Kluwer Arbitration Blog

Are Depositions Incompatible with International Arbitration?

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Broadly defined, the word “deposition” refers to the taking of a “written record of a witness’s out-of-court testimony.” (Bryan A. Gardner, Black’s Law Dictionary, 8th edition , p. 472.) This general definition notwithstanding, in practice the word “deposition” has become closely associated with US pre-trial discovery. The witness deposition, which is attended by lawyers for all parties involved, is utilized in American practice to record the testimony of potentially relevant witnesses prior to trial, with the intention that the transcript will be used inter alia in the cross examination of that witness. As rare as it is for an American case to go to trial without a deposition having occurred, it may be said that it is equally as rare for an international arbitration to include the taking of pre-hearing depositions–in particular in matters seated outside of the United States.

This post examines why the practice of taking depositions remains outside the norm in international arbitration, whether depositions could be useful in international arbitration and finally, what principles should guide the use of depositions in international arbitration in the event they are used.

Taking the first of the queries listed above, it could well be argued that depositions are redundant in the context of a classical international arbitration procedure and that this is why they have never found broad acceptance. Considering the predominant practice in international arbitration of using written witness statements, and the exchange of rebuttal witness statements, the need to conduct a pre-hearing cross examination of a witness in order to establish his or her testimony, is arguably absent. The party adverse to a witness’s testimony will know the nature of the testimony proffered against it because it has received a full, written statement of the direct testimony of the witness and will have had ample time in most circumstances to present counter-witnesses and further prepare for the hearing. In addition to the above, the use of depositions undeniably raises costs in the procedure, and thus here too one may find a persuasive reason for not incorporating a pre-hearing deposition into an international arbitral procedure.

Next to redundancy and costs, there are other reasons to exclude deposition-taking from the mainstream practices of international arbitration, but this is not to say that there are not times when an international arbitral tribunal may feel favorable towards, or even compelled to permit a deposition to take place. One obvious reason why depositions may be used in a procedure is that the arbitral clause calls for them. In this author’s experience it is not unheard of for clauses to be written calling for both ICC arbitration and for the use of depositions. But beyond the reference within the arbitration clause, the use of a pre-hearing deposition may be of use to the procedure. An often cited example of this is a published procedural order taken from ICC Arbitration no.

7170, where a tribunal directed the parties to take the testimony of a witness who could not attend a hearing before a notary public near the witness's location. In essence the examination of the witness before the notary was a pre-hearing deposition, and this example raises the possibility that such a procedure may be an excellent tool for securing testimony that would otherwise be lost to the arbitration.

To the extent that a deposition would be useful, one may still wonder how this procedure could be successfully managed in the context of an international arbitration. Depositions in US practice are conducted in accordance with detailed rules addressing notice requirements and also covering the manner of questioning and available objections, and are conducted with the general supervision of the court. In many states, such as California, this does not mean that the judge will attend the deposition but it does mean that the court may intervene to compel a witness to answer questions he or she has refused (often on counsel's objection) during the examination. Thus the question arises, how could a tribunal, which does not have the compulsory powers of a court and detailed evidentiary procedure, allow for the effective conduct of a deposition?

To answer this question, one may derive several principles from the IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules") and the limited case precedent on this topic. These principles are as follows: (1) a deposition would only be permitted to occur if representatives (including counsel) for both parties were given the opportunity to attend and ask questions of the witness; (2) a full written transcript of the witness examination should be deposited in the evidentiary record of the arbitration; (3) the method of questioning the witness may be taken from Article 8 of the IBA Rules, which means that the party who is presenting the witness in the deposition (or whom it is deemed the witness testimony is in favor of) would be permitted to first ask questions, followed by a cross examination by the adverse party, and limited re-direct and re-cross; (4) a party will be permitted to raise only limited objections to questions, and in particular, only those which are consistent with the objections stated in Article 9 of the IBA Rules; (5) while a tribunal may not compel a witness to answer a question, it may draw an adverse inference from a witness's refusal to answer a question (as is recorded in the transcript); (6) a tribunal may determine that depositions should only be taken where a witness is unavailable to attend a live hearing, or, a tribunal may determine that a party who insists on taking a deposition waives the right to call the witness to a hearing if the tribunal determines that the transcript is sufficient for its purposes.

To reiterate the third paragraph of this post, to say that depositions should be utilized in international arbitration is at best a controversial proposition. Moreover, there are certainly other principles or rules that could be added to the list set out above which might allow for the successful transposing of this procedure into an international arbitration. However, it is worth considering that as arbitration is lauded for its flexibility, such flexibility may at times call for the use of different means of establishing the facts of the case which are not considered part of the normal stable of procedures used in international arbitration.

Nathan O'Malley is the author of Rules of Evidence in International Arbitration: An Annotated Guide, Informa Law, 2012

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