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Perjury and Other Dangers of Transnational Virtual Witness Hearings in International Arbitration

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The COVID-19 pandemic forced many arbitration proceedings from a physical to a virtual format, including witness interrogations. Even though virtual examinations offer many well-known advantages, they introduce dangers as well, especially to the witness' credibility, *inter alia*, by facilitating the possibility of perjury. Adding another layer of complexity, this post addresses situations where the interrogation is not only virtual but also *transnational*, e.g., a witness testifies remotely via an online platform while physically present in a jurisdiction different from the seat of arbitration.

In short, if arbitrators fail to conduct transnational virtual witness hearings properly, it may increase the likelihood of perjury, such testimonies may be excluded as evidence in the case, may lead to award annulment or non-enforcement and even, arbitrators' criminal liability.

In connection with that, countries have already started discussions aiming to solve some of these issues. For example, recently, Switzerland has started deliberations on easing the requirements for digital witness interrogations of Swiss resident parties in civil proceedings. The Swiss are considering abandoning a burdensome administrative consent procedure for such an interrogation using legal assistance requests in exchange for a mere notification requirement.

The purpose of this post is to contribute to the debate surrounding issues of virtual transnational witness hearings in international arbitration, by shedding light on its nuances, which should be known by arbitration practitioners.

Perjury in International Arbitration: Different Standards in Different Jurisdictions

The definition of perjury is usually straightforward. For example, in the United Kingdom ("UK"), to convict a person for perjury, the prosecution must prove the following: (a) the witness was lawfully sworn as a witness; (b) in a judicial proceeding; (c) the witness made a statement wilfully, that is to say deliberately and not inadvertently or by mistake; (d) the statement was false; (e) the witness knew it was false or did not believe it to be true; and (f) the statement was, viewed objectively, material in the judicial proceeding (this to be decided by the judge) (Richardson, 2014, p. 2684) (see Perjury Act 1911).

One of the key "ingredients" of a perjury conviction is the administration of a witness' oath. If the

witness does not swear to say the truth during his testimony and is not informed about potential sanctions against him in case of knowingly false statements, usually he may not be prosecuted for perjury. When it comes to arbitration, different jurisdictions have different views towards administering oaths by arbitral tribunals (Sheppard, 2016, p. 204-206).

Some are *indifferent, i.e.*, neither compel nor prohibit the tribunals examining witnesses on oath or affirmation (usually, common law jurisdictions). For example, see Section 38(5) of the UK's Arbitration Act 1996 or Section 12(2) of Singapore's International Arbitration Act 1994, which empower a tribunal to examine a party or witness on oath or affirmation, but in no way compels to do it.

Others *prohibit* it, i.e. prevent the tribunals from administering oaths or affirmations. For example, Belgium allows the tribunal to examine witnesses but does not permit oaths (see Section 1700(4) of the Belgian Judicial Code). Latvia does not even allow witness testimonies as admissible evidence in arbitration proceedings because the tribunal cannot warn the witness of criminal liability for providing a knowingly false statement (Torg?ns *et. al.*, 2014, p. 120) (Nerets, 2021).

Finally, certain jurisdictions *oblige* the tribunals to cause the witnesses to take the oath. For example, Switzerland (Zuberbühler *et. al.*, 2013, p. 248 in Sheppard, 2016, p. 205) or the United Arab Emirates ("UAE") (see Section 211 of the UAE Civil Procedure Code). This approach represents a minority view (Martinez-Fraga, 2020, p. 299).

Virtual Transnational Witness Hearing: How It May Concern State's Sovereignty?

Few practitioners consider that an improperly conducted virtual transnational witness examination may be seen by certain states as an interference with its sovereignty, especially by those which have a strict stance towards the administration of oaths. Those countries, such as the UAE, may block such virtual examinations of resident witnesses because they consider it a violation of their sovereignty (New Zealand Ministry of Foreign Affairs and Trade, 2021, p. 25). An illustration of such opposition can be observed in the case of Joyce v Sunland Waterfront in Australia (Herzfeld, 2011). Such States believe that only a competent State authority may legally question a witness within its soil with a possible threat of criminal responsibility for perjury. These include Switzerland, which recently started discussions on potential legal amendments that could allow foreign entities to question Swiss witnesses without prior approval from Swiss authorities, using a simpler notification process to a competent Swiss authority.

