assist.

If your colleagues ask you to draft the initial cross-examination outline, you should first consider your side’s “case theory” and identify the aspects of the case to which the witness’s testimony is relevant. Before you put pen to paper, think about the objectives that the cross-examination should achieve: Which aspects of the witness statement (if they are taken to be true) are most problematic to your case? What admissions would be most valuable? Are there grounds for discrediting the witness? Resist the temptation to suggest questions about each “weak point” that you have identified in the witness’s testimony; instead, consider if the issue is truly relevant to the dispute.

In preparation for the hearing, consider both procedural and substantive issues. Double-check the procedural orders for any specific rules that apply to cross-examination of witnesses. Review the witness statement multiple times. Think about any issues on which the witness could reasonably be expected to testify, but which are not addressed in the witness statement. If the witness statement was submitted in a foreign language with a translation into the language of the proceeding, ensure that the translation is accurate. Review all the documents that the witness cites, and check whether they fully support the witness’s testimony. Search across all case exhibits for references to the witness’s name. Google his or her name, and see whether you can find potentially “impeaching” material.

Once you have a cross-examination script, help your senior colleagues to prepare the cross-examination bundle: Gather all the relevant documents, prepare a chronological index, and highlight all relevant passages. Check, double-check, and triple-check that everything is in order.

In addition to assisting with the cross-examination of the opposing party’s witnesses, volunteer also to help with the preparation of “your own” witnesses. Ask the partners if you can talk the witness through the hearing process, prepare and conduct a mock cross-examination, and be the witness’s point of contact in the days leading up to the hearing. (The extent to which you can help prepare a witness will depend on the professional rules that apply in your jurisdiction.) Finally, bear in mind that the witness will likely be nervous and have many questions. Provide him or her with reassurance, but also ensure that the witness does the necessary preparations. After the cross-examination, take a moment to thank the witness and offer a quick debrief.

6. Be observant

As Aaron Burr in “Hamilton” said, the opportunity to “be in the room where it happens” is one you don’t want to miss. As a junior associate, you can be the extra pair of eyes and ears that will allow



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your more senior colleagues to focus on the key tasks at hand, while knowing that someone is watching and listening to what is happening in the hearing room.

What does being observant mean in practice? First, it means keeping an eye on the tribunal. Watch the tribunal members' body language and facial reactions. Does the president appear to be listening? Are the arbitrators looking at the right document? Do they seem to be marking up and highlighting the key documents? Is the tribunal losing attention towards the end of a long hearing day? Take a note of these things and, if necessary, immediately alert your colleagues of major issues (such the tribunal president being visibly displeased with a particular line of argument). Otherwise, share your observations later, particularly if you think that they may influence the hearing strategy (such as, for example, the contents of the closing statements).

You should also try to watch the opposing counsel's reactions. Did the lawyers on the other side appear nervous when a particular issue was first mentioned? Did the lead opposing counsel start frantically scribbling notes during a certain part of a witness's hearing testimony? Is a junior member of the opposing counsel's team getting ready to hand out copies of a document? All this information can be useful to the rest of your team. At the same time, bear in mind that the opposing counsel may also be observing your own team's reactions. Try to maintain a poker face and do not, for example, display disappointment when your witness makes an unhelpful concession.

Keep also an eye on your own client representatives. Do they have a suggestion for how to respond to the tribunal president's question? Have they identified a factual inaccuracy in what the other side has said? Do they generally seem happy with how the hearing is going? Make sure to make the lead counsel aware of any major issues raised by the client. At the same time, avoid burdening your seniors with client comments that you consider non-essential and potentially distracting (but be diplomatic, and make sure to thank the client representatives for their suggestions).

"Being in the room" also entails:

- Closely watching the live transcript and identifying any major mistakes that the court reporter may have made. While many mistakes can be corrected after the hearing, some issues may have to be fixed immediately—so that, for example, an excerpt from the (corrected) transcript can be shown to the tribunal during the closing statements;
- Ensuring the accuracy of any live interpretation. If you are fluent in both the source and target languages, you may be asked to follow closely the live interpretation and flag any major mistakes that need correcting (because, for example, they may distort the tribunal's understanding of a witness's hearing testimony);
- Watching the clock. Has the opposing party exceeded the agreed time limit for their opening presentation? Is your senior aware of how much of the internally allocated time he or she has used up on a cross-examination? Are the "chess clock" calculations of the tribunal secretary accurate?



