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It's All Chinese To Me: Preparing And Cross-Examining Mandarin-Speaking Witnesses

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Witness evidence is an integral part of international arbitration, but challenges can arise from the interaction of different legal cultures, norms and languages. Although issues can arise with any testimony given through an interpreter, Mandarin-speakers are more challenged, and challenging, because of 1) the stark differences between Mandarin and English (the lingua franca of IA); and 2) the differences between international arbitration and the PRC legal system and process.

This article outlines practical considerations for preparing Mandarin-speaking witness evidence and conducting cross-examination in international arbitration. Mandarin-speaking witnesses will also find it useful in understanding the process and challenges of cross-examination.

Tips for being a witness

The role of a fact witness in international arbitration is to explain facts that are within his or her knowledge to the Tribunal to assist them in making their decision. The witness should present as honest and reliable so that the Tribunal believes their explanation of events.

Cross-examination is used by the cross-examiner to put their case to the opponent's witness, and in doing so, to educate the Tribunal. The cross-examiner seeks to establish and advance their case whilst undermining the other side's case, usually achieved by undermining the credibility of their witnesses.

In common law legal systems, the process of witnesses giving evidence orally and being tested by cross-examination, is considered one of the most effective means of discovering the truth. English arbitrators are increasingly unwilling to give much weight to written witness statements, prepared and polished by a party's lawyers. They therefore rely more heavily on cross-examination and hearing directly from the witness at the hearing.

While PRC law permits witnesses to appear in Court, this rarely happens in practice.

When witnesses do appear, the process is more akin to a deposition than oral testimony in a common law court. The witness may give a brief oral statement, generally for no more than 30 minutes. The witness may then be questioned by the lawyers from both sides and the judge. However, the PRC court system is more inquisitorial than adversarial with the judge having the discretion to end the questioning of witnesses or to forego witness testimony and cross-examination entirely.

Oral witness testimony is little used in practice because it is not held in the same regard as in common law systems. Judges consider written statements and documentary evidence to be more reliable than oral evidence. Witnesses are assumed to be biased in favour of the party for whom they testify, and their testimony given little weight.

A Chinese witness must therefore appreciate that, in contrast to domestic Chinese procedure, their oral testimony is an important part of an international arbitration and the Tribunal will consider what they say carefully. Honest and reliable witnesses, who persuade the Tribunal, can win the arbitration.

Tips for preparing a Mandarin-speaking witness

Witnesses familiar with Chinese court procedure are likely to be focused on demonstrating the authenticity of documents that evidence the facts. Reassure them that the Tribunal wants to hear their *personal* recollection of facts with which they were directly involved, even where there are no documents available on the point.

Witnesses may be privy to information that they are not able to reveal to you as foreign counsel or to the Tribunal, for example where there are ongoing criminal investigations in the PRC or where the matters are considered a Chinese state secret. Ensure the boundaries are clear to you and the witness, that they are raised in advance with the other side and Tribunal, and that the client is willing to risk having adverse inferences drawn if the witness refuses to answer a question. Should the witness still be called to testify or is the risk to the client too great?

A Mandarin-speaking witness will be inclined to only answer the exact question asked. This poses two problems. First, the witness will not tell his lawyer everything he knows unless the right questions are asked. A lawyer should have a detailed interview with the witness when preparing the witness statement and should ask questions in different ways to insure all information is being elicited. Second, witnesses will find it difficult to provide robust answers on cross-examination. The witness may fear saying the wrong thing.

Respect for hierarchy is an important Chinese cultural norm so it is useful to understand a witness's position within the company. A junior witness may be uncomfortable in giving testimony, especially before his or her superiors, and may look toward their superiors or their lawyers when testifying to seek approval of their testimony. Conversely, a senior executive may be offended by the process of cross-examination and may become defensive to deflect any challenge to his credibility.

When interviewing and preparing senior witnesses and experts, Chinese lawyers are usually more deferential than common law lawyers. It is important to strike a balance between adequate deference and thorough fact-finding. Be deferential but persistent.

If your witness speaks English as well as Mandarin, consider whether it is better to give evidence in their imperfect English and avoid the delay and confusion that can arise from interpretation.

If the witness can read English but is less able or confident with the spoken word, a real-time transcript will be extremely useful to help him or her (and likely the interpreter) to understand the questions more accurately.

Cross-examining a Mandarin-speaking witness

First and foremost, do not attempt any Mandarin terms unless you are **very confident** of your pronunciation. Mandarin is a tonal language, and a misplaced inflexion can mean that you and your witness end up speaking about different things, both of which may make sense to the speaker in context.

There are several key differences between the Mandarin and English languages and their grammar. In Mandarin, much of the meaning is contextual. Cross-examiners must state the question clearly and accurately. Moreover, Mandarin does not use tenses. Be careful formulating questions that involve different tenses as these will all be lost in translation.

Mandarin can be ambiguous and flowery. Unlike legal English, Mandarin expressions evoke more than just the words spoken. This can make accurate interpretation difficult. Often witnesses can reply in a vague manner that is open to interpretation if not further clarified. This may explain why Mandarin interpreters often have a lengthy dialogue with the witness before replying, "The witness said 'Yes.'" The process can be frustrating for the cross-examiner and the Tribunal, if they cannot understand the Mandarin discussion resulting in the simple answer. Thus, having a fluent Mandarin speaker at counsel table is crucial to the integrity of the transcript. Often counsel must correct or at least question the interpreter's understanding of the answer and be prepared to explain any "lost in translation" moments to the Tribunal. Waiting until the end-of-day transcript, or a post-hearing review of the tapes, will be too late.

Legal concepts may differ as well. The cross-examiner should ensure that the witness, especially an expert witness on PRC law, understands what is being asked. Concepts such as indemnification, liquidated damages, and indirect loss may have a slightly different meaning in Chinese. The cross-examiner must word their questions carefully and understand its implications.

Tips for counsel on both sides

Given the importance of the interpreter, the parties may wish to meet with him or her and test their interpretation prior to the hearing, particularly any relevant legal or technical industry terms. Consider if the interpreter will need experience with accented Mandarin or specific dialects. Consider too that Mandarin expressions may differ between Mandarin-speaking countries or regions.

There may simply be no translation of a term into or from Mandarin. It may be necessary to ask the interpreter to explain what synonym has been used and ensure all are content it is the best available.

People, ships, places, and companies may have both an English name and a completely different Mandarin name. Be aware that words may also have a Pinyin transliteration of the Chinese name. As such, a short bi-lingual glossary of key terms and names agreed between the parties can be a useful tool for the interpreter, counsel and the Tribunal.

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