A Counsel's Guide to Examining and Preparing Witnesses in International Arbitration

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To Marie, Henry and Johann

Preface

This book is mainly addressed to lawyers acting as counsel in arbitration, although this is not self-evident. Given that the book's title refers to the examination of witnesses, it could also be addressed to arbitrators. So before the book has even started, we arrive at the difference between common law and civil law jurisdictions with regard to the taking of witness evidence. The differences between common law and civil law – the great divide – have been the topics of countless arbitration conferences. When taking a closer look, many of the purported differences turn out to be myths, or have levelled out over time. But there is one area where the difference still stands strong, and that is the taking of evidence. In the civil law world, i.e. in inquisitorial systems, the examination of witnesses is predominantly carried out by the judge. He or she asks the questions, open questions most of the times, and only then attorneys may ask additional questions (also here, open questions are the preferred modus operandi). In the common law world, i.e. in adversarial systems, the party representatives take the lead in examining witnesses. Their examination typically follows the pattern of direct examination (or examination-in-chief), then cross-examination, and finally re-examination. It is fair to say that this method of examining witnesses requires more skill, care and preparation of the attorney than the tribunal-led questioning traditionally practiced in civil law jurisdictions.

In the majority of today's international arbitration cases, the taking of evidence bears more resemblance to the common law tradition than to the civil law tradition, even in arbitrations where there is no specific common law link. The common law tradition is also reflected in Article 8 (3) of the IBA Rules on the Taking of Evidence in International Arbitration, providing for direct testimony, followed by the other party's questioning of the witness, and finally re-examination. While common lawyers therefore enjoy a head start in international arbitration practice (at least those schooled in the art of advocacy), the difference is not such that it could not be made good by their civil law counterparts. This book is therefore predominantly addressed to those arbitration practitioners who have so far had little exposure to the adversarial approach to the taking of evidence, but who wish to learn the ropes of this fascinating method of witness examination. But also seasoned common law litigators who so far had little exposure to international arbitration may learn from this book. The civil law influence

on the taking of evidence in international arbitration exists and should not be neglected. Accordingly, a cross-examination that may be completely acceptable in a US courtroom may be considered overly aggressive, formalistic and histrionic in international commercial arbitration.

International arbitration as a whole is a fascinating area of practice. But if I were to identify those moments of my arbitration practice that I remember as the most dynamic, exciting and memorable, these would certainly have to do with the examination of witnesses, in particular by way of cross-examination. I hope that readers can share this passion and will find the book a rewarding read.

Ragnar Harbst
Frankfurt
August 2015

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CHAPTER 1

The Importance of Witnesses: Where the Documents End

Witnesses play a crucial role in international arbitration. This statement seems so obvious that it is very hard to challenge; who would think that witnesses are not important? However, these instances of doubt happen since commercial arbitration is heavily paper-based. To a large extent, the parties will rely on documents to argue their respective cases. Arbitration is therefore different from, let us say, a typical personal injury litigation where the first contact between the parties was when A hit B with his car. For such cases, it is obvious that what people saw and heard is of utmost importance. But in commercial arbitration, the situation is very different.

First of all, the parties are linked by a contract. In most cases, this will be a complex contract with a vast array of annexes and appendices. On top of that, the parties will have exchanged a plethora of faxes, letters, emails, memoranda, etc. It is not rare therefore for parties and their counsel to deal with literally thousands of documents. Accordingly, the parties share a common history that is well documented in writing. So where is the need for witnesses then? If everything has been recorded and put into writing, there should be no need for additional oral testimony. But in practice, this is not true. There is always some point where the documents end, some detail or arrangement that was not put into writing. Or things may have been put into writing, but the parties have different opinions on the meaning of this written record. Or there are conflicting documents, because the parties have documented their respective, differing opinions in the correspondence that they exchanged. And this may be the very reason why parties enter into arbitral proceedings.

When the parties wish to find out who among them is right, witnesses serve an important purpose. They can be the weight that tips the scale into one or another direction. Where the documents end, the parties offer witnesses. Beyond that, another important area where witness testimony comes into play is expert witness testimony. Taking as an example a typical construction project, parties will often argue over allegedly defective construction works, or a delay that occurred in the project. While

doing so, the parties will frequently rely on expert witnesses to prove that the works are/are not defective, or that certain acts or omissions by the other side caused a critical delay in the project. Similarly, arbitrations that evolve after a mergers and acquisitions (M&A) transaction often include expert witnesses, for example, to analyze whether an adjustment to the purchase price is required. In both cases, expert witness testimony often becomes the lynchpin of the entire arbitration.

