International commercial arbitration offers an interesting site for the study of witness examination as an interdiscursive phenomenon across professional, jurisdictional, linguistic and cultural boundaries. It is contentious not only because it is shared across two rather distinct practices – i.e., litigation and arbitration, bringing together international participants, particularly stakeholders who carry their individual baggage in the form of different ethnic and cultural backgrounds and languages, as well as interdisciplinary expertise – but also because it is meant to integrate two distinct legal systems and cultures, i.e., common law culture and civil law culture. Drawing on a multiperspective analysis of interdiscursive aspects of discovery and witness examination practices from arbitration and litigation, this paper makes attempts to identify and discuss some of the issues emerging from the hybrid nature of this legal practice, which may be seen as problematic in maintaining the integrity of arbitration practice as an alternative to litigation in international commercial context.

1. Overview

International commercial arbitration, especially the way it is practiced today, presents a number of challenges to practitioners as well as to corporate stakeholders. Some of these challenges include the selection of an appropriate arbitration panel, increasing costs and excessive time taken in the resolution of disputes, smooth and challenge-free enforcement of awards, the complexity of issues associated with confidentiality and privacy of the whole process, and of course, transparency of the award itself, among many others. All these challenges tend to contribute to the increasing judicialisation of international commercial arbitration practice, making it very similar to litigation and thus compromising the very integrity of arbitration as an alternative to litigation. So it will not be inaccurate to say that although arbitration is a process by which parties voluntarily refer their dispute to an impartial third person as arbitrator selected by them for a decision based on evidence and arguments presented by the parties themselves, in practice, the arbitrators selected are most often members of the legal community who are experienced in litigation; hence in presenting

---

1 Visiting Professor, City University of Hong Kong, 83 Tat Chee Avenue, Kowloon, Hong Kong, enhbhatia@cityu.edu.hk. The work on this paper is supported by an RGC CERG grant from the Government of Hong Kong (Project No. CityU1051/06H) entitled International Arbitration Practice: A Discourse Analytical Study. For details see: <http://enweb.cityu.edu.hk/arbitrationpractice>. The paper draws on some sections of an earlier paper written for the special issue of World Englishes Vol. 30. No. 1. (2011) pp. 106-116.

2 Vijay K. Bhatia, Christopher N. Candlin and Rajesh Sharma, in their article (2009) Confidentiality and Integrity in International Commercial Arbitration Practice, point out the need to make the arbitration process and awards more transparent and accessible for the training of new arbitrators and the development of arbitration as an institution.

3 Fali Nariman, in his Goff Lecture published in 2002 (262), asserts that “modern International Commercial Arbitration […] has become almost indistinguishable from litigation, which it was at one time intended to supplant”.
the evidence and arguments on behalf of each of the parties, they invariably use tried and tested litigation procedures. One of the major consequences of this overwhelming preference for legal specialists to act as legal counsels and also as members of arbitration tribunals is that international commercial arbitration is being increasingly questioned as an economical and effective alternative to litigation for settling commercial disputes. However, parties still continue to prefer arbitration to litigation to solve their commercial disputes, possibly because litigation is viewed essentially as adversarial in nature, which often involves, at least in the Anglo-Saxon common law tradition, almost unlimited discovery of documents in an attempt to put the other party at a disadvantage and hence make it lose the case, as both parties cannot win. This adversarial approach invariably magnifies differences between the disputing parties, thus hardening the attitudes toward each other. This often tends to lead to an eventual termination of the business relationship, which can be and often is highly valued in business contexts. Arbitration, on the other hand, tends to preserve and sometimes even enhance the mutual interests of the disputing parties. For international commercial dispute, therefore, arbitration still seems to be the ideal mode of dispute resolution.

Arbitration is an institution which is free from the jurisdictional constraints of any national court, in that the jurisdiction, selection and authority of the arbitrators are almost entirely determined by the disputing parties, who have complete autonomy in this respect. They can select, challenge or even dismiss the arbitrators, discuss their authority and even have the freedom to choose procedures for all forms of decision-making, without any interference from courts. Arbitration trials generally take place in an arbitration centre (institutional arbitration) or at any other place (ad hoc arbitration) mutually agreed by the disputing parties. The process normally consists of an initial phase in which the parties and the arbitration tribunal agree to a specific set of procedures adopted for the trial, including the question of jurisdiction, challenges to the selection of arbitrators, if any, and a number of other preliminaries. This is followed by the presentation of facts and other details concerning the dispute by the two parties, invariably through their individual teams of legal counsels, sometimes involving direct examination of witnesses, or more often written testimonies by their respective witnesses, followed by cross-examination. It is this stage of the arbitration trial that we are primarily concerned with in this paper. The final phase of the trial consists of the giving of an award, which is somewhat equivalent to the judgment in a court of law, although, unlike a court judgment, awards are final and enforceable in any jurisdiction internationally and generally very difficult to challenge in a court of law.

