Kluwer Arbitration Blog

2023 PAW Recap – Day 5: YSIAC – Witness Evidence and Preparation in International Arbitration: Cross-Cultural Perspectives

Mihaela Tarnovschi (ICC International Court of Arbitration) · Tuesday, April 4th, 2023

Witness testimony is a core component of the arbitral process and is often integral to the Tribunal's fact-finding exercise. But the reliability of witness evidence has come under increased scrutiny in recent years because of the degree of counsel involvement in the preparation and presentation of witness evidence, both prior to and at the hearing. In the context of international arbitration, these issues are further complicated due to the fact that different jurisdictions adopt different approaches to witness evidence and preparation.

During Day 5 of Paris Arbitration Week, Herbert Smith Freehills hosted a panel entitled "Witness Evidence and Preparation in International Arbitration: Cross-Cultural Perspectives." The panel was composed of Santiago Bejarano (Latham & Watkins), Emily Fox (Herbert Smith Freehills), Sebastiano Nessi (Curtis Mallet-Prevost Colt & Mosle), Khushboo Shahdadpuri (Al Tamimi, YSIAC), and was moderated by Dharshini Prasad (Willkie Farr & Gallagher). Drawing on the speakers' diverse backgrounds, the panel discussed issues and best practices surrounding witness evidence in international arbitration.

The English Approach

Emily Fox opened the discussion by giving a thorough overview of the approach of the English courts regarding the preparation of witness statements and the preparation of witnesses for the trial. Regarding the preparation of witness statements, the guidance given by the Bar Council is that when settling the witness statement "*great care must be taken to avoid any suggestion that: the evidence in the witness statement has been manufactured by the legal representatives; or that the witness had been influenced to alter the evidence which he or she would otherwise have given*" (para 22.1 & 22.2, page 8 of the Bar Council Guidance on Witness Preparation). This is also consistent with the slightly less prescriptive guidance in the Solicitors Regulation Authority Code of Conduct which only says that solicitors will not seek to influence the substance of evidence, including by generating false evidence or persuading witnesses to change their testimony (Articles 2.1-2.3).

Regarding preparation for the hearing, the guidance stems from a criminal case, R v Momodou, where the Court of Appeal said that: "*Training or coaching for witnesses in criminal proceedings*

[…] is not permitted. This is the logical consequence of a well-known principle that discussions between witnesses shall not take place, and that the statements and proofs of one witness should not be disclosed to any other witness."

However, the R v Momodou principle does not preclude witness familiarization exercises. Efforts to explain to the witness the layout of the court, the likely sequence of events, how to give evidence, speak up, answer concisely and prepare by reviewing their witness statement, are not only allowed, but also encouraged, because it is important that the witness will not be disadvantaged by their lack of knowledge of the process. It has now been confirmed that the R v Momodou principle, as well as the position of the Bar Council and the guidance from the SRA should be treated as applying in civil law cases as well.

The Singaporean Approach

The Singaporean approach does not seem to differ significantly from the approach under English law, as noted by Khushboo Shahdadpuri. She explained that in the most recent guidance provided by the Singapore Court of Appeal, three rules of thumb ought to apply to taking witness evidence: 1) the lawyers should not try to supplement the witnesses with evidence to aid them in preparing their witness statements; 2) the preparation for trial should not be too lengthy and repetitive; and 3) the witness preparation shall not be done in a group to prevent contamination of witness testimonies.

As well, mock cross-examinations with preparatory questions are allowed under Singaporean law, as long as there are no scripted answers. Rather, the lawyers are encouraged to pose questions that will help the witness realize contradictions in their witness statements. This is similar to the approach under English law, where witness familiarization is allowed, but witness coaching is not.

The Middle Eastern Approach

Regarding the Middle Eastern approach, Ms. Shahdadpuri noted that, since there are more civil law jurisdictions, the courts in those jurisdictions take an inquisitorial approach and question the witnesses only to the extent that their answers may aid the court's decision-making process.

Ms. Shahdadpuri also pointed out an interesting element that is characteristic of those jurisdictions: the taking of oaths before witness statements are admitted as evidence. Recently, the Dubai Court of Cassation adopted a position that stirred discourse within the arbitration community because an arbitration award was completely annulled on the basis that the court could not find any evidence of a witness taking their oath. Ms. Shahdadpuri thus advised caution regarding the taking of oaths in arbitrations in the Middle East, especially in the United Arab Emirates.