There is a second reason why witness testimony is important: the live testimony of a witness can paint a much more vivid picture of what has happened than any document could. It provides the tribunal with firsthand information, directly from the people who were involved when the seeds of the dispute were first planted. Arbitrators who have read hundreds of pages of pleadings and reviewed hundreds of exhibits look for indicators that will enable them to decide which of the versions presented to them is the correct one. In this situation, the spoken or written word of a witness stands out from the multitude of documents before them in terms of uniqueness and authenticity. In this regard, the salience of oral testimony cannot be overestimated. To state an example: A person is planning her summer holiday and she eventually picks a nice five-star hotel on a picturesque Greek island. Her decision was preceded by solid research. Three travel guides were checked, which all recommended the hotel without reservations. A recent issue of a travel magazine praised the hotel to the skies. She also consulted an online rating platform for hotels, which contained hardly any criticism for the hotel (and this is rare). On the way to the travel agent, she meets a friend and mentions her chosen vacation spot. The friend looks at her, slightly shocked, and gives her a five-minute, nonstop account of her last holiday in this very hotel. Unremarkable food, overpriced drinks, bad service, dirty linen and walls that are anything but soundproof. Quite clearly and ardently, the friend sends the message that it was the worst holiday that she and her family had taken, ever. Will the traveler-to-be still go to the travel agent and book the hotel? Odds are that she will not. Even if the dissatisfied traveler is not her best friend, and is not an experienced traveler, it is likely that she will at least have second thoughts, if not cancel the trip completely. The reason is that the vividness and emotional impact of the friend's "live testimony" renders her report credible.

Psychologists talk about the concept of availability heuristics, which postulates that because an example is easily recalled, or is mentally immediately available, this example may be considered as representative of the whole, rather than just as a single example in a range of data.[1] In the above scenario, taking all the reports that our traveler had studied together, her decision was probably based on information by more than a hundred guests. Still, the vivid account of her friend, statistically only 1 percent, will have a greater impact on her final decision. The same is true for a witness' vivid account of past events. This type of account stands out from the documents and can have a great impact on an arbitrator's decision. Studies have shown that decision makers are more strongly affected by vivid information than by pallid, abstract or

1. Amos Tversky and Daniel Kahneman: *Availability: A Heuristic for Judging Frequency and Probability* (1973) in *Cognitive Psychology* 4, 207–232; Scott Plous, *The Psychology of Judgment and Decision Making* (1993), 225.

statistical information.[2] In this sense, witness evidence has commonalities with storytelling, not in the sense of fabricated information, but in the sense of an appealing account of real events. Well-presented witness evidence can motivate the arbitrators to come down on one side rather than on the other, and give them the comforting feeling that they have made the right decision.

There is a third reason why witness testimony is important in arbitration. Arbitral tribunals have a tendency to hear the witnesses proffered by the parties (rather than refuse to hear them due to, for example, lack of relevance). One of the fundamental rules in arbitration is that each party must be granted a reasonable opportunity to present its case. In fact, the denial of *natural justice* is one of the very few reasons that a losing party can use to attack the award. Arbitrators are therefore careful, sometimes overly careful, to avoid accusations that the right to be heard was not granted; no arbitrator likes his or her decision to be quashed. In practice, tribunals therefore tend to hear most of the witnesses named by the parties,[3] even though the testimony may not be strictly relevant in order to decide the case. And here, a second psychological phenomenon is employed. Human beings strive for consistency. Once a choice is made, humans show a tendency to behave in a way that is consistent with, and justifies, this earlier decision.[4] So, if a tribunal decided to hear a witness, it will tend to justify this decision by attributing at least some evidentiary weight to the testimony in their decision-making. In other words, it is difficult for a tribunal to hear witnesses in the first place and then ignore their testimony as irrelevant.

These described tendencies reinforce each other. First, arbitral tribunals are likely to hear witnesses that are offered by the parties. Second, a vivid, live testimony can influence the arbitrators, irrespective of the large amounts of documents. Third, the tribunal is likely to attribute some evidentiary weight to the testimony. A handful of individual testimonials can outweigh an avalanche of documents. Against this background, any counsel in arbitration is well advised to take the task of preparing and examining witnesses seriously.

2. Plous, *The Psychology of Judgment and Decision Making* (1993), 126.
3. Michael Bühler and Carroll Dorgan, "Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbitration," in the *J. of Intl Arbitration*, Issue 1 (2000), 17.
4. Robert Cialdini, *Influence: The Psychology of Persuasion* (1993), 57.