

Procedural Issues at Interlocutory and Hearing Stages

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(A speech to the Chartered Institute of Arbitrators on 18th February 2013 at the HKIAC)

Introduction

In *Fletamentos Maritimos S.A. v. Effjohn International B.V. (No. 2)* [1997] 2 Lloyd's Rep. 302 at 303, Waller L.J. said: "I have always understood the position to be that there are no circumstances which could give rise to a power to review an interlocutory direction not made in the form of an award. Basically the position is, as I understand the authorities, that the Court has never had some general power to supervise arbitration and review interlocutory decisions."

An arbitrator has three (3) statutory duties or obligations in conducting the interlocutory proceedings, namely:

- (1) To act fairly and impartially between the parties, giving them a reasonable opportunity to present their cases and to deal with the cases of their opponents; and
- (2)+(3) To avoid unnecessary delay *or* expense;

But the duties of avoiding unnecessary delay *or* expense rarely get an arbitrator into trouble. Therefore, the only concern of an arbitrator remains to be his/her duty to observe the second rule of natural justice, namely, to act fairly and impartially between the parties and to give them a reasonable opportunity to present their cases and to deal with the opponents' cases.

The old saying of "an arbitrator is the master of the procedure as long as natural justice is observed" remains true as ever.

Procedural issues are evidential issues

Most of the procedural issues in arbitration are evidential issues. After all, a substantive hearing is very much an evidential hearing. Arbitrators and indeed lawyers in international arbitration are in a much more fortunate position than previous decades in having the guidance of IBA Rules on the Taking of Evidence in International Arbitration 2010 (the "IBA Rules"). The IBA Rules set out the broadly accepted standards which result from a convergence between the common and civil law systems. Increasingly, the IBA Rules have been adopted in international arbitration, including cases in Hong Kong. In the past 2-3 years, I encountered two major arbitrations that the parties and their counsels agreed to adopt the High Court rules, on the ground that the practice was their familiar territory, but eventually they were persuaded by me and my fellow-arbitrators to adopt the IBA Rules instead.

Difficulty to grasp

Because of confidentiality and the lack of guidance (unlike the Rules of the High Court) in how an

arbitrator can decide on an interlocutory matter, it is difficult for new comers to learn unless they have the opportunity of sitting (not once, but more times) with experienced arbitrators. The Rules of the High Court can provide valuable guidance even to an experienced arbitrator in facing difficult interlocutory matters or issues. But proceedings in court can sometimes differ a lot with arbitration, especially an international arbitration with foreign lawyers representing one or more parties.

I remember Mr. Neil Kaplan QC once said in an open speech that "it is very valuable for people who are aspired to be an arbitrator to spend a bit of time in the office of a practicing arbitrator". I fully agree, *albeit* the opportunity to do so is limited even in a place like Hong Kong because there are only a small number of busy full-time arbitrators.

With the limited time I have this evening, I shall pick a few problematic areas in interlocutory proceedings (hope to be of interest) which are unique to arbitration.

Who leads in a tribunal?

Most international arbitrations have three (3) arbitrators in the tribunal. So how a tribunal deals with interlocutory decisions and directions will directly impact on the speed, costs and harmonious working in an arbitration case.

In my experience, it differs (sometimes a lot) in each separate case, depending on whom you are sitting with as co-arbitrator(s).

The smoothest or the best way of handling (as I see it) is the London maritime arbitrations under LMAA Terms.R8(b)(ii) of the LMAA Terms 2012 says:

"If the tribunal is to consist of three arbitrators:

... the two so appointed may at any time thereafter appoint a third arbitrator so long as they do so before any substantive hearing or forthwith if they cannot agree on any matter relating to the arbitration, and if the two said arbitrators do not appoint a third within 14 days of one calling upon the other to do so the President (of LMAA) shall, on the application of either arbitrator or of party appoint the third arbitrator."

There remains the uncertainty of which contractual provision trumps if the arbitration agreement or clause (such as, in the ASBATANKVOY charter-party) expressly calls for a tribunal of three arbitrators to be constituted. But it does not deter most if not all London maritime arbitrators, who invariably accept appointments on the basis of LMAA Terms, to adopt the practice set out in r.8(b)(ii).

