American Bar Association
Forum on Construction Law

Winning the Battle:
Strategic Considerations for the Preliminary Hearing Conference

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Presented at the 2026 Midwinter Meeting
February 4-6, 2026

The Ritz-Carlton, Laguna Niguel, Dana Point, CA

I. Introduction

In modern construction arbitration, the preliminary hearing conference—often abbreviated as the "PHC"—marks the first true battleground in the dispute resolution process. While some counsel treat it as a procedural formality, sophisticated advocates recognize it as a critical inflection point that shapes the tempo, tone, and trajectory of the entire arbitration. The preliminary hearing provides counsel with the opportunity to influence case management procedures, discovery parameters, presentation of witnesses, and the evidentiary framework that will ultimately govern the hearing on the merits. In effect, it is the forum in which strategy becomes procedure.

The PHC serves multiple purposes under institutional rules such as those of the American Arbitration Association (AAA) and the AAA International Centre for Dispute Resolution (ICDR). Rule R-23 of the AAA Construction Industry Arbitration Rules effective as of March 1, 2024 (CIAR) authorizes the arbitrator to convene a preliminary hearing to address all matters necessary to the efficient conduct of the case—including scheduling, exchange of information, stipulations, and procedural orders.[1] The CIAR's preliminary hearing checklists provide similar guidelines.[2] The PHC thus provides a structured mechanism to organize the arbitration and it also creates the first substantive opportunity for counsel to advocate persuasively regarding procedure. Decisions made at this early stage frequently determine the scope of discovery, the number and sequence of witnesses, the use of experts, and even the overall cost and duration of the proceeding.

From a strategic standpoint, the PHC operates as both a coordination exercise and a persuasion exercise. Counsel are not merely organizing logistics—they are shaping the architecture of the dispute. The most successful advocates use the PHC to:

- frame the case in a way that highlights procedural efficiency and fairness;

- persuade the tribunal to adopt procedures advantageous to their client's position; and
- narrow the issues in dispute and focus the case management plan on matters most favorable to their theory of the case.

In construction arbitrations, these objectives are magnified by the inherent complexity of the disputes. Construction projects often involve multiple contracts, overlapping jurisdictions, voluminous documentation, and expert-heavy factual issues. A well-structured preliminary hearing can streamline these complexities, while a poorly managed one can result in procedural chaos and escalating costs. Arbitrators and counsel alike must therefore approach the PHC with deliberation and foresight, ensuring that procedural tools—such as consolidation, discovery limits, expert sequencing, and interpretation protocols—are deployed thoughtfully rather than reflexively.

The sections that follow examine eleven key procedural topics frequently addressed during a preliminary hearing conference. Each section explores the strategic implications of these issues, the discretion afforded to arbitrators under prevailing rules, and best practices for counsel seeking to "win" the procedural battle that precedes the evidentiary one. Together, they demonstrate that the preliminary hearing is not a bureaucratic hurdle, but rather a decisive arena where procedure and advocacy converge to shape the outcome of construction arbitration.

II. Consolidation of Proceedings

Few procedural questions test an arbitrator's discretion at the preliminary hearing stage more sharply than a request for consolidation. In construction disputes, the issue arises frequently: a single project may spawn multiple arbitrations involving owners, general contractors, and subcontractors, each governed by distinct but related contracts. The parties' ability—or inability—to consolidate these proceedings can fundamentally affect the efficiency, consistency, and fairness of the arbitration process.

Under the CIAR, consolidation is addressed in Rule R-7(a). The rule empowers the AAA or the tribunal to consolidate arbitrations when (1) the parties have agreed to such consolidation or (2) the disputes arise out of the same transaction or series of transactions, and there are common questions of law or fact creating the potential for inconsistent awards.[3] The discretion to consolidate, however, is tempered by due process concerns: each party must have a fair opportunity to be heard, and non-signatories cannot be compelled into consolidated proceedings without consent.[4]

At the PHC, the request for consolidation often comes before the tribunal in the form of a motion or procedural proposal. The moving party typically emphasizes judicial economy—arguing that consolidation avoids duplicative proceedings, inconsistent findings, and conflicting awards. The opposing party, by contrast, may stress the sanctity of contractual consent and procedural fairness, contending that consolidation alters the arbitration agreement and imposes undue prejudice. The arbitrator must navigate these competing considerations while respecting both the parties' autonomy and the institutional framework.

Strategically, counsel should understand that the choice to request consolidation, or object to a request for consolidation, is not merely a procedural question but will likely result in substantive consequences. Consolidation can influence the composition of the tribunal, the scope of discovery, and even the evidentiary record. For example, a contractor seeking to align disputes with multiple subcontractors may prefer consolidation to ensure consistent findings on project-wide issues such as scheduling or design changes. Conversely, an owner may resist consolidation to preserve separate proceedings that allow more focused arguments on each subcontractor's unique obligations.

