Chapter 1

Taking of Evidence in International Commercial Arbitration

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1 Background

International commercial arbitration is a system of dispute resolution that provides for the final resolution of disputes through a neutral and non-national decision-making body -- the arbitral tribunal. The arbitral tribunal is expected to apply its independent and impartial judgement to the determination of the parties' disputes, on the basis of the evidence put before it. The practices and procedures for obtaining and using documentary and testimonial evidence in the course of arbitral proceedings tend to be less formal than the strict rules of procedure that govern litigation proceedings before most national courts, which vary broadly from country to country and, in particular, between civil law and common law systems.

In recent years, as international commercial arbitration has established itself as the primary dispute resolution mechanism for international trade, certain commonly-accepted standards have evolved that reflect an internationally-harmonized approach to issues relating to the taking of evidence. This is reflected in the International Bar Association Rules for Taking Evidence in International Commercial Arbitration (the "IBA Rules"). The IBA Rules were drafted by a working group comprised of both common law and civil law experts with a view to establishing procedures relating to the taking of evidence in international commercial arbitration that would be acceptable to lawyers from both systems. The IBA Rules apply only to international commercial arbitration proceedings if the parties agree, or the tribunal orders, that they apply. They supplement applicable national laws and institutional or ad hoc rules. The IBA Rules were an ambitious undertaking, designed to overcome fundamental cultural differences relating to the taking of evidence under different national court systems. Whilst it is difficult to assess how frequently the IBA Rules are actually adopted by parties, it is fair to say that they have had a considerable influence on the practice of taking evidence in international commercial arbitration. Thus, in international arbitration proceedings, parties and arbitrators are becoming increasingly willing to employ elements of a procedural system other than their own.

Despite this, differences do remain. Parties, counsel and arbitrators from common law jurisdictions are accustomed to conducting proceedings in an adversarial manner, as is the nature of litigation under most common law systems. In adversarial proceedings, a party is expected to present all of the necessary evidence in order to prove the facts of its case. The role of the judge is to apply detailed and often complex rules of evidence in order to determine the relevance and admissibility of the evidence that has been tendered. Evidence put forward by one party in support of its case may be subject to a legal challenge by the opposing party. It is the judge's role to act as referee to determine whether or not evidence is to be admitted. However, the judge has no independent capacity to identify or obtain additional evidence and must come to a decision based on the admissible evidence put before him or her by the parties. In civil law countries, the judge will usually assume a far more inquisitorial role. He or she will often take an active part in obtaining evidence through direct questioning of the witnesses.

Therefore, it remains important for arbitration practitioners to understand the differences in the taking of evidence under civil law and common law systems, respectively. Such an understanding is vital in preparing for, and adequately dealing with, the frictions that may arise as a result of the differences in approach. Indeed, so prepared, the arbitration practitioner will be able to anticipate the expectations, perceptions and, perhaps, the conduct of the parties, their counsel and the tribunal members. To that end, some of the key differences between the civil law and common law approaches to: obtaining and using documentary evidence; the preparation of fact witness statements; the preparation of oral witness evidence; and the use of expert evidence, are considered below. (Although it is beyond the scope of this chapter, it is important to note that there also can be significant differences in the rules and expectations applying to privilege, confidentiality, and, in particular, the admissibility of settlement discussions across common law and civil law jurisdictions.)

2 Documentary Evidence

A key difference between the common and civil law procedures relates to the treatment of documentary evidence. For the purpose of this discussion, 'documents'

include any written or printed material capable of being made evidence. Given recent technological advances, in most jurisdictions it is well-accepted that the definition of a document must extend well beyond conventional 'paper documents' and will cover a wide range of media including computer records, tape recordings, television film and photographs.

Documents are central to the arbitral process and are, often, the most important and valuable evidence available to the tribunal. First, arbitral proceedings are, by their nature, less formal than court proceedings and, in particular, witnesses giving oral evidence may not be under oath in the same way that they would be if they were giving evidence in a national court. A result of the less formal nature of arbitral proceedings, coupled with different philosophies as to the role of witness evidence under different legal systems (as discussed below), is that tribunals often place greater reliance on documentary evidence than testimonial evidence. Secondly, international commercial arbitration usually involves the presentation of a party's case in full and in writing from the outset (usually in the form of written submissions, sometimes referred to as 'Memorials', written witness statements, supporting documents and, if appropriate, written experts' reports). This puts the documentary evidence, together with written submissions and written statements, at the forefront of a party's case. Thirdly, documents can be a less time consuming and less expensive form of adducing evidence than the production of witnesses. The importance of the role of documents in international commercial arbitration is therefore, universally acknowledged. However, the methods by which parties are accustomed to obtaining documents, particularly from the opposing party or third parties, are by no means universally agreed.