The United States Approach

Santiago Bejarano explained that under US court practice, witnesses can appear two times during trial: during the discovery process, offering witness depositions, and during trial, where they

appear to give live testimony. Witness statements, called affidavits, are not used as extensively as in other jurisdictions.

Regarding preparing the witnesses for testimony, the Restatement Third on the Law Governing Lawyers recognizes that a lawyer may interview the witness in anticipation for a deposition or a testimony and that a rehearsal of the process is allowed, including mock cross-examinations. Under US law this is not only advisable, but considered the obligation of a lawyer towards their client.

The Swiss Approach

As observed by Sebastiano Nessi, under Swiss law there are very strict rules regarding the interaction between the lawyers and their witnesses, while witness statements and cross-examinations are not allowed.

Mr. Nessi explained that, usually, party submissions contain references to potential witnesses that could help prove a statement of fact. Thereafter, it would be the judges that decide which witness to call to testimony and which questions to be asked to those witnesses. The law also forbids the parties to ask questions to the witness directly. They may suggest questions to the judges, which in turn decide to allow them or not, as all questions need to be pertinent to the case and the disputed facts.

Mr. Nessi noted that this is also very similar to the German approach. He also mentioned that in these jurisdictions the gathering of evidence is viewed as a judicial function within the exclusive purview of the public authorities, rather than within the scope of the decision making powers of the parties and their representatives.

What Rules Should Apply in International Arbitration?

In Ms. Prasad's view, the ethical rules that apply to a lawyer based on their bar membership would also apply during the arbitration proceedings that they participate in. Mr. Bejarano is of the view that the rules that are applied by domestic courts should only apply to domestic proceedings, while in arbitration the parties' choices should be upheld. He also considers that it would be helpful if the tribunal would set certain expectations regarding what will be permitted or not during the proceedings.

Ms. Prasad also mentioned that it can happen that lawyers from jurisdictions with more restrictive rules could also make an application for the tribunal that a Procedural Order include a strict prohibition on mock cross-examinations and witness coaching. Yet, oftentimes tribunals do not take a clear stance on this issue, but rather leave it to the parties to do what they believe is appropriate under the rules that they believe apply to them.

A Call for More Harmonization?

Mr. Nessi considered that we should not add another layer of soft law to arbitration proceedings, as

we risk having arbitration proceedings that are as complicated as state proceedings, which will not be seen in a good light by the parties. He also believes that harmonization will be hard, but also not necessary, as the current system works quite well. Rather, he suggested that these issues should be discussed during the case management conference with the tribunal, so as to give the freedom of choice to the parties and their counsel.

Ms. Fox also agrees that greater harmonization is not desirable. She recounted that The IBA Guidelines on Party Representation in International Arbitration do in fact say that "*if a party representative determines that he or she is subject to a higher standard than the standard prescribed in these Guidelines he or she may address this situation with the other party and/or with the arbitral tribunal*" (Comments for Guidelines 18-24, page 24).

Ms. Fox also contended that harmonization would be difficult because the law of the seat also has a lot of impact on the way the proceedings are conducted. For instance, under English law, Browne v Dunn stipulates that if counsel intends to rely on a version of events that is contradictory to a witness' testimony, that counsel must give the witness an opportunity to defend their position during cross-examination.

Ms. Fox further underlined that a breach of the Browne v Dunn principle is a breach of the fundamental principles of fairness and of equal treatment to the parties, which was also brought up in an international arbitration case, *P v D* [2019], covered previously on this blog. In that case, the award was successfully challenged under Section 68 of the English Arbitration Act (EAA) for serious irregularity, because the parties breached the rule in Browne v Dunn and failed to address a key disputed fact during the cross-examination of a witness.

At the same time, Ms. Fox recounted that in a very recent case, *BPY v MXV* [2023], an award was challenged under Section 68 of the EAA, and the challenge was not successful. This is because before the hearing one of the parties asked the tribunal to indicate whether it would like that the parties challenge every piece of contested evidence before the witnesses during cross-examination, and the tribunal refused, as it said that it will be for the tribunal to decide what weight to accord to the evidence put before it, regardless of whether it has been expressly dealt with in cross-examination. This was also in line with the discretion the tribunal had to organize the proceedings the way it saw fit, under the London Court of International Arbitration Rules that applied to that case (Articles 14.2, 14.6(ii), 19.2).

For their concluding remarks, the panelists agreed that witness evidence is here to stay as it is key in establishing facts of the case for which there is no other conducive evidence. As well, while we must be mindful of all the differences that arise from both civil and common law traditions, we should fully use the flexibility afforded by international arbitration proceedings and discuss relevant witness evidence issues with our tribunals.

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