When opposing consolidation, advocates can emphasize practical concerns that resonate with arbitrators—such as logistical complexity, differing arbitration clauses, or incompatible procedural timetables. Tribunals are often receptive to arguments that consolidation may create unmanageable proceedings or dilute individual party participation. Even when consolidation is permissible, counsel should consider whether partial consolidation (for example, joint hearings on shared factual issues) or coordination (parallel but distinct arbitrations with shared evidence) may achieve the efficiencies sought without compromising procedural fairness.

In managing consolidation requests, arbitrators frequently order targeted briefing and short oral argument at the preliminary hearing. This approach allows each side to clarify the factual overlap between cases and to address the potential impact on party rights. A well-prepared advocate can use this opportunity to educate the tribunal about the project's structure and to frame consolidation as either a vehicle for efficiency or a threat to due process.

Ultimately, the decision to consolidate turns on a balance between efficiency and fairness—the twin pillars of arbitral procedure. The tribunal must weigh the risk of inconsistent outcomes against the potential for delay, complexity, and prejudice. Whether granted or denied, the consolidation decision at the preliminary hearing stage often dictates the procedural path of the arbitration and can significantly influence its ultimate resolution.

III. Use of Witness Statements

Another critical issue for discussion at the PHC is the use of written witness statements in lieu of direct oral testimony. The issue sits at the intersection of efficiency and credibility—two values that arbitral tribunals must continuously balance. Written statements can significantly streamline hearings by replacing lengthy direct examinations with concise pre-filed narratives. Yet

they also raise concerns regarding authenticity, spontaneity, and the tribunal's ability to assess witness demeanor.

Under the CIAR, the tribunal has broad discretion to determine how witness testimony will be presented. Rule R-35(b) provides that "[t]he arbitrator shall determine the admissibility, relevance, materiality, and weight of the evidence."[5] This discretion extends to the format of evidentiary presentation, allowing arbitrators to order or accept written witness statements in appropriate circumstances. The practice has become increasingly common in complex construction cases, where technical testimony can be more efficiently conveyed in written form, particularly for expert or factual witnesses whose evidence is largely documentary.

A. *Efficiency and Organization*

From a practical standpoint, written witness statements promote procedural efficiency and case organization. They allow the tribunal and opposing counsel to review testimony in advance, narrow areas of disagreement, and focus cross-examination on points of contention. Counsel can use them to present a coherent narrative that integrates documents and expert analysis, reducing the need for lengthy oral explanations. In large construction arbitrations, where witness testimony may span hundreds of pages, written statements enable the tribunal to prepare in advance and maintain continuity throughout multi-week hearings.

B. *Credibility and Cross-Examination*

The efficiency benefits, however, come at a potential cost to credibility assessment. Oral testimony allows the tribunal to observe tone, demeanor, and spontaneity—factors that often inform findings of fact. Critics of written statements argue that they can sanitize testimony, insulating witnesses from the pressure of live questioning and reducing opportunities for the tribunal to test reliability.[6] For this reason, many arbitrators adopt hybrid approaches: written statements serve as the equivalent of direct examination, but the witness must still appear for live

cross-examination. This compromise preserves efficiency while maintaining the integrity of the adversarial process.

C. *Strategic Use by Counsel*

For counsel, the decision to advocate for written statements must be considered in the overall strategic presentation of one's case. Claimants, by contrast, may favor live direct testimony to enhance the tribunal's engagement with their witnesses and to humanize complex factual scenarios. Regardless of preference, advocates should prepare written statements with care, ensuring they read naturally and anticipate potential cross-examination points.

Tribunals also consider whether the witnesses are fact or expert witnesses. Expert testimony, particularly in technical fields such as engineering delay analysis or cost quantification, often lends itself to written presentation supported by exhibits and charts. By contrast, fact witnesses whose credibility is central—such as project managers or site supervisors—may be more effective in live testimony.

D. *Procedural Planning at the Preliminary Hearing*

During the PHC, the tribunal and parties can establish a clear procedural framework for the use of witness statements. Key decisions include deadlines for exchange, requirements for sworn declarations, and the sequence of live cross-examinations. Counsel should also clarify whether rebuttal statements will be permitted and under what conditions. By setting these parameters early, the tribunal avoids later disputes over admissibility and timing, thereby ensuring smoother progression toward the merits hearing.

Ultimately, the use of written witness statements exemplifies the procedural flexibility that defines arbitration. Whether adopted in full or in part, this approach can significantly affect both efficiency and fairness.

IV. Scope of Depositions

Discovery in arbitration—particularly depositions—remains one of the most contested aspects of case management in construction disputes. The preliminary hearing is where the scope of discovery is defined, and with it, the efficiency, cost, and proportionality of the entire proceeding. Although depositions are common in U.S. litigation, they occupy a much narrower role in arbitration, where efficiency and limited disclosure are foundational principles. The CIAR provide the framework, but the tribunal's discretion—and the parties' advocacy at the preliminary hearing—ultimately determines how discovery unfolds.