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- Reviewing the transcript: Following each day of the hearing, consider reviewing the hearing transcript, noting such things as (i) any items requiring follow up with the Tribunal; (ii) any issues that should be discussed with witnesses (subject to the sequestration rules); and (iii) useful concessions and other points for inclusion in the closing statement or post-hearing brief.

All these tasks require focus and attention, as well as prior coordination with the senior members of the team. They are the perfect illustration of ways in which a junior associate can significantly contribute to the overall success of the case.

7. Appreciate the importance of acting as the second chair

A hearing looks very different from the perspective of the “first chair”. The “first chair” is the lawyer playing the lead role during a particular phase of a hearing: the partner delivering the opening statement, the counsel or senior associate conducting a cross-examination, or the QC responding to the tribunal’s questions. (The name derives from the fact that such an attorney will typically sit in the front row, in the chair closest to the tribunal.)

The role of the first chair requires total concentration on the key task at hand. At the same time, the first chair must multitask, adapting to an evolving situation and (ideally) keeping an eye on everything that is happening in the hearing room, including the ever-ticking clock. It is a near-impossible task for a single person to do.

This is where the “second chair” comes in. The “second chair” is the lawyer who sits next to the first chair and assists with both the pre-hearing preparations and the actual delivery of oral submissions or examination of witnesses. The role can, sometimes, be played by more junior members of the counsel team, including junior associates.

If you have been asked to act as the second chair, take the challenge seriously. First, ask the first chair how much and what kind of assistance he or she will require. As mentioned (at point **4** above), everyone is different, and different first chairs will have different expectations.

Second, familiarise yourself with the relevant parts of the record, prepare your own bundle of key documents, and note down useful information. Consider sharing with the first chair whatever information you think he or she will find useful.

Third, reflect on what you know, and try to anticipate what might happen at the hearing. What questions might the tribunal ask? What will the opposing counsel say? Which exhibits could become relevant during a witness’s testimony? By considering these issues in advance, and preparing potential responses, you will position yourself well for the role of the second chair.

Fourth, complete your final, pre-hearing preparations: save the case file to your computer, print out the key documents, stock up on post-it notes, and even fill the first chair’s water glass.



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Finally, during the hearing itself, be ready to assist with anything and everything that might be needed: have on hand the documents to which the first chair may want to refer; be ready to filter through suggestions received from other team members; ensure that the speaker has clicked through to the correct slide; and keep an eye on the remaining time.

8. Be conscious of additional challenges posed by virtual hearings

Virtual hearings are a relatively new phenomenon. While it has for a long time been relatively common to conduct a procedural call or a brief “oral submissions only” session by video, it is only during the COVID-19 era that it has become popular to conduct over a videoconferencing platform full merits hearings (involving the examination of witnesses and experts).

Because virtual hearings are new, everyone is still learning how best to approach them. As a junior, you are well positioned to anticipate potential technical problems, advise on IT issues (the videoconferencing platform, technical setup, software issues, etc.), and propose specific procedural solutions in the draft hearing protocol.

The key to success in any virtual hearing is testing: check if the speakers’ audio is clear; ensure that the internet connection is fast enough; make sure that the entire team knows how to use the videoconferencing platform; and familiarise yourself with the document-sharing options. Test everything in advance. Organise at least one test session with all of the expected participants (tribunal, counsel, witnesses, experts, court reporters, interpreters, etc.)—or, at a minimum, with at least one person joining from all of the anticipated hearing locations.

Ensure you have the right equipment: a sufficient number of monitors, a good-quality headset, a stable internet connection, and — particularly if you anticipate appearing on camera — a high-resolution webcam and sufficient lighting.

Consider in advance internal communications: particularly if each team member is joining from a different location, it will be essential to have an effective way of exchanging messages. Agree on the appropriate communication tool (such as WhatsApp), consider setting up a “breakout room”, and collect everyone’s phone numbers.

If you are asked to display (“share”) electronic documents, take this role seriously. Review the documents in advance (make sure that they are stamped and consecutively page numbered) and, if possible, ask your seniors for specific document-displaying directions (“when I say X, open Exhibit A; then, scroll to page Y; and zoom in on paragraph Z”). Bear in mind that documents will appear differently on different devices, and you will not be able to see what others are seeing. If using Zoom, make sure to “share” the specific document, rather than your entire screen.