English case law provides another example of this sovereignty issue. The Upper Tribunal of the UK in the immigration case of Agbabiaka concluded that it is accordingly necessary for there to be permission from such a foreign State (whether on an individual or general basis) before virtual oral evidence can be taken from that State by a court or tribunal in the UK.

However, some States, such as Australia, do not consider that a foreign court's examination of a witness in the State using video or audio link is an incursion on its territorial sovereignty. Nevertheless, how can an arbitral tribunal be sure that a witness behind a computer screen is actually residing in Australia and not in the UAE?

In any case, if a country has not made such declarations as Australia or lacks legal regulation as Switzerland had planned to introduce, the only "legitimate" solution to avoid an "illegitimate"

hearing would be an international mutual legal assistance procedure. However, it is not always possible as there may be no international legal instruments allowing such measures between the states in question. Also, it may be inconvenient—usually, such procedures take much more time than just having a couple-hour meeting via an online video link platform.

Perjury and Other Dangers of Virtual Transnational Witness Hearings

Depending on factors discussed above, improperly conducted virtual transnational witness hearings may cause certain negative implications.

Perjury. Some States (*e.g.*, Switzerland or the UAE) believe that a witness is honest only under a real threat of criminal responsibility for perjury. Assuming this correlation is true, improperly conducted transnational virtual witness hearings when the witness has no real threat (for example, due to the breach of international legal assistance procedure) may increase the likelihood of perjury.

Improperly received transnational virtual witness testimony may be inadmissible evidence. Would a tribunal seated in Switzerland, where the witness is typically sworn in and warned about potential criminal liability for perjury, accept as evidence the transnational online testimony of a witness physically present and residing in the UAE without prior authorisation from the UAE institutions? It is crucial to note that Switzerland and the UAE lack an extradition treaty, making the effective prosecution of a false witness highly unlikely. The potential prosecution is even more remote, considering that the UAE may resist a witness's examination through video link due to perceived threats to its sovereignty.

Annulment, non-recognition or non-enforcement of an award. Perjury may lead to an annulment (or) non-recognition and non-enforcement of award if it was materially based on false testimony (example). However, if a jurisdiction has a strict stance on witness' oath and criminal responsibility for perjury, in certain cases it may be hesitant to confirm the award if it was materially based on the testimony of a witness who testified without a threat of prosecution for perjury, even though there is no substantial evidence on this testimony's falsehood (see *e.g.* Sheppard, 2016, p. 205)

Arbitrator's criminal liability. In certain countries, arbitrators may theoretically face legal consequences for conducting such examinations without the consent of the state involved. For instance, Section 271 of the Swiss Criminal Code classifies it as a criminal offence when a person carries out activities on behalf of a foreign State on Swiss territory without lawful authority, where such activities are the responsibility of a public authority or public official. The penalty for this offence may include imprisonment for up to three years or a monetary fine. While there is no known Swiss case law where an arbitrator or judge has been convicted for remotely questioning a Swiss witness, the potential risks involved make such actions precarious.

Conclusion

Erroneously carried out transnational virtual witness hearings in international arbitration may increase chances of perjury, exclusion of such testimony from evidence in the case, the annulment

or non-recognition/ enforcement of an award, or they may even lead to a criminal conviction of an arbitrator who allowed such a hearing.

To avoid such an unpleasant outcome, arbitrators (and parties), when faced with a request for a transnational virtual witness hearing, should, among other things:

- Check if the law of the seat of arbitration requires witnesses to take oath.
- Check if the witness State allows questioning its residents without its knowledge or consent.
- Follow any procedure the witness' State imposes on the arbitrator to carry such a hearing (*g.*, notification requirements or international mutual legal assistance procedure).
- If there is no legitimate way to conduct a hearing, refuse to examine the witness remotely.
- Before the hearing, make sure that the witness testifies from a State where he declared his actual presence.

This entry was posted on Friday, March 29th, 2024 at 8:47 am and is filed under Perjury, Sovereignty, Virtual hearings, Witness
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