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International Arbitration

Expert Analysis

Cross-Examination In International Arbitration

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One of the paradoxes of international arbitration is that, on the one hand, it is celebrated for being flexible and, on the other, it follows some fairly uniform practices. These practices are sometimes embodied in soft law promulgations by such organizations as the International Bar Association (IBA) (e.g., the IBA Guidelines on the Taking of Evidence in International Arbitration), and cover such issues as the procedures used for, and the scope of, discovery; the use of strict rules of evidence; and the submission of witness testimony. Depending on the arbitrators, some or all of these procedures often presumptively apply to a case unless a party can convince the arbitrators to depart from them or all parties to the proceeding agree otherwise.

These procedures can impact the appropriate approach to cross-examination in international arbitration proceedings. Because international arbitration often takes a different approach to the submission of evidence and witness testimony than that taken in U.S. litigation, one cannot approach cross-examination in international arbitration as one would in U.S. litigation. In this article, I offer three practice pointers for cross-examination in international arbitration. These points are not necessarily exclusive to international arbitration, but rather are an application to that field of more general considerations regarding the conduct of cross-examination.

Whether to Cross-Examine

First, think carefully about whether you should cross-examine a witness at all. While such consideration must be given regardless of the forum for dispute resolution, a decision about whether to cross-examine a witness in international arbitration must take into account a significant difference between the approach to witness testimony in arbitration and that in U.S. litigation.

In U.S. litigation, witnesses commonly give direct testimony in person. In international arbitration, by contrast, witnesses typically give their entire direct testimony in written statements submitted weeks and sometimes months in advance of the hearings. Moreover, a witness who submits a witness statement will appear to testify live at the hearings only if called by the opposing party for cross-examination, subject to the tribunal's authority always to require the presence of a witness at hearings.

While arbitrators will typically permit a short (e.g., 10-15 minutes), direct examination of a witness who is called for cross, the main focus of hearings in international arbitration is on cross- and redirect examination. Further, the common practice, typically embodied in a procedural order from the arbitrators, is that a decision not to call a witness for cross-examination is not an admission of the truth of the contents of that witness' statement.

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Before explaining why all this bears on the question of whether to cross-examine a witness, it is worth saying a little about witness statements. While practitioners often bemoan the "Americanization" of international arbitration, one of its most common practices—the use of witness statements—is derived more from English litigation, where witness statements are the norm rather, than U.S. litigation, where they tend only to be used in bench trials.

There are differing views on the desirability of witness statements. Detractors assert that such statements are unreliable as they are typically drafted by lawyers and that live direct testimony better allows a fact-finder to assess credibility. Proponents respond that witnesses who give live direct testimony are typically thoroughly prepared by their lawyers in any event, note that a witness' credibility can be assessed on cross examination, and tout efficiencies in the use of hearing time,

One of the advantages of witness statements for arbitrators is that when the direct testimony is submitted in advance, they will be able to learn a great deal about the case before the hearings begin. To be sure, a tribunal will have some sense of the dispute at the outset from pre-hearing briefs and opening statements, even when direct testimony is given live over the course of several days of hearings.

But the picture will be incomplete; significant details remain to be filled in as the case unfolds in real time. This can adversely impact the fact-finding process. For example, on the first day of hearings, an arbitrator may not know enough to understand how the testimony of a particular witness then testifying fits with the whole case. By the fourth day, she will have a better sense of the whole picture, and may have questions for the first day's witness that would never have occurred to her at the time, but who, by the fourth day, is no longer available to testify.

The reason why the use of witness statements in international arbitration impacts the decision about whether to cross-examine a witness is this: If you do not call a witness for cross-examination, the arbitrators may never see that witness in person; all they will have is her witness statement. (More about this "may" later.) In a U.S. jury trial, by contrast, the fact-finders will see a witness testify live—when she gives her direct testimony—regardless of whether she is cross-examined.

Unless a witness testifying live performs poorly, live testimony is almost always going to be more persuasive than written testimony. One only has to compare the difference between hearing a strong orator, like President Barack Obama, deliver a speech as opposed to reading a transcript of his remarks. When a witness testifies live, she does more than dictate a witness statement to a court reporter; she brings that statement to life, and if the witness comes across well—as likeable, credible, competent, reasonable—her testimony may have an immediate persuasive impact on the finders of fact.

Seasoned advocates know that there's more to a witness' testimony than its transcript and know how to sense the atmosphere of a hearing room or a courtroom after a witness has testified. Because of the immediacy of live testimony, it is often necessary to dispel or minimize any favorable impact resulting from a witness' direct testimony by cross-examining her without delay. Indeed, experienced practitioners often decline an opportunity to take a break after a witness has finished her direct testimony, and, instead, move immediately to cross precisely to prevent any favorable impression lingering too long in the minds of the fact-finders.

Cross-examining a witness who has submitted a witness statement—and who, therefore, might not otherwise appear live—risks violating a cardinal

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rule of cross-examination: first, do no harm; do not make your client's case weaker or your adversary's case stronger than it would have been in the absence of cross. Specifically, calling a witness for cross-examination—when she might otherwise not appear—risks that the witness will be more persuasive in person than through her witness statement alone. By calling her, you may be giving a persuasive witness a soapbox to explain her company's position and an opportunity to bring her testimony to life, to make a personal connection with the arbitrators, to clarify points the arbitrators found unclear, and to put a human face to the case.

Even the most effective cross-examiner cannot control the questions the arbitrators may ask, or how the witness will fare on redirect. Standard techniques of controlling the witness, such as not letting her explain an answer or trying to limit the scope of redirect, may be ineffective in international arbitration proceedings. The tribunal, interested in getting at the truth and hearing from the witness in person, may simply overrule an attempt to cut off a witness. It is not uncommon for arbitrators to overrule an objection that the redirect goes beyond the scope of cross with the assertion, "that may be the case, but we are interested in the witness's answer."