Virtual hearings pose some unique challenges. It is, for example, more difficult to feel the same level of adrenaline as during in-person hearings and, consequently, to perform equally well. Even if your camera is switched off and you start experiencing the “Zoom fatigue,” try to stay alert throughout the hearing and be on the lookout for opportunities to help.



9. Manage your stress and energy levels

Hearings (and the preceding preparations) can be stressful and exhausting. Expect this, and prepare for it in advance. Try to minimise any non-case-related disruptions by dealing in advance with any private errands, setting your out-of-office message, and even (if you find it useful) preparing a list of what you will wear on each day of the hearing. Once the hearing starts, it will require 100% of your attention.

Bear in mind that while the hearing days will typically coincide with the normal business hours, the evenings and nights will be spent on preparations for the next day, while early mornings may involve last-minute checks and printing. Be prepared for this and manage your energy levels. Consider dividing the work with other associates, skip non-essential parts of the hearing in order to get some rest, and don't forget to sleep! You will no doubt need to stretch yourself, but know your limits. You will be of little use to anyone if you over-work yourself to the point of complete exhaustion.

While this may be difficult at times, try to stay positive, and do not let fatigue and stress affect you. On the contrary, try to show a positive attitude and even humour. Your colleagues will appreciate it.

Finally, do not plan anything for immediately after the hearing. You will need plenty of rest!

10. Learn from your experience

Treat each hearing as an opportunity to learn and develop as a lawyer. If possible, try to note down throughout the hearing anything new that you have learned. Such reflections can vary from minor, technical issues (for example, "in the future, let's ensure we apply consecutive page numbering to all of our exhibits") to big-picture, strategic lessons (for example, "we gained an advantage by diligently using our allocated time").

Once the curtain has fallen—the closing statements have been delivered, hands have been shaken, and the hearing room has emptied—try to reflect on the experience and debrief with your team. What surprised you? What went particularly well? What could have been done better?

Remember also to ask your colleagues for feedback on your performance and suggestions for how you can perform better at the next hearing.

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BONUS: Become a better advocate by serving as a tribunal secretary

If you are lucky, you may be asked to assist an arbitral tribunal as a "tribunal secretary"—a person whose role is to help with the administrative aspects of the case. While it is not every day that junior associates get to act as tribunal secretaries, you may receive such an opportunity if, for example,



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a partner in your law firm is appointed as the president of a tribunal. If this happens, treat the experience as a learning opportunity, which will allow you to become a better arbitration lawyer.

Your role as a tribunal secretary does not start at the hearing. You have probably been heavily involved in helping the tribunal prepare for the hearing. You may have, for example, drafted the tentative hearing schedule, organised the pre-hearing conference call, or compiled a list of the key documents.

The parties will normally take care of most organisational issues and logistics, but you may also be asked to assist with some practical preparations. Once the hearing starts, make sure to follow closely proceedings, keep an eye on the time, take notes, and assist the arbitral tribunal with locating documents. You can help the tribunal run the hearing in an efficient manner by, for example, acting as a liaison person between the parties and the tribunal on logistical issues, calling participants back to the hearing room at the end of breaks, or assisting the court reporter with identifying any proper names that he or she may have missed.

You may also be asked to help with more substantive tasks, such as assisting the tribunal with its deliberations, summarising submissions (including oral pleadings), conducting research and reviewing authorities, or preparing draft versions of procedural correspondence, procedural orders, and even parts of awards. Such tasks—particularly the last one—would normally have been entrusted to the tribunal secretary with the parties' agreement. To perform these tasks effectively, you will need to maintain focus and stay attentive throughout hearing.

During the hearing and subsequent tribunal deliberations, you can bring significant “added value” in your role as a tribunal secretary (bearing in mind that tribunal secretaries should not engage in any decision-making). Your opportunity to shine may come in the form of a procedural issue about which you remind the tribunal at the end of a long hearing day, or the first draft of a procedural order, which you quickly prepare on the tribunal's instructions during a lunch break. You may even bring the arbitrators' attention to details, arguments, and evidence that they might have missed in the mass of materials before them.

Finally, treat the experience of acting as a tribunal secretary as an opportunity to learn and develop as a lawyer. Observe how the tribunal deals with *ad hoc* procedural issues; compare the advocacy styles of different attorneys and assimilate the most effective techniques; watch closely the tribunal members' reactions to the parties' arguments; and observe how the tribunal deliberates and reaches its decisions. The experience of seeing a hearing from the perspective of the tribunal will help you become a better lawyer, and a more effective advocate.