Document disclosure under the common law systems in the United Kingdom and New Zealand, for example, means the disclosure of all relevant documents. Failure to comply with a disclosure order in litigation proceedings may lead to severe sanctions. A party is not permitted simply to produce the documents that support its case, but must produce every single relevant and admissible document in its possession, including those documents that may harm its case. This exercise usually takes place after the parties have submitted their claims and defences (which tend not to contain evidence), but before the exchange of witness statements, if any, and well before the commencement of the hearing. Disclosure obligations in English litigation changed considerably as a result of the Reforms of Lord Woolf in 1999, which introduced the new Civil Procedure Rules. The Rules limit disclosure to what is really necessary in individual cases and abolish the procedure for 'automatic' disclosure of non-specified documents without orders. Whilst the object of the reform was to lessen the burden of disclosure for parties in English litigation proceedings, it does not alter the underlying principle of common law disclosure: that a party is obliged to disclose relevant and admissible documents, irrespective of whether they are helpful or harmful to its case.

In the United States, parties to litigation proceedings are entitled to seek 'discovery' of documents, including not only relevant and admissible documents but any document that is calculated to lead to the discovery of admissible evidence. The very nature of the word 'discovery' suggests interrogative investigation by one party into the existence of documents in another party's possession, custody or control, which is entirely apt. The Federal Rules of Civil Procedure, which apply to cases in the US federal courts, require initial disclosure of supporting materials only (and in state courts there may be no initial disclosure obligation at all). Discovery takes place pursuant to requests from an opposing party and can be an extensive and hard fought stage of US litigation proceedings. Parties may also seek discovery from third parties. The purpose is to allow the party taking discovery to uncover materials in the possession of the opposing party in order to use that as evidence in its own case. Methods include document requests, interrogatories, and depositions. The scope of discoverable documents is usually very broad and the obligations on a party subject to a discovery application are strict.

In many civil law jurisdictions on the other hand, a party will present to the court at the commencement of the proceedings (or soon thereafter) all of the facts necessary to support, as a matter of law, the relief it is requesting. In Germany, for example, evidence is required only in respect of those facts that are disputed by the opposing party. Duties on parties in respect of document disclosure in civil law jurisdictions have always been significantly less onerous than in common law jurisdictions. A party is, in principle, required only to produce those documents that it relies on in support of its submissions. Therefore it is not necessary for a party to respond to broad or searching requests for documents.

The civil law practice of submitting one's case to the judge and to the opposing party from the outset, and permitting the judge to take an inquisitional role towards fact-finding, carries its own checks and balances. The judge in civil law jurisdictions will place a substantial emphasis on the rules relating to burden of proof. Thus, a party that is required to prove certain disputed facts in order to succeed in its claim (or defence) must produce the appropriate evidence to support those factual allegations. If the evidence required to prove a particular disputed fact is in the possession of the opposing party, a party may apply to the court for an order requiring the opposing party to produce that evidence. However, such applications are strictly limited to particular circumstances, and certain types of evidence, and the documents requested must be identified with specificity. At the end of the day, the court does not usually have the authority to impose sanctions on a party that refuses to comply with a production order. This process is effectively checked by the discretionary power of the court to draw the appropriate (adverse) inference from a party's refusal to produce the required evidence. Civil law jurisdictions traditionally have been reluctant to permit production orders against third parties, although recent developments suggest that this might change. Germany, for example, has recently amended its Civil Procedure Code to give the courts the discretionary power to request documents that are relevant for the determination of the dispute from third parties.

Recent practice in international commercial arbitration goes some way towards reconciling the differences between common and civil law procedure. As noted above, typically in arbitration proceedings, each party will set out its case in full from the outset, attaching to its written submissions the supporting documentary evidence. Following the submission of each party's case,

parties may agree, or the tribunal may order, a procedure whereby each party will be entitled to request additional documents from the opposing party, including documents that are harmful to that opposing party's case. If a party were to refuse to produce a requested document, the tribunal would be entitled to order its production or, alternatively, draw appropriate adverse inferences.

Under the IBA Rules, a request for production of documents must contain a description of a particular document or a category of documents, with sufficient particularity to enable it to be identified, as well as a description of how the document is relevant and a statement that the document is not in the possession of the party making the request and why that party believes it is in the possession of the party to whom the request is made (Article 3.3). The tribunal may either order that the document in question be produced, consider the document itself, or appoint an expert to consider the document and provide an opinion to the tribunal as to whether or not the document should be disclosed (without divulging its contents if the document is not to be disclosed). Any document ordered to be produced will be confidential to the tribunal and the parties. In the event that a party fails to produce a document when ordered to do under the IBA Rules, the tribunal is entitled to draw negative inferences in respect of that document. Distinctly 'inquisitorial' civil law elements have found their way into the IBA Rules as well, permitting the tribunal, for example, to order *ex officio* the production of a document from the parties, if the tribunal deems that document to be material for outcome of the case (Article 3.9).

