TWENTY-ONE THESES ABOUT WITNESS TESTIMONY IN INTERNATIONAL ARBITRATION AND CROSS-EXAMINATION

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Time and cost of the proceedings are a major concern for international arbitration practitioners and the users. Witnesses, the preparation of their written statements and their examination at the hearing are major cost factors in an arbitration. Like other features of the proceedings, the use of witness testimony therefore must come under scrutiny.

The present theses are an attempt of such scrutiny. The author of these theses is aware of the great diversity in international arbitration which is one of its major advantages. Generalisations therefore are difficult and indeed risky. But this risk should not preclude efforts at identifying areas for improvement. While I believe that the theses below reflect a large part of international arbitration practice and show the direction for change in those fields, I recognise that others may have had different experiences and found different solutions.

A. Witnesses in international Arbitration

1. Witness testimony rarely is the principal and even less so the exclusive evidentiary basis for decisive facts in decisions of tribunals in international arbitration.

2. The principal contribution which witnesses can usefully make consists in assisting the arbitrators in understanding the documentary evidence in the context of the real life events, in getting an impression of the protagonists of the case and of their relationship to each other and in understanding the differences in perception of the facts by these protagonists.

3. Witnesses, like most other participants in arbitration proceedings, including the arbitrators, frequently have an agenda, i.e. messages which they want to get across and objectives which they want to achieve. This affects the manner in which they respond to questions and present their story; but normally they do not tell consciously straight lies.

4. Even witnesses who tell lies can make interesting and even useful contributions to an understanding of the facts of the case.

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B. Cross-Examination

5. Cross-examination, as it is generally practiced in the courts of common law countries, seeks to destroy the witness' credibility, to make the witness confirm propositions of the examiner and often to achieve both these objectives. While counsel in international arbitration often do not apply these techniques in the same manner, their principal objectives generally remain the same.

6. The principal techniques of this form of cross-examination are "closed questions" to which the examiner knows already the answer; and an interrogation which stops when the examiner either has obtained the desired answer or concludes that the witness is unlikely to provide this answer (whether or not the witness has said all he had to say about the question).

7. Cross-examination, conducted in this manner, makes the witness an instrument of the examiner, used to present the parties' respective cases, rather than a source of information or understanding for the arbitral tribunal.

8. Testing the witnesses' credibility and making them confirm the examiners' propositions, in proceedings before experienced arbitrators who have studied the file of the case, are activities of limited importance and often of little use – even if, as at least some experienced arbitrators often do, the witness is invited by the tribunal to complete the testimony on a point which the examiner closed as part of the technique described in thesis 6.

9. The limited use of this method is compounded by the practice of accepting written witness statements as direct testimony, commencing witness interrogation immediately or after a short "warming-up period", by cross-examination. In this manner, the tribunal does not hear from the witnesses what they have to say but reads what the lawyers drafting the witness statements think the tribunal should know about the witnesses recollection of the facts.

10. As a result, witness testimony, as it is now widely (and increasingly) practiced in international arbitration, consisting essentially of cross-examination and a few questions from the tribunal, is an exercise of low efficiency which consumes time and cost out of proportion with its contribution to the understanding of the case by the tribunal.

11. The inefficiency is further compounded by an almost total disregard of what modern science of the mind and of communication has revealed about the complexities of human perception, memory and communication and of the techniques of interrogation and interpretation which have been developed in other areas. The interest of writers, teachers and practitioners in the field of arbitration to a large extent is limited to cross-examination and there seems to be no serious attempt in international arbitration to make use of this body of learning for a better understanding and interpretation of the substance and meaning of a witness' testimony.

12. If these propositions are correct, substantial change must be brought about in the role of witnesses in international arbitration, in the manner of their interrogation and in the interpretation of their testimony.

C. Alternatives

13. A search for alternatives to the unsatisfactory present situation of witness testimony must start by taking the witness not so much as a tool in counsel's trial strategy and by showing a true interest in what he or she has to say.

14. It is submitted that the most productive and rewarding approach to witness testimony is questioning by the arbitrators, i.e. by those players in the arbitration proceedings which have the most objective interest in understanding what the witnesses have to say and which have the least incentive of making them confirm preconceived positions. Questioning by the arbitral tribunal allows the interrogation to be focused on what the arbitrators consider as most relevant for the decision they have to make. It also tends to be far more productive, since witnesses normally are more forthcoming when asked by the arbitrators.

15. Questioning of witnesses by the tribunal requires from the arbitrators careful preparation, in particular the study of the parties' case, the documentary evidence and any written witness statements, which in such a context may serve a truly useful purpose. It also requires from the arbitrators training and practice in interrogation, a qualification which today seems largely absent among international arbitrators.

16. Witness interrogation by the arbitrators does not make counsel redundant. Counsel's knowledge of the case generally is superior even to that of a well prepared arbitrator. Assistance from counsel during the course of interrogation by the tribunal therefore can be helpful, provided counsel is truly assisting the tribunal, rather than trying to derail the interrogation. In all cases, counsel should have an opportunity of questioning the witness at the appropriate time, i.e. at the end of the tribunal's interrogation or during the questioning by the tribunal when discussion of a certain point has been completed. There may also be cases where exceptionally it is preferable that interrogation of a witness be commenced by counsel.

17. A particularly useful technique of questioning consists in the collective interrogation of witnesses (also referred to as "witness conferencing"), provided it is conducted in an orderly fashion by experienced arbitrators, well familiar with the file. This does not exclude that there are situations where separate interrogation of a witness is preferable.

18. In those proceedings in which witnesses are interrogated primarily by the parties' counsel with occasional questions from the tribunal, there should be a substantial change in the method of cross-examination as practiced in the courts and before juries. In particular the exclusive use of "closed" questions should be abandoned.

19. The purpose of such a different interrogation method is not to make the interrogating counsel the promoter of some objective truth. The role of counsel in an arbitration is and remains the promotion of his or her party's case. However, it is submitted that more open methods of questioning serve this case better, as testimony made in response to such questions tends to reflect more closely the witness' own position and thus is of greater interest to the tribunal.

20. Such methods of "open" questioning require from counsel, to a degree which may be higher than in ordinary cross examination, (a) a thorough knowledge of the file in order to measure the range of possible answers and the risk of adverse testimony, (b) some understanding of the witnesses personality and possible motives and (c) presence of mind and creativity to adjust a line of questions to the witness' answers.

21. Such "open" questioning is highly challenging and, if successful, creates a flow of communication between the examiner, the witness and the tribunal which can be both instructive and rewarding.

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