A. *Discretionary Nature of Depositions*

The AAA Rules do not create an automatic right to depositions. Rather, it grants the arbitrator authority to allow them if necessary to achieve fairness and efficiency. This discretion reflects arbitration's hybrid nature: while rooted in party autonomy, it also aspires to procedural economy. Arbitrators thus approach depositions as exceptional tools, appropriate only when justified by the complexity or importance of the issues.

In construction cases, depositions may be warranted where documentary evidence alone is insufficient to clarify technical or managerial facts. For example, a project manager's oral testimony may illuminate ambiguous daily logs, or an engineer's deposition may assist in narrowing disputed causation theories before the hearing. Still, arbitrators remain cautious about authorizing extensive depositions, recognizing that they can replicate the cost and delay of litigation.

B. *Competing Party Perspectives*

During the preliminary hearing, parties often present opposing views on the need for depositions. Claimants may request broad access, arguing that large-scale construction projects produce extensive documentation and numerous participants whose testimony must be explored

to prepare an effective case. Respondents, by contrast, typically advocate for narrow limitations, stressing arbitration's purpose of avoiding litigation-style discovery.

Each position has strategic underpinnings. Parties seeking expansive discovery may be pursuing evidentiary advantage or signaling to the tribunal that transparency supports their claims. Those advocating limits may seek to control costs or to maintain procedural discipline. The tribunal's challenge is to ensure that discovery remains proportional to the dispute's value and complexity, avoiding the "Americanization" of arbitration through excessive pre-hearing practice.[7]

C. *Proportionality and Procedural Efficiency*

The concept of proportionality—long recognized in both litigation and arbitration—serves as a guiding principle. Arbitrators often evaluate discovery requests through four lenses: relevance, materiality, burden, and fairness.[8] A deposition request that imposes disproportionate time and expense relative to the amount in controversy or the significance of the issues is likely to be curtailed. Similarly, arbitrators may reject duplicative depositions when witness statements or documents already address the relevant topics.

In complex multi-party disputes, proportionality analysis also considers the cumulative effect of discovery. Tribunals may, for instance, cap the total number of depositions per side, limit their duration to a set number of hours, or restrict questioning to pre-identified subject areas and/or corporate representative depositions. Such limitations promote predictability and discipline, ensuring that discovery serves its intended function: preparation, not attrition.

D. *Practical Frameworks for Managing Depositions*

Experienced arbitrators often implement practical frameworks to manage depositions efficiently. These may include:

- requiring party agreement or tribunal approval before any deposition is taken;

- limiting each deposition to a defined duration (e.g., four hours);
- restricting the number of depositions to key fact witnesses;
- permitting depositions by remote means where cost or geography warrants; and
- directing that transcripts, not recordings, serve as the official record unless otherwise agreed.

Counsel should use the PHC to propose balanced discovery frameworks that demonstrate proportionality and good faith. Tribunals appreciate advocates who recognize that streamlined discovery benefits all parties. Moreover, counsel who appear pragmatic and cooperative at this stage build credibility that can influence later procedural rulings.

V. Site Visit Protocols

In construction arbitration, disputes often revolve around the physical reality of a project: workmanship, sequencing, or alleged defects that are best understood through direct observation. Consequently, one of the recurring questions at the preliminary hearing is whether the tribunal should conduct a site visit. The issue can appear deceptively simple but carries significant procedural, logistical, and evidentiary implications. The manner in which the parties and tribunal address site visits during the PHC can influence both efficiency and fairness in the subsequent proceedings.

A. *Purpose and Value of Site Visits*

Site visits can in certain instances allow the tribunal to visualize the subject matter of the dispute and contextualize the testimony and exhibits that will later be presented. In cases involving structural integrity, complex mechanical systems, or large-scale construction sequencing, visual inspection may enhance comprehension in ways that documents cannot. The AAA recognizes the tribunal's discretion to conduct inspections or investigations relevant to the dispute, provided the parties have an opportunity to be present and comment on the results.[9]

When thoughtfully structured, a site visit can facilitate understanding, clarify technical issues, and improve evidentiary accuracy. However, it must be approached with procedural sensitivity. Tribunals must ensure that no party gains an improper advantage, that communications remain transparent, and that observations are properly documented for the record.

B. *Strategic Divergences Between the Parties*

At the preliminary hearing, parties often diverge on whether a site visit is necessary. A party seeking to highlight the visual impact of alleged defects will typically advocate for an inspection, framing it as indispensable to a fair adjudication. The opposing party, meanwhile, may question its utility, citing cost, safety, scheduling, or the risk of the tribunal forming premature impressions.