Finally, the national law of the seat of the arbitration may have a significant impact on the conduct of document disclosure in international commercial arbitration proceedings. Under English law for example, a party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings in order to secure the attendance of a witness to produce documents. However, such procedures may only be used with the permission of the tribunal or the agreement of the parties and, even then, only if the witness is in the UK and the arbitral proceedings are being conducted in England and Wales or Northern Ireland. Other jurisdictions, like Germany, have implemented Article 27 of the UNCITRAL Model Law on International Commercial Arbitration and permit parties to seek the assistance of the national courts in taking evidence, either directly or through the tribunal.

3 Written Fact Witness Statements

For the reasons outlined above, it is often the practice in international commercial arbitration for a party to place heavy emphasis on documentary evidence in support of the facts of its case. Nonetheless witness testimony, both oral and in the form of written witness statements, is still important evidence in most international arbitration proceedings.

Under common law legal systems, the written witness statement is a relatively new instrument in litigation (and it is by no means used in all common law countries). Traditionally, witnesses would be expected to attend the hearing and, at the hearing, would present their evidence in full in the course of oral examination-in-chief by counsel for the party seeking to rely on that evidence. Counsel for the opposing party would be entitled to cross-examine the witness and, following cross-examination, the original party's counsel would be entitled to re-examine. The judge would not be expected to have an active role in independently questioning the witness.

Even before the advent of the written witness statement, it has been standard and accepted practice in most common law jurisdictions for counsel to carefully interview a witness prior to that witness giving evidence at the hearing. It has never been permitted practice for counsel to 'coach' a witness, but it is considered to be an important aspect of trial preparation for counsel to understand the precise nature of the evidence that any witness is to give at the hearing (and indeed it may be negligent for counsel not to do so). In addition, it is not uncommon, and completely acceptable, for the common lawyer to assist a witness to draft his or her written witness statement. Under 'The Guide to the Professional Conduct of Solicitors' in the UK for example, it is permissible for a solicitor acting for any party to interview and take statements from any witness or prospective witness at any stage in the proceedings. The Guide does state that "*a solicitor must not, of course, tamper with the evidence of a witness or attempt to suborn the witness into changing evidence*", but as a general rule, it is not improper for a solicitor to advise a witness from whom a statement is being sought that he or she need not make such a statement. Such advice must be in accordance with the client's interests and the circumstances of the case.

In state court proceedings in civil law jurisdictions, written witness statements are practically unheard of. The witness is nominated in the written submissions of the party that intends to rely on that witness's testimony and, if the witness's evidence is considered necessary by the court and the court so orders, the witness must appear at the hearing. It is not the practice of civil law practitioners to carefully interview and prepare witnesses of fact prior to a hearing. In fact, professional rules in many civil law jurisdictions prevent lawyers from contacting, let alone preparing, a witness prior to his or her testimony. At the hearing, the judge will usually assume an inquisitorial role and thus 'test' the credibility of witness testimony and elicit from the witness those facts that the judge requires in order to determine the case. Counsel for both parties have the right to pose additional questions to the witness, usually after the judge has finished the examination. It has been suggested that witness testimony in civil law countries is sometimes considered less reliable than documentary evidence, particularly if the documents are contemporaneous. Therefore, although witness testimony is considered important, and at times critical, to the outcome of a case, strong documentary support is often the determinative success factor in civil law litigation.

Again, the IBA Rules provide for a 'middle ground' approach that seeks to reconcile the major differences between the common law and civil law systems. Under the IBA Rules, parties may be ordered to submit written statements within a particular period of time. Such witness statements must include a number of details including a full description of the witness and his or her present and past relationship with any of the parties, a description of his or her background, qualifications, training and experience (if relevant and material to the dispute or the contents of the statement), a full and detailed description of the facts, the source of the witness's information as to

those facts, an affirmation of truth and the signature of the witness as well as its date and place. The IBA Rules expressly state that it will not be improper for a party (or its representative) to interview a witness (Article 4.3).

It is now accepted practice in international arbitration that counsel will interview a witness prior to the witness giving testimony (without, of course, manipulating the witness's testimony). However, as discussed, arbitration practitioners from civil law jurisdictions still may be reluctant to contact witnesses directly, due to the ethical and professional rules that apply to litigation in some civil law jurisdictions, which prevent counsel from meeting with witnesses in order to prepare witness testimony. Such (real or perceived) restrictions in international commercial arbitration may place civil law counsel at a disadvantage.

