EXAMINATION OF WITNESSES IN INTERNATIONAL ARBITRATION

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L'interrogatoire des témoins dans l'arbitrage international

Résumé *Le processus de l'interrogatoire des témoins dans l'arbitrage international et son importance ont fait l'objet d'un certain débat au cours des dernières années. Depuis le tribunal a le pouvoir discrétionnaire de décider de la procédure à adopter, il y a eu de variables prises de position concernant la nécessité de ce processus. Cet article vise à examiner si le contre-interrogatoire des témoins et des experts clés est une garantie procédurale nécessaire dans l'arbitrage international. Il examine le rôle de contre-interrogatoire du témoin dans la procédure arbitrale, en termes des Règles de l'IBA sur l'obtention des preuves et analyse les tendances visibles de cette pratique dans le droit commun ainsi que les juridictions de droit civil.*

Mots clés *les témoins, les tribunaux d'arbitrage, l'arbitrage international, les témoignages de témoins, la recevabilité des éléments de preuve, les techniques d'entrevue, les Règles IBA, les Règles CNUDCI*

Rezumat *Procesul de examinare a martorilor în arbitrajul internațional și importanța sa au fost supuse multor dezbateri în ultimii ani. Datorită faptului că tribunalul are libertatea de a decide realizarea acestuia, au fost luate diferite decizii cu privire la necesitatea acestui proces. Această lucrare urmărește să verifice dacă examinarea încrucișată a martorilor-cheie și a experților*

este o garanție procedurală necesară în Arbitrajul Internațional. Se discută despre rolul examinării martorilor în procedură arbitrală, prin prisma Regulamentului IBA privind obținerea de probe și analizează tendințele vizibile ale acestei practici în dreptul comun, precum și în jurisdicțiile de drept civil.

Cuvinte cheie *audierea martorilor, curtea de arbitraj, arbitrajul internațional, mărturiile martorilor, admisibilitatea probelor, tehnici de audiere, Regulile IBA, regulile UNCITRAL*

The process of examination of witnesses in International arbitration and its importance has been subject to quite some debate in the last few years. Since, the tribunal has the discretion to decide the process it adopt, there have been varying stands taken with respect to the necessity of this process. This paper seeks to examine whether cross examination of key witnesses and experts is a necessary procedural safeguard in International Arbitration. It discusses the role of cross examination of witness in arbitral procedure, through the lens of the IBA Rules on Taking of Evidence and analyses the discernible trends of this practice in common law as well as civil law jurisdictions. Our work not only makes a case for cross examination of witnesses to facilitate due process in the conduct of arbitration but also entails scenarios wherein such procedure need not be strictly mandated. It also permeates on the question of vitiation of the arbitral process and the award so passed in such cases, where such examination is not conducted.

The principle of party autonomy governs the conduct of arbitral proceedings, subject to restrictions such as mandatory rules and public policy requirements of the seat as well as the norms contained in international conventions on arbitration. (Redfem & Hunter, 2012: 264) While the institutional rules of the UNCITRAL Model Law recognize procedural autonomy of the

parties, the parties' agreement to arbitrate implies an important procedural authority being granted to the Arbitral Tribunal. (Born, 2009: 1757-1758) However, the growth in use of oral evidence and witness testimony in international arbitral disputes nowadays can be attributed to the primacy given to due process principles followed by tribunals over party autonomy.

There are two broad categories of oral evidence, namely general witness testimony and expert testimony, with varying applications in common and civil law traditions respectively. In the former, experts are party appointed witnesses, whereas in latter tradition, they are appointed by the arbitral tribunal and are not witnesses in the normal sense. (Waincymer, 2012: 885-976) Several policy and procedural questions such as who may be entitled to give testimony, use of written statements and expert reports arise in lieu of gathering oral evidence.

Although oral evidence through witness testimony helps facilitate queries pertaining to diverse themes in the arbitration process, at the request of opposing counsel or the adjudicator, the disadvantages seem plentiful as well. Major drawbacks in using oral evidence in arbitral proceedings include the expense, given that all parties sit and listen to examination and cross-examination; individuals who are better educated and more eloquent might have their testimony preferred even though they are not more truthful; different people have different ability to withstand the tricks of cross examination techniques; and the evidence may be less probative given that it is presented after the dispute is known and at times by those with a vested interest in the proceeding's outcome. Despite these concerns, in many instances, oral evidence is crucial and widely used to resolve contentious factual questions, explain the background of the parties, nature of the dispute and even interpretation of key documents. The central argument of this paper wishes to *elaborate upon the process of cross examination of key witnesses and experts while the conduct of arbitral proceedings*. While

elaborating upon this argument, the author also seeks to answer questions pertaining to *enforceability of the arbitral award and the effect on the conduct of arbitral proceedings, if such examination is not conducted*.