This brings the next question of who should lead in the absence of a third arbitrator. In London, it is the established practice (*albeit* nowhere written in the LMAA Terms) that the claimant-appointed arbitrator shall lead. In most cases, the "lead" arbitrator would go ahead in

contacting the parties and issue interlocutory directions without any consultation with the respondent-appointed arbitrator. The respondent-appointed arbitrator will not have the slightest offence or displeasure. Even if he/she may prefer a different decision, there will be restraint (very much like the High Court judge) not to second-guess the lead arbitrator's decision in procedural issues. Only in very important interlocutory decisions, the lead arbitrator may come back to seek the views of the respondent-appointed arbitrator. Or, the respondent-appointed arbitrator may take the initiative in promptly volunteer his/her views, so that the lead arbitrator can take into account in deciding the directions.

This practice works in London maritime arbitration because of tradition and above all, the handful of maritime arbitrators know each other very well and have developed a trust between them.

In Hong Kong, which has quite a lot of maritime arbitration cases from the Mainland, it is hard to "implement" this London practice except between a small number of no more than 3-4 arbitrators who are familiar with it (and certainly agree to it as a good practice). In Hong Kong, without the LMAA Terms, implementation will require the additional step of going to the parties asking for their agreement to defer the appointment of the third arbitrator (and only if necessary), and then leave the claimant-appointed arbitrator to lead the interlocutory proceedings.

Even in a typical maritime arbitration, if I sit with an arbitrator who is unfamiliar with this practice or I see one or both law firms who are not known to have handled London maritime arbitrations, I normally do not bother explaining the potential benefits and simply go ahead to make the appointment of the third arbitrator without delay.

Outside of maritime arbitration, the practice is almost always the prompt appointment of the third arbitrator in order to complete the tribunal, so that the proceedings can move forward. In that case, the lead arbitrator is logically the third arbitrator. But there are occasional variations. For instance, the third arbitrator happens to be travelling, or very busy, or he/she is just a lay expert (appointed because of his/her knowledge in what is essentially a difficult technical dispute) rather than a lawyer or an experienced arbitrator. That may need a party-appointed arbitrator to step-in and lead the interlocutory proceedings. This is less desirable unless the two party-appointed arbitrators know each other. Otherwise, there can be a lack of trust between the two and may lead to delay and excessive deliberations.

The bigger problem in a full tribunal of three is: do you need all of them to reach unanimous decision or at least a majority in all of the interlocutory directions? Because many co-arbitrators sitting in non-maritime international arbitrations do not know each other (or know each other well enough to be comfortable), it is often the case that everyone wants to be involved. It can be quite difficult for the tribunal to internally agree to allow the third arbitrator (or the presiding arbitrator or the chairman) to "lead" with or without having to consult and agree with the party-appointed arbitrators. This can result in serious delay and extra costs. Serious delay, even in a relatively straight-forward direction, can come from the traveling, busy schedule,

unavailability or simply slow motion of one of the co-arbitrator. It will be discourteous and difficult to reject a co-arbitrator who wants to say something (pretty useless, sometimes) but asks for 7 days or thereabout to do so. Extra costs can come from one co-arbitrator who happens to be talkative (or provocative), inquisitorial and controversial, who comes with lengthy views and ideas and insisted to approve every draft directions before sending out to the parties. The inevitable result will be that the other arbitrators, including the third arbitrator, who disagreed, must go back to reason or dissuade at length as a matter of courtesy and/or proper deliberation process.

To conclude, I suggest if a party finds an arbitration moving slowly when it comes to interlocutory proceedings, what I have said above may well be the reason behind. One solution may be for the party to try to reach agreement with the opponent (it should be for mutual benefit) that the interlocutory proceedings shall forthwith be dealt with by the third arbitrator alone, always assuming the third arbitrator is known by the parties to be competent and/or experienced. In that case, the arbitrators must follow what the parties have agreed when it comes to procedure. Going to the court in applying to remove all members of the arbitral tribunal on the ground of unnecessary delay is not a viable option because the delay may not be serious enough to warrant a drastic step of removal of arbitrators. Furthermore, the party will not know what is happening between the party-appointed arbitrators and the third arbitrator, if he/she is the target of removal, is possibly not the person who is guilty of delay.