These positions frequently correspond to broader case themes. Claimants alleging visible defects—such as cracked concrete, water intrusion, or misalignment—tend to view the site as a silent witness that supports their claims. Respondents, especially those emphasizing contractual defenses or design intent, may prefer to rely on electronic recordation of the site (via video, photographs, or demonstrative depictions, for example) or expert evidence that can be more precisely controlled. Both positions are legitimate, and the tribunal must balance them with care.

C. *Logistical and Procedural Considerations*

If a site visit is contemplated, the preliminary hearing is the appropriate forum to address logistics. Key questions include:

1. Who will attend (tribunal, parties, counsel, experts, and possibly witnesses)?
2. When will the site visit occur?
3. How will neutrality and safety be maintained?
4. What documentation—such as photographs, videos, or diagrams—will be created?
5. How will observations be recorded for the record?

The tribunal may issue a procedural order outlining the parameters of the visit, including a schedule, conduct guidelines, and protocols for note-taking or recording. Typically, the order will prohibit ex parte communication and clarify that no party statements during the visit constitute evidence unless later introduced formally.[10]

Arbitrators also must ensure accessibility and fairness. In cross-border or remote arbitrations, physical visits may be impractical. In such cases, virtual site visits—using video walk-throughs or drone footage—offer a viable alternative. While these methods cannot fully replicate in-person observation, they can provide sufficient context when properly authenticated.

D. *Evidentiary Impact*

A critical consideration is the evidentiary status of observations made during a site visit. The tribunal's impressions form part of its understanding of the facts, but the visit itself is not "evidence" in the traditional sense. For this reason, tribunals often issue statements clarifying that any findings must be supported by testimony or documentary proof. Counsel should anticipate this distinction and ensure that all key observations are later tied to admissible evidence such as expert reports or photographs marked as exhibits.

E. Balancing Efficiency and Fairness

The decision to conduct a site visit exemplifies the balance between efficiency and fairness that defines arbitration. A well-managed visit can shorten hearings by reducing the need for lengthy explanations and enhancing the tribunal's understanding of technical matters. Conversely, an unnecessary or poorly controlled visit can increase costs and create procedural disputes. Counsel should therefore evaluate whether a visit meaningfully advances their client's case or merely adds spectacle.

Efficiency also plays a major role in when the site visit should occur. Some prefer that it take place prior to the commencement of the evidentiary hearing—either right before it starts or

some days prior to its commencement. This decision can be impacted by the time and cost constraints of having a site visit a week or so before the hearing starts, adjourning and then re-convening back for the evidentiary hearing. Thus a site visit right before the hearing commences may make more sense logistically. Others prefer that the arbitration panel hear some of the testimony so they have a better understanding of what they are observing in connection with the importance of their observations on the issues in dispute. This means that the panel may receive a day or more of testimony and then attend to the site. A site visit can also occur toward the end of the evidentiary hearing when the testimony is more fully developed and the panel is cognizant of the arguments of both parties on issues that have been heard. It is important a discussion of when the site visit is to occur be addressed at the PHC.

Arbitrators should also consider whether alternative forms of evidence—such as detailed photographic surveys, time-lapse videos, or 3D models, for example—may accomplish the same purpose more efficiently. Modern technology increasingly allows for "virtual inspections" that preserve accuracy without logistical complexity. When combined with expert explanation, these methods can provide the tribunal with a reliable factual foundation.

Ultimately, the PHC offers the best opportunity to resolve site-visit questions in advance, minimizing later disagreement and ensuring that any inspection proceeds under clear, fair, and transparent conditions. A well-structured site visit can transform the tribunal's understanding of the project; a poorly planned one can undermine confidence in the process. As with many aspects of construction arbitration, success depends less on whether the tool is used than on how thoughtfully it is applied.

VI. Discovery Protocols and Translation Challenges

Discovery in construction arbitration is a perennial source of tension between parties seeking full transparency and those emphasizing procedural efficiency. The preliminary hearing is where that tension is negotiated and transformed into concrete procedural rules. This negotiation becomes even more complex in international or multilingual disputes where document production and translation burdens can quickly escalate. The PHC thus serves as the tribunal's primary forum for establishing a discovery framework that balances thoroughness, cost, and fairness while managing linguistic and logistical challenges.

A. *The Framework for Discovery*

Unlike litigation, and as noted above, arbitration does not grant parties an automatic right to broad discovery. The CIAR provide that the arbitrator shall "manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute."[11]Discovery is, therefore, a matter of discretion guided by proportionality and relevance. Tribunals often turn to the AAA's *eDiscovery Considerations for Construction Arbitrations* and the International Bar Association (IBA) *Rules on the Taking of Evidence* for benchmarks on scope and methodology.