In any event, both parties and arbitrators need to be aware that, in international commercial arbitration, contact between counsel and witnesses is likely to take place. If such contact is considered to be inappropriate by any party, that issue ought to be addressed at the earliest opportunity in the proceedings. Indeed, as written witness statements are now widely used in international commercial arbitration, most experienced international arbitrators are aware of the issues faced by lawyers from different legal systems and will ensure that adequate safeguards are in place to avoid any procedural disadvantage to one party. However, parties should also bear in mind that the weight that the members of a tribunal will be prepared to give to written witness statements may be determined by the background of the arbitrators themselves.

4 Oral Witness Testimony

As outlined above, oral witness testimony in common law jurisdictions comprises the examination-in-chief, cross-examination and re-examination of witnesses. In recent years, in litigation in many common law jurisdiction (with the exception of the US), the role of examination-in-chief has been largely superseded by the written witness statement. As a consequence, common lawyers expect witnesses to be subjected to fairly intensive cross-examination by the opposing party's counsel (and that cross-examination is intended to provide an effective check and balance to the written testimony in chief). Civil lawyers, on the otherhand, are more likely to expect the judge to take the primary role in eliciting oral testimony. The practice of cross-examination by opposing counsel remains a foreign concept to many civil law practitioners expecting the judge to assume the active role of inquisitor. Also, civil law practitioners are not trained in the skills of cross-examination and may find themselves in a disadvantageous position vis-à-vis their common law counterparts (although an experienced tribunal will seek to level the playing field between the parties' representatives). Common lawyers, on the other hand, may be taken by surprise by the active role taken by civil law arbitrators.

In practice, in most international commercial arbitration proceedings the tribunal will permit the cross-examination and re-examination of witnesses (particularly if the evidence-in-chief has been in the form of written witness statements). However, the tribunal is also likely to put questions of its own to the parties' witnesses. Reflecting that practice, the IBA Rules provide that each witness who has submitted a written witness statement must appear for testimony at an evidentiary hearing unless the parties agree otherwise. In the event that a witness does not appear at a hearing without a valid reason, except by agreement of the parties, the arbitral tribunal is required to disregard that witness's statement unless, in exceptional circumstances, the tribunal determines otherwise.

There may be situations where a party will wish to enforce the attendance of a witness at a hearing. In those circumstances, the party must look to the applicable procedural law of the arbitration (usually the law of the seat) for assistance. Under English law, for example, a party to arbitral proceedings may use the same court procedures that are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony. However, it may only do so with the permission of the tribunal or agreement of the other party and only if the witness is in the UK and proceedings are being conducted in England and Wales or Northern Ireland.

5 Expert Evidence

In common law countries, parties generally submit expert evidence in a similar form to evidence from witnesses of fact, but most lawyers appear to accept that the role of the expert witness is to provide objective and neutral evidence on specific issues. Accordingly, the expert witness is expected to be independent of the parties. Therefore, it is less likely that common law counsel will assist in the preparation of expert witness reports to the same extent that they would assist in the preparation of written statements by witnesses of fact. If counsel were to do so, there would be a risk that the credibility of the so-called independent expert would be seriously undermined. Nonetheless, it is accepted that in common law jurisdictions the role of the independent expert is to assist the party that calls him or her to prove its own case.

In civil law systems on the other hand, it is most common for the judge, after consulting the parties on appropriate candidates, to appoint the required expert, who then assumes the role of expert adviser to the court itself, as opposed to a witness for one or the other of the parties. That practice is consistent with the judge's role of fact finder in the dispute resolution process. In civil law systems, parties also may be entitled to appoint their own experts but evidence from a party-appointed expert may not be considered to be as credible as that of a tribunal-appointed expert.

In international commercial arbitration, both practices are common. Under the IBA Rules, party-appointed experts are assumed to be providing expert evidence in support of a party's case. Tribunal-appointed experts are expected to report to the tribunal and assist the tribunal to determine specific facts and issues. It is becoming more common in international commercial arbitration proceedings for tribunals to order that the party-appointed experts meet separately, before the hearing, to establish a set of agreed technical facts and issues. Occasionally a tribunal may require its own expert to attend such a meeting or, alternatively, to report to the tribunal in respect of those issues that the party-appointed experts are unable to agree upon.

6 Conclusion

Procedures relating to the taking of evidence in international commercial arbitration continue to evolve through the application of the IBA Rules and the practice of experienced counsel and arbitrators. Skilled arbitrators will identify cultural differences from the outset and apply practical solutions to avoid inconsistent, inequitable or simply unhelpful practices in the taking of evidence in international commercial arbitration proceedings. After-all, the objective of international commercial arbitration is to obtain the fair resolution of the parties' disputes; the purpose of any practices and procedures adopted to govern the taking of evidence is to facilitate a fair means for the resolution of the parties' dispute, without unnecessary delay or expense.

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