Reasons for interlocutory orders? Adversarial v. Inquisitorial approach?

This is one of the few areas members in a tribunal may disagree with one another from time to time, which can affect the smooth running of the reference and the increase of costs to the parties.

There is a demand for a reasoned award in the Arbitration Ordinance (Cap. 609) (the "HKAO") in Section.67. There is no similar demand for an interlocutory order. The general belief, I believe, is that an interlocutory order is best not to give reason, so that the parties cannot get back to the arbitrator for reconsideration. I accept that for relatively simple interlocutory orders. But for difficult ones with parties and their lawyers spent a lot of costs arguing before the arbitral tribunal, I have some hesitation. I am inclined to think that the arbitral tribunal somehow owes an obligation to the parties an explanation as to why the interlocutory decision was reached. When I am faced with one or both parties who is/are inexperienced in HK arbitration, I am also inclined to give reason for an interlocutory order, for the purposes of educating the party/parties or to pacify them.

But if I am not sitting as a sole arbitrator, even a matter like this can be disagreed amongst the arbitrators. I suggest that co-arbitrator(s) should give more regard or respect to the lead or presiding arbitrator's style in the granting of interlocutory orders - with or without reason and to what extent. Any comment from the co-arbitrator should be directed to the correctness, extent or appropriateness of the reason (if any), rather than the form or style.

Another area of even greater difficulty is the “adversarial v. inquisitorial” approach. The power is now given to arbitral tribunal to adopt an inquisitorial approach under section 56(7)¹ of the HKAO. Similar power has been given to arbitrator under the English Arbitration Act 1996 in section 34(g). My impression with London arbitration is that the London arbitrators (and the lawyers) are too entrenched in the tradition of running on purely adversarial lines. Some of them probably hate the inquisitorial approach. In Hong Kong, the situation is not much better. But I submit that in Hong Kong, there is a greater need for taking an inquisitorial approach. More often than in London arbitration, one may encounter cases of parties and their legal representatives who are imbalanced. In that case, an arbitrator like me can be caught in a dilemma of whether I should seek out the truth or leave the parties to fight it out in the traditional way. There are times, I believe, an arbitrator is tempted to raise with the parties regarding the omission of say, reference to another clause in the contract, or a judgment, or an important piece of evidence, or an issue, etc. But to raise it may have the consequence of helping one party, usually the weaker party. Worse still, in a tribunal of three, it will be even more difficult to reach a consensus in the proper approach to take.

Discovery/disclosure

This is always a very difficult interlocutory step. I will only discuss a few of the issues I often encounter. The IBA Rules deal with document production (or discovery/disclosure) extensively in Article 3, which is too lengthy to be reproduced here in full.

The **first** issue is the parties do not always follow the IBA Rules even they agreed themselves, or directed by the arbitral tribunal. For instance, the parties still follow minutely the Anglo-American style of document discovery/disclosure procedure. This is apparently not the intention of the drafters of the first edition of the IBA Rules in 1999 – see IBA Working Party, Commentary on the New IBA Rules of Evidence in International Commercial Arbitration [2000] BLI Issue 2, p.20.

In the book on Rules of Evidence in International Arbitration: An Annotated Guide by Nathan D. O’Malley, it said in para.3.14:

“Article 3.1 (of the IBA Rules) affirms the position generally adopted in international arbitration that a party is only required to produce, of its own initiative, those documents on which it relies. Failure to voluntarily (e.g., without an order from the tribunal) disclose evidence adverse to a party’s position is not a violation of the IBA Rules.”

There are a number of English cases dealing with this issue. For instance, in L. Brown & Sons Ltd v. Crosby Homes (North West) Ltd. [2008] BLR 366, Mr. Justice Arkenhead said in para.36(ii): *“Under some agreed or standard procedures for disclosure (for instance the IBA Rules) disclosure is*

¹ “Unless otherwise agreed by the parties, an arbitral tribunal may, when conducting arbitral proceedings, decide whether and to what extent it should itself take the initiative in ascertaining the facts and the law relevant to those arbitral proceedings”.

voluntary unless specific documents are either agreed or ordered to be disclosed.”