At the PHC, the tribunal typically seeks to establish protocols governing the categories of discoverable materials, custodians, time frames, and the production format. Counsel must be prepared to articulate why each requested category is material to the case's outcome. Arbitrators are increasingly receptive to tiered or phased discovery—initial exchanges of key documents followed by limited supplemental production—so that discovery costs remain proportionate to the dispute's value.

B. *Balancing Efficiency and Materiality*

Proportionality is the guiding principle in managing discovery requests. Arbitrators evaluate whether the probative value of requested documents justifies the time and expense required to produce them. Counsel seeking extensive discovery bear the burden of demonstrating both materiality and necessity. Tribunals may also require cost-benefit analyses that ask parties to explain how the requested data will meaningfully advance their case.

Counsel should approach the preliminary hearing as an opportunity to shape discovery strategically. Advocates who propose structured, reasonable discovery plans—rather than open-ended demands—gain credibility with the tribunal. For example, proposing that discovery be limited to specific document categories (e.g., delay logs, change orders, and correspondence concerning specific design packages) can show proportionality while preserving access to critical information.

C. *Electronic Discovery and Emerging Technologies*

With the digitization of construction project management, electronic discovery (or "eDiscovery") now dominates the exchange of information. Project data may span thousands of emails, Building Information Modeling (BIM) files, and digital daily reports. The AAA's *eDiscovery Considerations for Arbitration* encourage parties to limit electronic searches to key custodians and relevant time frames, employ keyword filtering, and utilize agreed metadata formats.[12]

At the preliminary hearing, parties should discuss practical issues such as the use of searchable databases, native file formats, and document exchange platforms. Clear protocols reduce later disputes about production completeness and/or format. When both parties adopt a collaborative stance on eDiscovery, the tribunal can avoid burdensome motions practice and focus on substantive issues.

In addition, if the parties do not raise and agree to "litigation holds" (if not already initiated by the parties) and/or claw back agreements, the tribunal should raise these matters. Arbitration should not devolve into a series of prolonged discovery disputes between the parties as to whether documents that were privileged and inadvertently produced constitute a waiver, whether spoliation has occurred, or other battle royales akin to those in state and federal court on these topics.

D. *Translation Challenges*

In cross-border disputes, translation issues can magnify discovery burdens. Construction projects frequently involve multilingual teams and mixed documentation—specifications in English, correspondence in Japanese or German, and technical manuals in yet another language. The preliminary hearing provides an essential opportunity to establish translation protocols that balance accuracy and cost.

The tribunal must address several key questions:

1. Which documents must be translated and into which language?
2. Who bears the cost of translation?
3. Will machine translation be acceptable for non-critical documents?
4. What certification or verification will be required for official translations?

Arbitrators often direct that only key documents—those expected to be relied upon in submissions or hearings—must be translated. Secondary materials can remain in their original language, provided each party supplies summaries or identifies portions to be relied upon. Some tribunals also adopt cost-sharing models, requiring each party to bear translation costs for documents it submits, while joint translation costs are divided equally.

E. *Strategic Approaches to Managing Translation*

Counsel should view translation not merely as a logistical burden but as a persuasive tool. Well-executed translations can convey precision and professionalism; poorly executed ones can

create ambiguity or even undermine credibility. Advocates should vet translators with technical expertise in construction terminology to ensure that the translated record accurately reflects engineering and contractual nuances.

Furthermore, counsel may propose pragmatic solutions, such as bilingual glossaries or agreed translation memory tools, to standardize terminology across submissions. Where feasible, tribunals may allow the use of bilingual documents, having the original and translated versions side by side for clarity. These practices not only streamline proceedings but also enhance the tribunal's confidence in the accuracy of the record.

F. *Phased Discovery and Sampling Techniques*

To manage both production volume and translation costs, arbitrators may employ phased discovery or representative sampling. In phased discovery, the tribunal orders an initial exchange of limited materials, assesses their relevance, and authorizes additional production only if necessary. Sampling, by contrast, allows the tribunal to review a subset of documents to determine whether full production is warranted. Both techniques align with the principles of proportionality and efficiency that underpin arbitration.

VII. Expert Testimony Format

Expert evidence is often the linchpin of construction arbitration. Disputes over delay, productivity, quantum, or design invariably depend on technical analysis that exceeds the tribunal's expertise. Consequently, the preliminary hearing becomes the appropriate—and critical—forum to determine how expert testimony will be presented. The decisions made at this stage can substantially influence the clarity, efficiency, and perceived fairness of the proceedings.

A. *The Tribunal's Discretion Over Expert Procedure*

Arbitrators possess broad discretion to determine the format and sequencing of expert testimony. Rule R-34(b) of the CIAR grants the tribunal authority to control "the admissibility,

relevance, materiality, and weight of the evidence offered," which necessarily includes decisions regarding how experts will testify.[13] The tribunal may adopt traditional sequential examination, concurrent presentation ("hot-tubbing"), or hybrid methods tailored to the dispute's complexity.