It pursues this question by first analyzing the discretionary powers of the tribunal with regard to the conduct of arbitral proceedings. It then seeks to make a case for the International Bar Association Rules on the Taking of Evidence, 2010, as an appropriate roadmap which the tribunal can adopt if necessary. Further, it provides a detailed explanation as to the importance of cross examination of witnesses and how the lack of it diminishes the credibility of the uncorroborated witness statement. The issue of enforceability of award due to the failure to follow this procedural requirement is also discussed by the author. On the flipside, the piece also intends to cover circumstances which could be considered justifiable in cases where cross examination could not be conducted and suggest suitable alternatives. The author also seeks to make the counter argument against cross examination in arbitral process by looking at certain civil law jurisdictions which attach more weight to documentary evidence over witness testimony. Lastly, in conclusion, the author would state his opinion regarding this contemporary debate in International Arbitration.

Discretion of the Arbitral Tribunal on Procedural Issues

The Arbitral Tribunal has the power to decide the scope of its authority (Art. 16(2) UNCITRAL Model Law) and the manner in which the proceedings will be conducted, subject to any agreements made by the parties. (Art. 19(1) - (2) UNCITRAL Model Law) The parties are free to decide the procedural law that shall apply to the arbitration proceedings. This broad discretion of the tribunal to determine the procedure to be followed includes determinations of the relevance, materiality and admissibility of evidence generally, as well as the permissibility of examination or

cross examination of witnesses by the parties at evidentiary hearings in particular. (Lew, 2003: 575)

One certain procedural benefit of international arbitration is precisely its ability to allow procedures to be tailored to the needs of each specific case. The Tribunal's discretion in deciding such procedural questions, which are not agreed upon by the parties, extends to any gaps in the law chosen by parties. However, it is well established that the IBA Rules do not have direct application unless expressly incorporated into the agreement by the parties or adopted by the tribunal in exercise of its discretion. The IBA Rules also clearly provide that these rules can be adopted by an arbitral tribunal *suomoto*, in exercise of their discretion. (Article 1(1), IBA Rules) It must be further noted that the language used in both these provisions is indicative of its mandatory nature, emphasizing the requirement of examination of witnesses and implying that derogation therefore would constitute a serious violation of the IBA Rules. (Black, 1990: 432)

Therefore, the Arbitral Tribunal has unfettered power to decide questions of admissibility and to exclude evidence that it deems unreliable. One example can be found in *Glamis Gold* where the arbitral tribunal used the authority granted by Article 15(1) UNCITRAL Arbitration Rules (presently Art. 17(1)) to apply the IBA Rules to questions of evidence-taking[11].

The Relevance of the IBA Rules on Taking of Evidence

Although most Institutional Arbitration Rules leave it to the tribunal to give directions on whether a written submission constitutes a sufficient witness statement, it is silent in regard to important procedural questions such as the consequences for a

[11] Glamis Gold Ltd. v. United States ICSID Decision on Objections to Document Production, 20 July 2005.

written statement that according to the tribunal's decision shall not suffice and the issue of cross-examination of witnesses. (Moses, 2008: 44) Therefore, the Arbitral Tribunal is empowered to look elsewhere for guidance on these procedural issues and the IBA Rules could serve as a proper supplementary framework in such matters. The IBA Rules are indeed intended to supplement the institutional rules adopted by the parties, and specifically to fill any gaps related to the taking of evidence[12].

The IBA Rules have evolved to become one of the most popular and commonly used instruments which govern the appreciation of evidence in international arbitrations. (Greenberg, Kee & Weeramantry, 2010: 312) They are accepted as a codification of the norms on the taking of evidence in most arbitration disputes. (Webster, 2010: 6) Further, the rules also maintain a suitable balance between flexibility and predictability, which are considered as recognized aims in any arbitral proceeding. These rules also provide "an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those between parties from different legal traditions" and are "designed to supplement the legal provisions and the institutional, ad hoc or other rules" applicable to the arbitration. An overwhelming majority of case law highlight the practice of arbitral tribunals applying the IBA Rules[13] even where they are not directly applicable to the proceedings[14].

There are substantial differences between common law and civil law approaches to issues concerning evidence, the

[12] *** IBA Rules On The Taking Of Evidence In International Arbitration, 2010, p. 4.

[13] *** Final CME Czech Republic BV v Czech Republic, Final Award: 14 March 2003.

[14] *** Noble Ventures v. Romania ICSID Case No. Arb/C1/11:12 October 2008.

substantial one being that civil law lawyers favors proof through documents over witness testimony. Most authors concur that the IBA Rules have gained acceptance, particularly on the issue of witness testimony, across the world as a set of rules on the taking of evidence that not only incorporate aspects of civil and common law systems into the context of international commercial arbitration but also qualify as the most pragmatic and effective methods of conducting arbitral proceedings.

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