In *Chantiers de l'Atlantique SA v. Gaztransport & Technigas SAS* (2011) EWHC 3383 (Comm), Mr. Justice Flaux said in para. 213: “In particular the rules for disclosure of documents were based on the IBA Rules. There was no duty to disclose relevant documents, akin to CPR Part 31, such as would be the case with London arbitration conducted in accordance with English procedure.”

The **second** issue is the request to produce documents. This is in the IBA Rules, Article 3.3². Essentially, five (5) conditions must be met in a request to produce. They are:

- (1) Sufficiently describe the documents.
- (2) If a category of documents is requested, a “narrow and specific” description must be provided.
- (3) A reasoned explanation as to why they are “relevant to the case” and “material to its outcome”.
- (4) Confirm that the documents are not in its control.
- (5) Explain why the documents are assumed to be in the control of the other party.

If Redfern Schedule is used, then the five conditions should be stated therein.

The five conditions are very much self-explanatory. But I can elaborate a little more about (2) & (3). For (2), the meeting of a “narrow and specific” standard is aimed at limiting production requests. Thus a request for a category of documents should provide a description that provides the technical or commercial functionality of the record. Such as certain drawings or plans, or meeting minutes, etc. The description can be the author or the possible recipient of the documents. Furthermore, a time frame of the documents should be stated. If it is too broad, it may be viewed as a violation of the “narrow and specific” standard.

For (3), the reworded IBA Rules in 2010 from the earlier version in 1999 shows that “relevant to the case” is a concept different with “materiality to its outcome”. The difference between these two concepts can be shown in the English case of *ABB AG v. Hochtief Airport GmbH* [2006] ArbLR2. It was an application to set aside an LCIA Award. The applicant complained it had been unfairly treated when a number of relevant documents requested were denied by the tribunal. In reviewing the conduct of the arbitral tribunal under the IBA Rules, Mr. Justice Tomlinson agreed relevance was shown but it was still appropriate for the arbitral tribunal to deny production because the arbitrators no longer regard the relevant argument itself to be material to its award.

The **third** issue is happening in a lot of cases. Namely, the request to produce is responded by a

² A Request to Produce shall contain: (a)(i) a description of each requested Document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; ... (b) a statement as to how the Documents requested are relevant are relevant to the case and material to its outcome; and (c)(i) a statement that the Documents requested are not in the possession, custody or control of the requesting Party ... (ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party.

short reply that no such document existed. Sometimes, the reply is accompanied by an explanation that a search has been conducted. But if the applicant continues to insist that the document must exist (for instance, by reference to the common practice of that trade) and makes the demand of an order to produce, to follow by sanctions, it can put the arbitrators in a difficult position. Firstly, the arbitral tribunal who has yet to be educated about the case and the alleged practice of the trade (say, by experts), will be hesitated to accept that the document must exist. Secondly and more importantly, it is difficult for the arbitral tribunal to make the order, which prematurely and unnecessarily display a distrust of the opposite party's allegation that the document does not exist.

Usually in international arbitration, if a foreign party claims that he has no such document or documents, it will be the end of the matter. If the arbitral tribunal issues an order and the applicant converts it to an order of the court under HKAO s.61, it will not be too effective against a foreign party. A statement of truth confirming a reasonable search for the documents may not be comforting as well.

But even if the arbitral tribunal did not make an order and formally impose the usual sanction of drawing adverse inference, I do not believe there can be no consequence whatsoever *if*, at the hearing and in the deliberation, the arbitrators are convinced that the particular document or documents should exist. Then, whether or not there was a formal sanction of adverse inference may not be too different. The frustrated applicant probably should stay patient, rather than to over-react as was in the case of *Jung Science Information Technology Co. Ltd. v. ZTE Corporation* [2008] 4 HKLRD 776. It may well be a much better approach to the problem.

In appropriate cases, the alleged non-production of specific document(s) can be ordered to deal with in the witness statements to be exchanged, and the issue to be left over for the hearing by way of submissions and/or cross-examination.