The choice of format is rarely neutral. Each structure shapes the way expert evidence is understood and weighed. Counsel should therefore approach this procedural issue as an advocacy opportunity—framing the format that best supports their theory of the case as the one most consistent with efficiency and fairness.

B. *Traditional Sequential Testimony*

The traditional model—where each party presents its expert(s) sequentially followed by cross-examination—remains the default in many arbitrations. It provides counsel with greater control over presentation and allows experts to testify within the framework of their party's case narrative. Sequential testimony also facilitates focused cross-examination and allows for rebuttal reports to address opposing opinions.

However, sequential testimony can be time-consuming and duplicative. When multiple experts opine on overlapping issues, their testimony may cover the same technical ground repeatedly. This redundancy can prolong hearings and risk confusing rather than clarifying technical distinctions.

C. *Concurrent Testimony ("Hot-Tubbing")*

Concurrent expert testimony—informally known as "hot-tubbing"—has gained traction in international arbitration and, increasingly, in domestic construction disputes. Under this model, opposing experts testify together before the tribunal, responding to questions from the arbitrators and from one another in real time. This approach can highlight points of agreement and crystallize the core issues in dispute.

The advantages are clear: it promotes efficiency, reduces duplication, and allows the tribunal to compare expert reasoning side-by-side. Because experts address the same question sequentially, the tribunal can directly observe differences in methodology, assumptions, and credibility. Moreover, the format encourages a collaborative rather than adversarial tone, which can enhance technical understanding.

Nevertheless, concurrent testimony also carries risks. It may reduce counsel's ability to control the flow of questioning, potentially exposing experts to unfamiliar dynamics. Strong-willed experts may dominate the discussion, thus influencing the tribunal's perception disproportionately. For that reason, many arbitrators adopt modified concurrent formats that balance spontaneity with structure—for example, alternating questions between the tribunal and counsel, or dividing the discussion by topic.

D. *Hybrid and Comparative Models*

Hybrid models combine the strengths of both approaches. A tribunal might, for instance, receive written expert statements in advance followed by short sequential direct examinations and a moderated joint session. This format allows the tribunal to verify key facts while still fostering direct comparison.

At the PHC, counsel should engage constructively in designing such hybrid procedures. Tribunals appreciate parties who approach procedural innovation pragmatically rather than dogmatically. A well-crafted expert procedure can streamline hearings and focus attention on the most consequential technical questions.

VIII. Language Interpretation and Translation Access

In an increasingly global construction industry, arbitration frequently involves participants who do not share a common first language. Contractors, design professionals, and owners may hail from different jurisdictions, and witnesses may testify in multiple languages. The preliminary

hearing thus becomes the proper forum to establish rules governing interpretation and translation—matters that, while procedural on the surface, directly implicate fairness, accuracy, and due process.

A. *The Importance of Clear Language Protocols*

Arbitration depends upon clarity of communication. Misunderstandings caused by language barriers can distort testimony, impair the presentation of evidence, and ultimately compromise the integrity of the award. The tribunal's obligation to ensure equal opportunity for each party to present its case necessarily includes the duty to manage interpretation and translation effectively. The AAA and ICDR Rules both recognize this obligation, granting the arbitrator authority to direct the way hearings are conducted to promote fairness and efficiency.[14]

At the PHC, counsel and arbitrators should discuss not only what language(s) the arbitration will proceed in, but also how interpretation will be provided, when it will be required, and who will bear the associated costs. Establishing these protocols early prevents later disputes about translation accuracy or logistical disruption during the hearing.

B. *Determining the Language of the Arbitration*

In domestic arbitrations, English is often assumed, but international construction projects may involve multilingual contracts and correspondence. When no specific language is prescribed in the contract, the tribunal typically selects the language that best serves procedural fairness and efficiency, taking into account the language of the contract documents, correspondence, and parties' capacities.[15] Counsel should be prepared to address this issue at the preliminary hearing as the tribunal's decision will affect all aspects of the arbitration—from pleadings and document production to witness examination.

C. *Simultaneous vs. Consecutive Interpretation*

Once the arbitration language is established, the next procedural issue concerns the mode of interpretation. Simultaneous interpretation allows the proceedings to continue without pause, with interpreters translating in real time. This method minimizes delay but requires skilled interpreters familiar with both technical and legal terminology and/or an agreement to a implement a technology tool and software to do so. Consecutive interpretation, by contrast, pauses the hearing to allow translation after each statement or question. It offers greater precision but doubles the hearing length.

During the PHC, the tribunal should consult with counsel to determine which mode best fits the case's complexity and logistical constraints. For hearings involving multiple languages or highly technical testimony, simultaneous interpretation often promotes efficiency, provided qualified interpreters are available. In smaller or less time-sensitive arbitrations, consecutive interpretation may better ensure accuracy. Hybrid approaches—simultaneous interpretation for narrative testimony and consecutive for technical cross-examination—can strike a pragmatic balance.

