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Factual Witness Conferencing – Need for Another Hot Tub?

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An ICC Young Arbitration & ADR Forum (YAAF) seminar titled “Another Tub – Is it Time for Fact Witness Conferencing?” was held in Seoul on 20 April 2023. In international arbitration proceedings, establishing facts is crucial for determining the outcome of a case. One of the key sources of information is factual witness evidence. However, there is an ongoing debate about the reliability and credibility of factual witnesses, with some practitioners questioning the value of witness statements and cross-examination altogether as a means of discovering facts. With moderation from ICC YAAF Representative for North Asia Mino Han (Partner, Peter & Kim), four “next generation” practitioners based in Seoul debated the need for factual witness hot-tubbing in arbitration.

The Role of Factual Witness Evidence in International Arbitration

The first debate of the evening addressed the proposition that factual witness evidence is unreliable and therefore relying on witness statements and cross-examination in the way it is commonly done is a sub-optimal way of discovering facts.

Hyunyang Koo (Partner, Lee & Ko) kicked off the discussion by stressing the importance of factual witness evidence. Given that fact witnesses provide information based on their first-hand experience, observations, and knowledge, factual witness evidence is considered to be invaluable in disputes as a reliable source of information, particularly in cases involving complex technical or commercial issues. However, Koo also emphasized that human memory can be fallible and that witnesses may be susceptible to cognitive biases or external influences. Koo highlighted how memory can be easily distorted, especially in business settings, by many factors such as the high level of interaction between a witness and others, the way questions are framed and phrased by counsel in arbitration proceedings, and the fact that the purpose of factual witness testimony in international arbitration is not always about facts, but rather context. Many arbitration practitioners question whether the usual technique for obtaining witness evidence of written witness statements followed by cross-examination is efficient or indeed always necessary for ascertaining factual witness evidence.

Hyung Won Nahm (Associate, Yulchon LLC) disagreed with this proposition and noted that, in addition to preparing thoroughly to ensure that witness evidence is accurate, detailed, and consistent, counsel can also use experts, such as psychologists, to help pinpoint potential biases or

memory issues. Additionally, factual witness evidence can be evaluated alongside other corroborating evidence, such as documents, expert testimony, and other objective sources.

The speakers also emphasized that experienced arbitrators are skilled at evaluating witness credibility, identifying inconsistencies, and understanding the impact of potential biases. Arbitrators' discretion and expertise are key to ensuring that factual witness evidence is given appropriate weight and considered in the context of the broader case.

In sum, while there are concerns about the reliability of factual witness evidence, the speakers seemed to broadly agree that by employing various techniques, such as thorough preparation of witness statements, reliance on expert assistance, and effective use of cross-examination, factual witness evidence can be properly evaluated and given appropriate weight by experienced tribunals in determining the outcome of a case.

Fact Witness Hot-Tubbing

Following the first panel, Brandon Bang (Senior Foreign Attorney, Bae, Kim & Lee LLC) launched his argument on fact witness hot-tubbing with a two-part analysis: (i) first, as a matter of principle, is it desirable?, and (ii) second, as a matter of convenience, is it feasible? According to Bang, it is a mistake to conflate the two issues, because doing so proceeds on a (false) logic that an idea should be rejected based on practical considerations alone. He pointed out that international arbitration is inherently flexible and agile; therefore, if we, as a community, believe that fact witness hot tubbing is desirable, then we can think separately about changing our behavior in order to accommodate it in practice.

Bang started out with desirability. The first question was to define what fact witness conferencing involved: at its core, witness conferencing replaces or greatly reduces the scope of the classic cross-examination format – a purely counsel-driven process that proceeds through each witness in a sequential and separate manner and which is inherently adversarial. By contrast, witness conferencing (i) is not sequential, as it allows for joint testimony of multiple witnesses in a free-flowing panel discussion, and (ii) could be tribunal-led (or counsel-led) – the defining feature is that the process is more inquisitorial and that interaction among the tribunal, counsel, and witnesses is more fluid.

Then Bang focused on one point that makes witness conferencing desirable: that it produces more valuable evidence. Witness conferencing creates an immediate confrontation of evidence, where the goal is to find out what genuinely transpired and get as close to the truth as possible. Witness conferencing spends less time on the witness credibility attacks for which cross-examination is known. One form of witness conferencing is organizing fact witnesses by issue, where the goal is to allow the tribunal to see the whole picture in one sitting by inviting all the evidence relevant to a particular issue. And when witnesses from both sides testify on that particular issue concurrently, the conflict in their narratives will be apparent quickly. The tribunal can identify those tensions and ask questions as and when they arise, and counsel can ask follow-up questions: it is like a mini-hearing within a hearing, where there is a fluid interaction between a witness, tribunal, and counsel on an issue-by-issue basis.

Bang moved on to feasibility and emphasized that there is not much required by way of behavioral changes to achieve fact witness conferencing. He noted that we are already well accustomed to

conferencing in the context of experts, who are often directed by tribunals to submit joint reports organized by issues, and that the proof of a broad consensus that the same procedure should be extended to fact witnesses is in Article 8(4)(f) of the IBA Rules on the Taking of Evidence in International Arbitration (2020) (which allows witnesses to be "questioned at the same time and in confrontation with each other" by "particular issues"). As to the risks that discussions among fact witnesses become chaotic with witnesses speaking out of turn, for example, Bang argued that there are sensible tools to manage such risks, such as through a pre-hearing meeting between the tribunal and counsel to agree on basic ground rules as to timing and scope of intervention by counsel, tribunal, and witnesses.

Jae Ha Kwon (Foreign Attorney, Kim & Chang) countered Bang's points. First, she observed that the preparation for hot-tubbing is a significant task that consumes the time and attention of both the witnesses involved and the legal counsel representing the parties relying on the evidence. She said that this will likely add another layer of costs in arbitration proceedings by lengthening the duration of hearings.

Second, lawyers from various jurisdictions are subject to different rules of ethics. This raises the issue of inequalities, especially when it comes to the preparation of fact witnesses for hot-tubbing.

Third, while most institutional rules, such as Article 8.3(f) of International Bar Association Rules, are broad enough to allow for hot-tubbing, there is no guidance as to the circumstances in which attorneys can usefully employ witness hot-tubbing or as to how the process should be conducted. For example, a key question remains of the extent to which tribunals will take the lead in directing how factual witness evidence is to be prepared. Per Kwon, a great deal of reliance is placed on the arbitrators directing effective questioning of witnesses, which in turn requires that arbitrators have a comprehensive grasp of the issues in dispute. Also, the tribunal must ensure that each party has a fair opportunity to present their case. Kwon warned that a disorganized process will only lead to confusion and inefficiency. Time may also be wasted if witnesses go around in circles. A single witness may be able to manipulate a discussion if she/he has greater knowledge of a particular issue than all other witnesses. Without a formal examination and cross-examination process, key factual evidence will be missed. Kwon concluded by calling for a formal protocol to resolve this issue.

Conclusion

It can hardly be disputed that factual witness evidence is crucial in international arbitration proceedings. Therefore, it is of vital importance that arbitrators and counsel be given proper tools to efficiently and reliably discover such evidence. The seminar shed valuable light on the possible pitfalls of the common reliance on witness statements and cross-examination, and pointed to other procedural mechanisms and innovations that have the potential to aid arbitrators and counsel in the fact discovery process.

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