Exchange of Witness Statements/Expert Reports

One would have thought the practice of directing the parties to exchange before the hearing written witness statements and/or expert reports, which shall be treated as evidence-in-chief, is very much established in arbitration. In many cases, the directions will further make clear that no factual or expert witness shall testify at the hearing unless he/she has earlier served evidence-in-chief by way of witness statement or expert report.

But in a lot of the arbitration cases I have encountered recently, most of them are in Hong Kong but a few in London or Singapore, problems remained. The problems included but not limited to:

- 1) Limited contents in the witness statements, sometimes no more than a few sentences, from one party. This often necessitated that the factual witness having had to give additional oral evidence-in-chief at the substantial hearing over areas which he/she did not cover in the witness statement. This is often opposed strongly by the opponent. I can only hope and urge arbitral tribunal in facing one party's law firm is a foreign firm and from a jurisdiction less

familiar with this practice, will explain in a more detailed manner in the directions about the functions and consequences of exchanging witness statements required in a Hong Kong arbitration.

- 2) A party wants to adduce new factual (or expert) witness after the exchange of the original witness statements (or expert reports). This is often an after-thought, say after seeing the opponent's evidence or due to ill preparation of their original evidence. Unless on the face, the new factual witness is unavailable earlier (e.g. Robinson Crusoe has just been found) and the new evidence can make a crucial difference or material to the outcome, an arbitral tribunal usually would not be sympathetic. If the substantive hearing is just around the corner, to admit the new evidence will be tantamount to allow an ambush against the other party. Even if the substantive hearing is still away for a while and there is time to allow a second round of exchange of witness statements, the party who was allowed to adduce new evidence has upset the procedure and should be, as a minimum sanction, liable for costs, preferably payable forthwith and the arbitral tribunal can summarily assess.
- 3) A party wanting to change its expert witness after the exchange of expert reports. This is not a case of the original expert witness (who produced the exchanged report) becomes unavailable due to illness or any other justifiable reasons. My recent encounter has to do with, possibly, a newly instructed counsel was unhappy with the 1st expert witness and hence the applicant made a decision to change. The problem is: another expert report, very different in its content, will have to be exchanged again. In a way, this is quite careless or even stupid on the part of the applicant as it will discredit its own expert evidence and open to the opponent's counsel raising difficult questions in cross-examination at the substantive hearing.
- 4) Very often, the directions concerning factual witness statement and/or expert evidence will include a further round of exchange of supplemental or rebuttal witness statements and/or expert reports. Rebuttal statements or reports should only be limited to a response to matters contained in the opponent's witness statement and/or expert report. The IBA Rules gave recognition to the fact that a statement or report produced by the opponent will often require a response³. If needed, even a new factual witness can be adduced in order to reinforce the rebuttal.⁴ But sometimes, the rebuttal or supplemental witness statement or expert report tries to use this procedural step in bringing in a completely new story or new approach or new evidence. This creates quite a number of problems, such as, the expert's earlier asserted statement of truth, the whole truth and nothing but the truth without

³The IBA Rules, Article 4.6 said: If Witness Statements are submitted, any party may, within the time ordered by the Arbitral Tribunal, submit to the Arbitral Tribunal and to the other Parties revised or additional Witness Statements, including statement from persons not previously named as witnesses, so long as any such revisions or additions respond only to matters contained in another Party's Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration.

⁴ Adducing a new witness at this late stage is not adducing new evidence. It will not cause any surprise to the opponent and will cause no unfairness as long as the new witness is limited to a rebuttal. For instance, the opponent's witness statement alleged in a meeting, Mr. A together with Mr. B made an important promise. Mr. B is the party's listed witness but not Mr. A. There is no justification if the party is prevented from adducing an additional factual witness, Mr. A, serving a rebuttal witness statement denying he has made the promise.

qualification becomes dubious. There is also the problem of how is the opponent's factual witness or expert witness going to deal with the new evidence in the limited timeframe that is left before the hearing, which amounts to an ambush. Again, I am sure the party doing it would not be sympathetically looked at by the arbitral tribunal. Chances are, the new story and the new evidence, not a rebuttal or response to the opponent's witness statement and/or expert report, will be held inadmissible.