D. *Qualifications and Neutrality of Interpreters*

Interpreter qualifications are another crucial consideration. Construction disputes involve specialized terminology from structural engineering concepts to contract administration jargon. The tribunal must ensure that interpreters possess not only linguistic fluency but also familiarity with construction terminology. Parties may propose interpreters jointly or the tribunal may appoint neutral interpreters through institutional rosters.

Neutrality is paramount. Interpreters must avoid ex parte contact, refrain from summarizing or embellishing testimony, and translate verbatim. The tribunal should confirm these obligations

in a procedural order issued after the preliminary hearing. When disputes arise over interpretation accuracy, the order should specify a mechanism for immediate clarification on the record.

E. *Translation Access and Cost Allocation*

In multilingual arbitrations, translation issues extend beyond live interpretation. Documents, exhibits, and written submissions may need translation into the arbitration language. To control cost and ensure fairness, the tribunal should establish clear allocation rules at the preliminary hearing. Common approaches include:

- Each party bearing the cost of translating documents it submits;
- Shared translation costs for documents designated as jointly relevant; and
- Limiting translation to excerpts or summaries unless full translation is demonstrably necessary.

Parties may also agree to use machine translation for non-critical documents, provided the opposing side may request certified translation for specific items. These protocols reflect arbitration's emphasis on proportionality—balancing accuracy against efficiency.

F. *Managing Interpretation in Hybrid and Remote Hearings*

Hybrid and virtual hearings have introduced new challenges for interpretation. Audio delays, internet instability, and overlapping speakers can degrade translation quality. Tribunals should address these risks during the PHC by specifying technical requirements, such as separate audio channels for interpreters, stable internet connections, and advance testing sessions. Some institutions now require that all participants mute microphones when not speaking to reduce interference.

In addition, tribunals should establish procedures for flagging interpretation issues in real time—such as a designated signal for pausing proceedings when interpretation becomes unclear. These practical steps ensure that linguistic equality is preserved even in digital environments.

IX. Procedural Time Management – Chess Clocks

Effective time management lies at the heart of procedural fairness in arbitration. In construction cases, where hearings may span weeks and involve extensive witness and expert testimony, the tribunal must balance thorough presentation with efficient case progression. One increasingly common solution is the adoption of "chess clocks"—a structured system that allocates equal total hearing time to each party. Once a party's time expires, its presentation ends, regardless of whether all intended examinations have been completed.

A. *Purpose and Rationale*

The use of chess clocks promotes predictability, discipline, and parity. It ensures that each side has equal opportunity to present its case and prevents one party from monopolizing hearing time through extended cross-examinations or procedural skirmishes. The AAA Rules empower arbitrators to manage proceedings "to achieve an efficient and economical resolution of the dispute," which includes authority to impose time limits.[16]

Chess clocks embody this efficiency mandate by giving parties control over their own time allocation. Each may decide how to distribute its allotted hours among opening statements, direct and cross-examination, and closing arguments. This structure encourages strategic focus and minimizes digression.

B. *Implementation and Practice*

If the tribunal anticipates using a chess clock, it should discuss the system at the PHC and incorporate it into the procedural order. Key decisions include:

- The total time per party;
- Whether tribunal questions are counted against either side; and
- How interruptions (such as interpretation or technical difficulties) will be handled.

Typically, the clock stops for breaks, tribunal questions, and administrative matters. In hybrid hearings, tribunals may appoint a clerk or timekeeper to ensure transparency.

C. *Advantages and Challenges*

The principal advantage is fairness through structure. Counsel know exactly how much time they have and proceedings stay on schedule. Chess clocks also deter procedural gamesmanship—parties cannot prolong examinations to disadvantage opponents. Moreover, by enforcing balanced time use, arbitrators can preserve the integrity of the hearing schedule, particularly when multiple witnesses or experts must appear remotely.

However, strict timekeeping can also limit flexibility. Complex cross-examinations or late-emerging issues may require additional time. For this reason, some arbitrators maintain "reserve" time allowing adjustments when fairness demands. The key is proportionality: time limits should discipline proceedings, not constrain the tribunal's ability to reach a fully informed decision.

D. *Balancing Efficiency and Equity*

Properly managed, chess clocks advance arbitration's core values of efficiency and fairness. They transform scheduling from an administrative afterthought into a shared discipline of advocacy. By raising the issue at the preliminary hearing, parties and arbitrators can establish expectations that prevent later disputes and preserve the rhythm of the hearing. In large construction cases, where complexity often breeds delay, structured timekeeping remains one of the most effective procedural tools for maintaining fairness and focus.

