Taking concurrent evidence in international arbitration for procedural efficiency

International Arbitration Alert

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With the growing need to improve efficiency in international arbitration, concurrent presentation of witness evidence (also known as witness conferencing or "*hot-tubbing*") is an attractive proposition for tribunals and parties endeavouring to achieve time and cost savings. The recent publication of the *Chartered Institute of Arbitrators Guidelines for Witness Conferencing in International Arbitration* (Guidelines) (click here) is a welcome development in light of the increasing popularity of hot-tubbing in international arbitration.

The Guidelines provide much needed guidance on the process, while recognising the "*diversity of approaches that can be adopted without seeking to restrict the ability and imagination of tribunals and parties to shape a conference most suited to any given dispute*". The process is, however, by no means the panacea. Care should be exercised in deploying it in practice in order to ensure procedural fairness.

What is witness conferencing?

Witness conferencing involves the process of two or more witnesses giving evidence concurrently with each other in a hearing. It facilitates a side-by-side presentation of evidence by the witnesses allowing a direct comparison of their evidence on a particular issue. This departs from the conventional cross-examination process where witnesses are called to give evidence consecutively.

The process is more commonly used with experts than factual witnesses. It is widely used in Australia and adopted as a default mode of giving expert evidence by some Australian courts (for example, see the Supreme Court of New South Wales Common Law Division Practice Note SC CL1 at paragraph 48). Properly managed, it can help to reduce the hearing time and costs. The proponents of witness conferencing also argue that the process helps to improve the quality of evidence as witnesses are generally more willing to concede points in hot-tubbing (or in other words, less willing to make a technical assertion which they know to be incorrect), than they are in cross-examination where they tend to take a confrontational and partisan approach.

Criticisms of witness conferencing

Witness conferencing is not without its problems. The process may be dominated by witnesses who are more assertive and exude confidence with better demeanour and presentation skills. Such traits are not necessarily related to the merits of the evidence being presented, yet may unfairly influence the tribunal's mind. The interpersonal dynamics are difficult to predict and usually on display for the first time after the witnesses are called to give evidence. Intervention at that stage is often too late to undo the subtle damage inflicted by the process.

Moreover, time saving offered by witness conferencing may not necessarily translate to cost saving. In the case of expert evidence, the process involves substantial groundwork to be carried out by counsel and experts in the lead up to a hearing including by engaging in expert conferrals and preparations of joint reports. This could result in a long drawn out process, albeit it is necessary to identify areas of disagreement and narrow down expert issues for determination. While this helps to reduce the tribunal's burden, it increases the workload of the parties and their experts. The extent of the work involved in the process is often difficult to estimate. In some instances, the overall costs of witness conferencing may well be substantially higher compared to the conventional cross-examination process. If not properly managed, it may also require substantial re-work in the presentation of the evidence at the eleventh hour disrupting the hearing schedule.

Preservation of witness independence is fundamental to the process. The increased need for preparation for witness conferencing (both between the parties and their experts and as between the experts) can however blur the lines between preparation and coaching. General distrust between the parties may turn the pre-hearing conferrals into little more than window dressing with no meaningful progress in the experts' discussions, which would ultimately impact the quality and success of the witness conferencing. The tribunal's intervention can only go so far, and may in any event be too late, given that the process is largely underpinned by the good will of the parties and experts.

CIArb Guidelines

The Guidelines provide helpful guidance in determining whether it is appropriate to conduct a witness conference in international arbitration, and if so, what form it should take including procedural orders to be adopted. The Guidelines are structured in three sections:

1. *The Checklist*, which provides a list of preliminary matters to be considered in determining the appropriateness of witness conferencing and its form, such as the nature of the issues in dispute, witnesses' backgrounds, and logistical matters. Notably, it may not be appropriate to deploy witness conferencing where the credibility of a witness is in issue. The tribunal with particular expertise in the relevant issue may adopt a tribunal-led conference, although care should be exercised by a party appointed arbitrator in the line of questioning to avoid any allegation of bias. The structure of witness conferencing should be carefully managed when the case is complex involving multiple issues, witnesses and conferences. Consideration should be given to seating arrangements and use of videoconference for witnesses not present in the hearing room. Most importantly, the contrasting experiences and cultural backgrounds of the witnesses should be considered to ensure the process affords a fair opportunity to present evidence without tainting the quality of their evidence;

2. *Standard Directions*, which are initial procedural orders that may be adopted to establish the ground rules for witness conferencing. Relevantly, these provide for the development (on a without prejudice basis) of a joint schedule containing a list of areas of agreement and disagreement and a chronology of agreed facts.The Standard Directions also set the basic parameters of the tribunal's powers relating to witness conferencing; and

3. *Specific Directions*, which are more specific procedural orders that may be adopted depending on the types of witness conferencing in use. The Guidelines provide directions for three types of witness conferencing: tribunal-led conference (adopting inquisitorial processes with limited role played by parties' counsel); witness-led conference (allowing free-flowing interactions between the witnesses with minimal input from the tribunal or counsel); and counsel-led conference (similar to the conventional cross-examination process). Witness-led conference is generally discouraged where hot-tubbing involves witnesses of facts. In practice, a witness conference may involve some aspects of, or draw on different directions from, all of the three frameworks as appropriate in order to suit the circumstances of the case.

Conclusion

There is no "one size fits all" approach for witness conferencing. As is evident from the Checklist provided in the Guidelines, flexibility is needed to customise the process to suit the circumstances of the case. Our own experience suggests that the two most important factors that can contribute to the success of the process are: (1) managing the level of counsel involvement in the process; and (2) proactively monitoring its progress from conferrals to the final conference. While the Guidelines do not provide any explicit guidance on these matters, tribunals, with their case management powers, can and should play an important role. Tribunals have the discretion to make appropriate procedural orders for witness conferencing and suitable adjustments as the process unfolds. To this end, the Guidelines recommend "*modifying*

the mode of witness conferencing where it appears that an interpersonal dynamic may be affecting the quality of evidence" or "*in appropriate case, dispens*[ing] *with it and direct*[ing] *that evidence be taken consecutively*". The Guidelines also recommend that tribunals "*remain vigilant to the possibility that the conference has ceased to be a useful means of taking evidence and either vary the form of the conference in some way, or adjourn or conclude the conference*".

International arbitration is however, by its very nature, a process that can only work fairly and efficiently if all parties involved hold themselves accountable. Accordingly, effective monitoring by the parties themselves is equally crucial in shaping and maintaining appropriate procedural frameworks within which witness conferencing takes place. An assessment should be made to ascertain whether witness conferencing is appropriate for relevant witnesses and issues in dispute, and if so, what procedural orders should be adopted. The without prejudice nature of pre-hearing conferrals should be respected. A clear boundary should be set at the outset as to the extent to which parties may have their input on the process. Where possible, parties should give joint instructions to their experts on the list of issues they are to opine on to avoid conflicting and partisan approaches. Also, the experts should be required to jointly provide regular updates to the tribunal without party interference. Ultimately, no matter what approach is taken, much can be gained from exercising good forensic judgment in good faith.

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