- 5) Last but not the least, some expert evidence can be very expensive – much more expensive than the fees of counsels or the arbitrators. I have a recent case which an expert witness charged more than the combined fees of three experienced (and rather expensive) arbitrators (me included. and I am the less expensive arbitrator). The arbitral tribunal should, in most cases try to cap the recoverable costs of expert evidence, even without party's application, before the costs are being incurred.

Chronology, list of issues, hearing bundles, etc.

One would have thought these standard pre-hearing preparations should not be controversial. But this is not always the case. I have recent encounters that the parties' legal representatives could not come up with chronology and/or list of issues before or in the course of the hearings.

One recent encounter was unnecessarily bitter. The respondent's law firm pressed the claimant's law firm for the hearing bundles, said to be absolutely crucial for its counsel to prepare for the hearing. Failing to achieve an agreement, the respondent's lawyer applied to the tribunal (which I happened to chair) for an order to deliver the hearing bundles, failing which the tribunal should adjourn the hearing. The respondent's lawyer said it is the court's practice that hearing bundles must be ready 2 months before the hearing.

The claimant's law firm offered to deliver the hearing bundles on a date which is quite a little more than a month before the hearing. It is quite acceptable to me and indeed my co-arbitrators. After all, we are not persuaded that the lack of hearing bundles can affect the respondent's preparation for the hearing. I also made clear that there is no way the tribunal would consider adjourning the hearing fixed a year ago. This possibly made the respondent extremely unhappy.

Then close to the date set for delivery of the hearing bundle, which was on a Friday, the claimant's law firm applied for a short extension of time until next Monday. I granted the extension. But this resulted in an outburst of extreme anger by the respondent's law firm. A 3-page message came with all sorts of accusations from bias and favourism, unfair in refusing to adjourn the hearing as the counsel could not prepare the opening submissions, calling for my co-arbitrators to intervene and last but not the least, a threat of going to the Hong Kong Court to remove me.

Because the attack was on me, I have to immediately respond with a message as follows:

"Your message is somewhat surprising as the service of hearing bundles should be a very minor

issue. For the first time, you have stated that the preparation of opening submissions will be affected without the hearing bundles. But since you have all the documents (which I have repeatedly stated), the only possible delay is the checking of references to the documents in the opening submissions are consistent with the hearing bundles.

I must confess in several arbitration hearings I have recently encountered (including one London arbitration 2 weeks ago) the hearing bundles were not delivered to one party when the due date for the exchange of opening submissions was due and the actual hearing was only a few days away. The parties actually exchanged opening submissions with unchecked cross references to the hearing bundles. The checking was only confirmed later with hand-written references in the opening submissions on the actual date of the hearing.

Therefore, to conclude, your concern is in my view unnecessary and unwarranted because of:

- 1) The exchange of opening submissions is still 2 weeks away, and the hearing a month from now.*
- 2) You have all the documents in hand.*
- 3) You have the indices and you can make your own bundles...."*

I tried my best to be peaceful and calm. Therefore, I did not directly respond to the accusations of bias and favourism other than to reassure the respondent that I understand my role as an arbitrator. My response could very well be seemed as weak. But I was keen to avoid another case in my name as in *Jung Science Information Technology Co. Ltd. v. ZTE Corporation* [2008] 4 HKLRD 776. I was also hoping that the respondent would be discouraged (by my reasoned response) in going to the court to remove me, which could jeopardize the substantial hearing if one of my co-arbitrator or the claimant preferred to wait for the outcome in the court's decision concerning me.

Witness preparation

This is an area I have been preaching lately, for instance, in the Comité Maritime International (CMI) Conference in Beijing back in October 2012. Namely, there should be a level playing-field in international arbitration when it comes to witness preparation.

For most Asian or Chinese factual witness, encountering for the first time an adversarial-style cross-examination is a daunting experience. If he/she is not educated or prepared in advance, it is rare that the witness will perform satisfactorily. Sometimes a seemingly good case on documents can be destroyed by a poor witness. It is not short of horrifying stories concerning Asian witnesses behaving badly. Such as, running away halfway during a protracted cross-examination, or having a heart-attack, or bursting into quarrel with the opponent's counsel or even the arbitrator... etc. I have even heard of a case of an angry Asian witness physically attacking the opposite party and its counsel, and police had to be called.