The reality is that, in practice, most witnesses are called for cross-examination in international arbitration. And there will certainly be times when it is not just prudent, but essential to cross-examine a witness who has submitted a witness statement. But it is important that practitioners not take a knee-jerk approach and automatically call all witnesses for cross-examination. The risks of doing more harm than good are typically greater compared to cross-examining a witness who has given live direct testimony. If you don't cross-examine a witness who has submitted a witness statement, all the arbitrators may have from that witness are her words on a page, which can be challenged in ways other than cross-examination.

I want to return to a caveat I noted earlier—that if you don't call a witness for cross-examination, the arbitrators "may" never see that witness. Arbitrators always have the power to call a witness to the hearings even if the opposing party does not call her for cross-examination. While, in this writer's experience, they don't often exercise that power, they can do so, and might well do so if they sense that a party has decided not to call an important witness for tactical reasons.

Know Your Audience

This brings me to the second practice pointer. Don't treat your cross-examination as a private conversation.

While cross-examination bears some resemblance to a conversation, it is very different. A conversation between two people can meaningfully take place without anyone else present. Cross-examination, which also involves two people, the examiner and the witness, does not. It is a performance, not a private conversation. Cross-examination presupposes an audience with a particular task—deciding the merits of a proceeding based on the evidence.

In the heat of cross-examination, advocates can forget their audience in small and large ways. For example, in the middle of a cross-examination, a lawyer tells a witness to turn to an exhibit. The witness—often assisted by a paralegal—may find the right exhibit quickly. Seeing that she has the exhibit before her, the examiner immediately begins examining the witness, without checking to see whether the arbitrators have located it.

This has become less of an issue, perhaps, now that exhibits can be made to appear on iPads or monitors in front of arbitrators. But even where documents can appear instantly on an iPad, an arbitrator may not be focusing on it, but may be making notes or caucusing with her co-arbitrators. The key point for the advocate is this: Just because the witness may appear ready to field a question, it does not mean that the arbitrators are ready to hear the answer.

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Another way in which lawyers can overlook the arbitrators is to take a stealth approach to cross-examination, to try to get a witness to give damaging testimony without being aware she is doing so. One strategy is misdirection; asking a witness questions designed to conceal the object of the cross-examination. The problem with this approach is that if the witness doesn't see where the examination is going, the arbitrators might not either; if the witness is being misdirected, the arbitrators might be also. The "gotcha" moment may be so obscure that only the examiner realizes it has taken place.

Proponents of this approach may respond that even if the arbitrators don't realize that a witness has given damaging testimony at the time, the advocate can rely on that testimony in closing argument or post-hearing briefs. But this line of thinking rests on the faulty assumption that arbitrators remain passive observers until the time comes for the lawyers to tie the case together at the end. That is not the case.

Arbitrators inevitably form tentative views as a case proceeds. They evaluate evidence as they get it, assess witnesses as they see them. Their views may be fluid at the beginning but if they are repeatedly confirmed as a case unfolds — and here the concept of confirmation bias may come into play (a story for another day) — such views may begin to gel and solidify, such that by the time of closing submissions the arbitrators may have a provisional view of the correct outcome. What this means is that presenting an apparently brand new point—elicited through a stealth cross-examination—in closing submissions may not have the desired impact precisely because it does not fit with the tentative view the arbitrators already have of the case.

Documents

A third point is don't try to make your entire case on cross-examination. One practice in which lawyers regularly engage in international arbitration proceedings is to use cross-examination as a vehicle to get before the tribunal favorable documents, even where the witness being crossed had no involvement with those documents. The reason U.S. counsel often do this is because the practice in common law systems is that a document is not admitted in evidence unless a witness authenticates and presents it. And because there are limits to one's ability to compel witnesses to appear to testify in international arbitration proceedings, the author or recipient of a document may simply not be at the hearings to be asked about its contents. And so advocates, convinced that the best way to get documents before the arbitrators is through a witness, do what they believe to be the next best thing. They cross-examine a witness from the same company even though she had no involvement with the document.

The problem with this approach is that there are very few incisive questions you can ask a witness about a document she never wrote, received, or saw before. Questions are typically along the lines of: "Were you aware Mr. X said that?" "Would it surprise you that Ms. Y wrote that?" "What did you understand Mr. A to mean when he wrote that?" Or, after a portion of a document is read by the examiner, "did I read that accurately?" Such cross-examination often drags, elicits appropriate foundational objections, and risks losing the interest of the arbitrators.

But there are other ways besides cross-examination to get helpful documents before arbitrators. Arbitration does not follow strict rules of evidence. Typically documents are presumed to be authentic, and it is generally unnecessary to have a witness present a document for it to be part of the record. Therefore, rather than trying to present favorable documents through a witness who had no involvement in them, who has no desire to be helpful, and to whom an advocate can only pose questions, consider discussing favorable documents during an opening statement. By focusing on specific documents in an opening statement, the advocate is able to comment on them and weave them into a compelling narrative.

While arbitrators often request counsel to keep their opening statements short on the theory that they have already read the parties' briefs, many tribunals these days adopt—or could be persuaded to adopt—a procedure whereby each side in a case has approximately equal time to use as it believes appropriate. Bringing documents to the attention of the arbitrators can be done more quickly and persuasively in an opening statement than by asking questions of a recalcitrant witness who has never seen them before. If you can use your equal time as you see fit, it may be wiser to spend more time discussing helpful documents in an opening statement and less cross-examining an unknowledgeable, hostile witness about them.