Kluwer Arbitration Blog

New York Arbitration Week 2023 Recap – Tales from the Hearing Room: "What Would You Do?" Young Practitioners Panel

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As part of the 2023 New York Arbitration Week, on November 13, 2023, Chaffetz Lindsey LLP and the New York Arbitration Week Organizing Committee hosted *Tales from the Hearing Room: "What Would You Do?"*, a young practitioners panel jointly organized by CIArb's Young Members Group, AAA-ICDR Young & International, CPR Young Leaders in ADR, and Young Canadian Arbitration Practitioners.

The panel featured David Blackman (Associate, Chaffetz Lindsey LLP), Travis Gonyou (Associate, Binder & Schwartz LLP), Ryan Lax (Senior Associate, Torys LLP), and Ricardo Cruzat Reyes (Legal Consultant, White & Case LLP). Opening remarks were given by Gretta Walters (Partner, Chaffetz Lindsey) and the panel was moderated by Maria Teder (Counsel, Ellex Legal).

The panelists shared stories of unanticipated circumstances and in-the-moment decisions from the hearing room. It was an interactive and well-moderated panel with a highly engaged audience, with panelists taking questions about each circumstance and surveying audience members on how they would handle the situations, before finally sharing how the story unfolded.

1. Dismissal of the Court Reporter

David Blackman presented a scenario which arose at the beginning of an evidentiary hearing. The parties had agreed to and hired a court reporter to transcribe the entirety of the hearing. Accordingly, an experienced court reporter was flown in from the United States for this purpose. However, it quickly emerged that this particular court reporter struggled to understand non-Anglo-Saxon accents and thus was unable to transcribe the proceedings smoothly. Within the first few minutes of the claimant's opening statement, counsel was interrupted repeatedly by the court reporter's requests for clarification. The chair of the tribunal then stopped the proceedings, ordering the parties to dismiss the court reporter and propose an alternative solution.

The audience was asked how they would proceed if they were counsel in this arbitration, with four different options:

1. Hire a new court reporter.
2. Have each side assign a junior associate to take verbatim notes and agree on a final transcript later.
3. Keep audio recordings of the proceedings and have a transcript generated later.
4. Rely on memory and not use a transcript.

Audience members chimed in with comments on similar experiences, sharing the approaches they had followed under similar circumstances. Option (3), of generating a transcript using audio recordings, received the most audience votes among the four. David Blackman explained that his team also went with option (3) in order to avoid the likely uncertainties and delays attendant to the alternatives. Moderator Maria Teder noted that practitioners from a civil law background might not have found it necessary to hire a court reporter or prepare an official transcript in the first place, as the civil law tradition tends to place less weight on live witness testimony than common law. Audience members also commented on the cultural differences between common law and civil law advocacy more generally, an aspect of practice which international arbitration lawyers must often navigate.

2. Challenge to the Tribunal's Jurisdiction

Travis Gonyou discussed a case in which the parties' dispute resolution clause referred to an arbitral institution which did not exist by that exact name.

In this case, the named arbitral institution appeared to be a mistranslation, similar to the names of two leading arbitral institutions in the jurisdiction of the seat of arbitration, but the mistranslation appeared to be closer to one of the institutions. Travis Gonyou was working as counsel for the claimant, who initiated arbitration. The governing law was the same as the jurisdiction of the seat of the arbitration, which was a civil law jurisdiction.

At the same time, the respondent initiated proceedings in a United States State Court and argued that the arbitration agreement was pathological and thus void.

For this question, the audience was asked to take the place of the tribunal and rule on the jurisdictional issue, with four possible outcomes:

1. Determine that the intent of the parties was to have this institution administer the arbitration, as the name was close enough.
2. Determine that the agreement was void as it named an institution that did not exist.
3. Wait for a motion to compel in court and let the national courts determine intent and validity.
4. Determine that the tribunal has jurisdiction to decide the issue and require the parties to submit documents that would evidence their intent at the time of drafting.

Most of the audience members chose option (1). As Travis Gonyou explained, the tribunal in this case looked at the language of the arbitration agreement and determined it was sufficiently similar to the arbitral institution where the claimant had initiated proceedings. Resultantly, the tribunal determined that it had jurisdiction over the dispute.