In educating or preparing the factual witness, it can take different form or shape. It may be a lecture on the law of evidence or a mock arbitration to allow the Asian or Chinese witness to get familiar with testifying before an arbitral tribunal in a well structured manner.

Mock arbitration is no longer a stranger in international arbitration. When it comes to cases where 'stakes are high', a mock arbitration may resemble the real exercise, plays out over several days, in order to prepare the witnesses and the lawyers. That means a "shadow tribunal" will be picked from people who are as close as possible to the experience, area of practice, character, demographic, general altitude and culture as the real sitting arbitrators. Both sides of the case are argued by teams of lawyers from the same firm. Factual witnesses will be called and cross-examined from a full list of difficult questions likely to be imposed by the opponent's counsel in the real hearing. The arbitral tribunal is invited to be critical in the performance of the factual witness. The whole exercise involves a lot of work and is very expensive. But the benefit of thoroughly educating the factual witness is obvious. Furthermore, it can be hidden under privilege.

Mock arbitration or mock litigation is common in the US. High level of contact between US attorneys/ counsels and witnesses, even training of witnesses, are commonplace. Ethical US attorney will of course follow the limitations in place, such as, in the American Bar Association's Model Rules of Professional Conduct in relation to the false testimony of witnesses. Such as, in Rule 3(4)(b): "A lawyer shall not ... falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law." (Model Rules of Professional Conduct 2010). But to get the factual witness to be familiar with the exercise and to suggest right way to answer are clearly within the boundaries of US federal/ states laws.

In England, it seems to be a lot stricter and under paragraph 705 of the Code of Conduct of the Bar of England and Wales 8th edition, "a barrister must not rehearse, practice or coach a witness in relation to his evidence". English lawyers are restricted only to "witness familiarization". But this is for court litigation and to what extent it applies to arbitration, especially international arbitration with seats other than London or other British cities, one cannot tell.

By contrast, countries such as France and Switzerland have laws prohibiting all contact between lawyers and witnesses in court cases.

To conclude, different jurisdictions differ widely in practice and it is an issue remains unsettled in international arbitration. The arbitral institutions⁵ or arbitral tribunals rarely or do not address this issue. It may well be, pre-hearing education or mock arbitration for Asian or Chinese factual

⁵ For example, LCIA Arbitration Rules 1998 in Rule 20(6) provided for: "... subject to the mandatory provisions of any applicable law, it shall not be improper for any party or its legal representatives to interview any witness or potential witness for the purpose of presenting his testimony in written form or producing him as an oral witness." Please also take note of a broader provision in IBA Rules on the Taking of Evidence in International Arbitration 2010, Article 4(3): "... it shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them." (bold letters are my emphasis)

witnesses in international arbitration ought to be allowed and/or encouraged to ensure level playing-field.

Oral hearing by video-conferencing – the way ahead?

Oral hearing is the most expensive step in an arbitration case. But unfortunate for the parties, there is still a lot of cases which require oral hearing due to a variety of reasons – large quantum at stake, inadequate or incomplete documentary evidence, important oral evidence which must be tested, opposing expert evidence, reluctant respondents wishing to delay the date of reckoning, parties, law firms or even the arbitral tribunal who are not accustomed to document-only arbitration, etc.

To reduce costs, the use of video-conferencing for individual factual or expert witness has been going on for a number of years. I believe the practice is getting increasingly receptive.

In early December 2012, I chaired an arbitration hearing of 5 days at the Chartered Institute of Arbitrators, London headquarters, using video-conferencing (backed up by telephone-conferencing) throughout the entire process. It was because one party and their law firm in Shanghai decided to participate in the arbitration hearing belatedly, hence they were unable to fly to London (and to apply for visas for some members including the witnesses) in time for the hearing. It turned out to be quite workable. But the costs involved were a tiny fraction of flying the entire team (parties, witnesses and the Shanghai lawyers) to London.

I believe with the advance of technology, the use of video-conferencing can become even more receptive and common.

THANK YOU FOR LISTENING!

Philip Yang, Chartered Arbitrator