In litigation, there are well-defined rules of procedure that control the nature and manner of evidence that is admissible in a court of law. In the case of arbitration, however, there are no set rules of procedure to regulate the evidentiary phase of arbitration. Whatever general rules are available, they all give arbitration tribunals wide-ranging discretionary powers to determine what evidence can or cannot be presented, at what time, and in what manner. In general, the tribunals admit almost all the evidence that the parties can offer and then determine what relevance, value and credibility should be given to specific aspects of evidence so presented. Within the framework of the international arbitration rules, the presentation of evidence in international arbitrations falls within three general categories: (1) submission or discovery of documentary evidence with statements of claims, replies or other briefs, (2) witness statements, and (3) oral testimony. It is interesting to see in what respects this evidential phase of international commercial arbitration practice is similar to or different from the evidentiary phase in litigation within the common and civil law systems. This paper focuses on the second phase of the arbitration process, which concerns the discovery of facts and witness examination.
2. Discovery in International Commercial Arbitration

Often legal counsels experienced in litigation are hired to represent party positions in international commercial arbitrations, and they invariably assume that the discovery process in commercial arbitration will be the same as in litigation, with which they are very familiar. American counsels, for instance, often assume that the discovery and deposition procedures will allow evidence and witnesses to be examined before trial. However, the experienced civil law counsel will expect each party to produce a limited range of documents relevant to the case without any need for discovery through direct witness examination. Most international arbitrators attempt to find a balance between the two extremes.

International commercial arbitration relies for its processes and procedures on arbitration laws, the institutional rules of application, and the specific rules of the arbitration centre, i.e., the seat of arbitration. UNCITRAL and most of the leading arbitral institutions, such as the American Arbitration Association, the London Court of International Arbitration, and the International Chamber of Commerce provide general guidelines for discovery, but none of them explicitly provide specific guidelines as to the scope or nature of discovery; they all tend to leave the final responsibility to the discretion of the arbitrators. As a consequence, when the parties cannot agree on the appropriateness or extent of discovery, all matters related to discovery, its scope, and the methods depend on the arbitrators’ personal views and preferences especially on their legal backgrounds. The revised IBA Rules, which are used in conjunction with institutional rules of international commercial arbitration, provide mechanisms for the presentation of documents, witnesses, site inspections and the conduct of evidentiary hearings.

The IBA Rules are an attempt to integrate the strengths of the two legal systems, civil and common law. In line with the civil law system, these rules allow the arbitral tribunal to be proactive in gathering evidence, whereas it allows the fundamental common law principle that each party has the right to know the evidence that is likely to be used by the other party⁴. The rules also provide for cross examination. The IBA Rules are meant to ensure that arbitration is economical in terms of time and cost. Unfortunately, however, the outcomes are most often swayed by the legal background of the participants, arbitrators as well as legal counsels, thus pushing the evidence-gathering processes towards increasing judicialisation of arbitration practice. Legal counsels, and oftentimes even the arbitrators or arbitration tribunals involved in international commercial arbitration, often tend to follow familiar procedures of litigation to conduct arbitration. Some even assume that arbitration is just another form of litigation, which is sometimes referred to as ‘private litigation’⁶.

The generally agreed procedure, however, is that the parties will prepare for inspection all documents considered relevant to the issues in a particular arbitration dispute. It is also expected that the parties will cooperate in the discovery of evidence either by limited

---

⁵ The IBA Rules follow the principle that “each Party shall be entitled to know, reasonably in advance of any evidentiary hearing, the evidence on which the other parties will rely.” IBA Rules of Evidence, preamble (4).
examination of the witnesses through oral testimony or written statements. Some practitioners, especially those with a common law background, believe that without some form of discovery, however limited, there is a risk that the hearing may not lead to a reasonable conclusion, because they think it is important that evidence must be presented to parties before they respond to it. Tribunals, however, often discourage lengthy and irrelevant discovery. This and other related issues are generally addressed and negotiated at the preparatory phase of an arbitration trial. To sum up, although it is possible to get away with some discovery in international commercial arbitration, even within a civil law jurisdiction, a typical American-style discovery in the common law tradition is less likely to be allowed. It is interesting to note that Lucy Reed⁷ claims:

A recent study of the Corporate Counsel International Arbitration Group (CCIAG) found that 100% of the corporate counsel participants believe that international arbitration “takes too long” (with 56% of those surveyed strongly agreeing) and “costs too much” (with 69% strongly agreeing). […] Many people blame it on outside counsel – especially those from the United States – for requesting too many documents, making too many motions, and generally filing too many pages. Others blame in-house counsel for not using their authority to rein in practices they criticize as inefficient or wasteful. And some blame the arbitral institutions themselves for not constructing a system that reins in everyone.

It is not surprising that there is an increasing trend to prefer the use of documents, witness statements, site inspections, and expert views. American-style depositions are generally dispreferred, except in very exceptional circumstances.