The clear identification of an arbitral institution in arbitration agreements is an ever-present issue. In a similar case involving an arbitration agreement naming a "non-existent" arbitral institution

discussed in an earlier Kluwer Arbitration Blog post, the Intermediate People's Court of Beijing determined that while the Chinese-language version of an arbitration agreement named a non-existent institution, the arbitration agreement could still be deemed valid based on the English-language version that named an existing institution.

3. Unexpected Introduction of Evidence

Ryan Lax discussed a case in which opposing counsel attempted to cross-examine an expert witness on a document that had not previously been submitted as an exhibit, with the apparent purpose of embarrassing the witness. Opposing counsel presented the document on screen during the cross-examination without notice or permission from either the tribunal or Ryan Lax's team.

Counsel was left with four options:

1. Object that Procedural Order No. 1 had been breached and force a motion for leave to introduce the document.
2. Object that Procedural Order No. 1 had been breached, seek leave for an *ex parte* conversation with the expert to obtain context, and seek to negotiate an agreed statement of facts with opposing counsel in lieu of introducing the document.
3. Object that Procedural Order No. 1 had been breached to shame opposing counsel but consent to the introduction of the document to avoid the appearance that it was significant.
4. Do nothing and leave it to your expert to address as she knows her background best.

Option (2) received the most audience votes, and Ryan Lax revealed that his team had done the same. He explained the reasoning behind this decision, noting that it presented a reasonable "middle ground" – the document was not allowed in without proper introduction, but the parties avoided delaying proceedings and causing a drawn-out disagreement over the document's entry. Audience members shared their own stories of witnesses being ambushed during hearings, calling to mind the difficulties of establishing witness credibility, especially with the advent of online and hybrid hearings. This story exemplified the importance of expert witnesses' communication skills, reliability, and transparency, and the agility needed by counsel to make strategic choices at a moment's notice.

4. Unexpected Testimony About Document Not Produced

Ricardo Cruzat Reyes discussed a case in which a fact witness unexpectedly testified to the existence of a document which the client had previously indicated did not exist.

During the earlier document production phase, the opposing party had requested a certain working document that was relevant to the dispute. The client produced a version of the document that was believed to be the latest version of the document. However, during the cross-examination of a fact witness who was a former employee of the client company, the fact witness responded that a later version of the document existed.

As Ricardo Cruzat Reyes recounted, this revelation was unexpected and touched on a sensitive area for both parties, as the document production phase had been contentious.

The audience was presented with four possible in-the-moment responses:

1. React immediately at the end of the examination and tell the tribunal you will check with your client again in case they missed the document. Work with the client to conduct an in-depth search and report on your findings to the tribunal.
2. Remain passive until you have a chance to discuss with your client. Wait for the other side to take the initiative to comply with any instructions you receive from the tribunal.
3. Ask for a short break to discuss with your client and provide the tribunal with a full response explaining your side's view of what happened.
4. Use re-direct examination of the witness to ask why he thinks the document exists in case there was a misunderstanding about the document that explains why your client's initial answer was that it did not exist.

Most audience members opted for outcome (3), favoring the option because it would allow counsel to determine a full and correct answer to the tribunal's inevitable questions about whether the document existed and why it had not been produced. This scenario generated lively discussion among audience members, demonstrating the strong impact of individual and cultural preferences on advocacy in international arbitration. Among other topics, the panel discussed that outcome (4) (which was among those with high support from the audience) was particularly risky, as it could lead to further unexpected testimony by the fact witness.

Ricardo Cruzat Reyes explained that in this dispute, counsel followed outcome (1), prioritizing maintaining their credibility with the tribunal and preempting a potential accusation of collusion with the client to conceal documents. Counsel reacted immediately at the end of the cross-examination to let the tribunal know they were surprised by the testimony and would investigate to determine what had happened and provide an update.

Conclusion

The panel discussion highlighted the validity of various approaches when counsel is tasked with making decisions based on the quickly shifting circumstances in arbitration hearings. The range of options and the audience participation demonstrated the breadth of discretion and preferences by counsel, based on their style, the law, and the factual circumstances of each case. As an event for young practitioners, this panel did an exceptional job in providing its early-career attendees with valuable frameworks and lessons to apply in the future.

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