X. Zoom Transcripts and Recordings

The rapid normalization of virtual and hybrid hearings has reshaped procedural practices in construction arbitration. Among the most consequential innovations is the use of automated transcription and video recording platforms—most notably Zoom-generated transcripts. While technology offers efficiency and accessibility, it also raises questions about accuracy,

confidentiality, and evidentiary integrity. The preliminary hearing is the right moment to establish clear policies governing how such tools will be used.

A. *The Appeal of Automated Transcription*

Zoom and similar platforms can produce near-instantaneous transcripts, allowing counsel and arbitrators to review testimony in real time. This convenience can enhance efficiency, especially in multi-day hearings or cases involving multiple languages. The system's searchability also aids post-hearing briefing. From a cost standpoint, automated transcription is often less expensive than engaging certified court reporters, particularly when proceedings are conducted remotely.

However, automated systems are imperfect. They may misinterpret technical terminology, accents, or overlapping speech—problems that are especially acute in construction disputes where specialized vocabulary abounds. Tribunals should therefore treat platform-generated transcripts as convenience tools rather than official records.

B. *Reliability and Evidentiary Concerns*

Automated transcripts, while convenient, do not meet the accuracy standards of certified stenographic records. Arbitrators must therefore decide whether the official record will be based on (1) a professional court reporter's transcript, (2) an audio recording maintained by the tribunal, or (3) a hybrid combination of both.

Some tribunals adopt a dual-track approach: Zoom's automated transcript is made available to the parties for reference, while a certified reporter produces the official version. This balances efficiency with reliability. If discrepancies arise, the certified transcript controls.

C. *Confidentiality and Data Security*

Another consideration is confidentiality. Automated transcripts are typically processed and stored on cloud-based servers controlled by third-party vendors. Unless security protocols are

verified, this may expose sensitive project or proprietary data. At the PHC, the tribunal should confirm whether transcripts will be locally saved, password-protected, and shared only through secure channels. Counsel should also ensure compliance with any contractual or statutory confidentiality obligations, particularly in government or defense-related projects.

D. *Best Practices for Hybrid Hearings*

When proceedings combine in-person and virtual participation, coordination becomes crucial. Arbitrators should designate a single host responsible for controlling recordings, admitting participants, and managing transcript access. Clear ground rules—such as prohibiting private recordings—maintain procedural integrity.

Counsel should also test technology in advance, verify audio quality, and ensure that witnesses appearing remotely can be seen and heard clearly. These measures, when agreed upon at the PHC, prevent disruptions that can consume valuable hearing time.

E. *Practical Guidance and Strategic Considerations*

Strategically, counsel should not assume that convenience outweighs reliability. For critical testimony—especially expert evidence—advocates should insist on certified transcription to ensure accuracy in post-hearing briefs or potential enforcement proceedings. Conversely, for less contested portions of the hearing, automated tools may suffice. The key is proportionality: matching the method of recordkeeping to the materiality of the evidence.

F. *Procedural Balance*

Ultimately, technology should serve—not supplant—arbitral due process. The PHC provides the forum to balance accessibility and integrity by setting clear expectations for transcripts and recordings. Tribunals that take a proactive approach preserve fairness, prevent disputes about the record, and demonstrate that even in the digital age, procedural rigor remains the foundation of effective arbitration.

XI. Conclusion

The preliminary hearing conference stands as the procedural cornerstone of construction arbitration. Far from a perfunctory scheduling call, it is the first true arena in which advocacy and strategy meet. Every procedural decision—whether concerning consolidation, discovery, expert sequencing, or interpretation—has downstream effects on cost, timing, and even the substantive outcome. The most effective counsel recognize that to "win the battle" at the preliminary stage is often to shape the contours of victory at the hearing on the merits.

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[1] CIAR R-23 (American Arbitration Association, amended and effective March 1, 2024).

[2] CIAR R. P-1, P-2.

[3] CIAR R. R-7.

[4] *See id.*

[5] CIAR R. R-35(b).

[6] *See* Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* § 6.107 (7th ed.).

[7] *See* Elena V. Helmer, *International Commercial Arbitration: Americanized, "Civilized," or Harmonized?*, 19 Ohio St. J. on Disp. Resol. 35 (2009).

[8] *See* Int'l Bar Ass'n, *Rules on the Taking of Evidence in International Arbitration* art. 3(9) (2020).

[9] CIAR R. R-34(c).

[10] *See* Int'l Bar Ass'n, *Rules on the Taking of Evidence in International Arbitration* art. 7(2) (2020).

[11] CIAR R. R-24(a).

[12] AAA, *eDiscovery Considerations for Construction Arbitrations* § 7 (2025).

[13] CIAR R. R-34(b).

[14] CIAR R. R-33; *ICDR Arbitration Rules* art. 20 (2021).

[15] See *ICDR Arbitration Rules* art. 20 (2021).

[16] CIAR R. R-34(b), R-24(a).