3. Divergent practices across jurisdictions

Unlike the standard court procedures, direct testimony of witnesses in international commercial arbitration is often replaced by detailed written statements in order to reduce the time and cost of the arbitration process and also to avoid the need for discovery or disclosure. Discovery is a typical American common-law adversarial litigative practice which is sometimes viewed as a ‘fishing expedition’⁸. Although discovery is not common in international arbitration, it is sometimes allowed at the discretion of the arbitral tribunal. It may be pointed out that discovery is an unfamiliar practice in civil law jurisdictions; therefore, parties and counsel from civil law jurisdictions do not feel comfortable with the prospect of discovery in arbitration proceedings. Instead, they prefer to see witness testimony presented through written witness statements as a substitute for the witness’s direct oral testimony. The widespread use of written evidence in international arbitration reflects the distinct influence of civil law tradition, whereas discovery is seen as a distinct American practice. In the civil law tradition, evidence is often presented in written form, and the questioning of witnesses is conducted not by the legal counsel, but rather by the arbitrator or

⁷ Lucy Reed in a recent post on the Kluwer Law International blog posted these comments under More on Corporate Criticism of International Arbitration, at <http://kluwerarbitrationblog.com/blog/author/lucyreed/>.

judicialisation of international commercial arbitration practice

the arbitration tribunal. Direct examination of witnesses is generally not permitted in arbitration, especially if the tribunal is dominated by specialists from civil law jurisdictions.

Ideally, the disclosure process in international commercial arbitration needs to strike a balance between common law and civil law traditions and practices. The rules and procedures in international arbitration reflect a mixture of common law and civil law norms; however, the system is increasingly evolving in the common law direction that favours the adversarial process. As the concept of adversarial cross-examination of witnesses is drawn from the common law approach, it requires extensive training and practice, neither of which civil law counsels receive in their legal training. Therefore arbitrators from the United States and the United Kingdom are generally at a competitive advantage. Gabriël Moens, a well-known arbitration practitioner and trainer with a common law background, when asked about arbitration as adversarial practice in a special interview conducted within the framework of this project, claimed, ‘You must remember that your client who is paying you money is sitting behind you or even at the same table, and they want you to do your very best for them […] and therefore I find that it is definitely an adversarial process. If I am involved in it, I use it as an adversarial process’.9

4. Written statements v. direct oral examination

Many lawyers prefer to have an opportunity for a brief direct examination to highlight key points of the written statements. They would like the arbitrators to be fairly familiar with the key elements of witness statements before they hear any challenges to it. The IBA Rules on the ‘Taking of Evidence in International Commercial Arbitration’ have given cross-examination skills some importance, indicating a clear preference for the common law adversarial system. However, in practice it is left to the discretion of the arbitration tribunal and the parties to the dispute when arbitration procedures are agreed upon in the preliminary stage of the arbitration process. It is difficult to predict the way tribunals will deal with counsels from different legal cultures, especially when they come with different expectations about the role of cross-examination. The IBA Rules can be seen as an effort to harmonize common law and civil law procedures into a common framework for witness-examination10. Unfortunately however, these Rules have neither been adopted by any prominent arbitral institution, nor regularly incorporated in arbitration clauses. Instead, it is claimed, they are cited opportunistically by counsels either to justify their position in a case, or to reject the other party’s position, most notably oral depositions, which are a common practice in America11.

The use of written witness statements can nevertheless have an effect on witness testimony. Oral witness testimony can often help a witness give truthful testimony and thus establish his or her credibility. However, arbitration tribunals tend to give comparatively less importance to written testimony if the witness in question has been subjected to cross-examination. Besides, the tribunals have considerable discretion in the matters of credibility of written witness testimony when the witness is available for cross-examination.

9 Gabriël Moens, in a specialist interview.
11 See Moens supra note 9.
5. Identity and voice in written testimonies

In courtroom examination, particularly in common law jurisdictions, there is a perception that defendants have no voice of their own and their identity is often manipulated by legal counsels. The issue in common law jurisdictions is: How much of a witness’s testimony is presented by the witness, and how much by the counsel? If this is really so, the valid question to raise then is: Whose narrative is unfolded in the court? This presupposes that the witness, and not the counsel, is the real presenter of evidence. In International Commercial Arbitration therefore one may also legitimately ask: Who is responsible for written statements? Often the witness provides the facts, and the counsel constructs a statement based on the submitted facts. Written narratives from witnesses thus often become repetitive accounts of their factual positions, thereby removing in the process the individual identities of the witnesses in almost every statement, which raises an interesting issue: to what extent is the individual identity of the witness crucial to maintain the integrity of witness examination, which is invariably lost in written testimony as it is written by the counsel? One may justify this action of the counsels by arguing that witness statements need to be intertextually referenced to the documents submitted by the parties, and this kind of intertextuality can only be adequately and meaningfully provided by the counsels. One may also argue that oral testimony by witnesses is likely to be more time-consuming than written testimony, and since legal counsels may have a much better understanding of the issues at stake in a particular dispute, it saves time to allow counsels to write witness statements instead of asking witnesses to do it on their own. This again brings direct witness examination in arbitration and litigation somewhat closer to each other. Another concern that disputing parties have is that the counsels have the ability to take out any weak points to limit unnecessary exposure to negative and hence damaging aspects of their case in cross-examination. Written testimony thus can be an effective strategic instrument in the hands of legal counsels to avoid focus on weak points of the case during cross-examination.

It must be pointed out that cross-examination following written submissions raises unique challenges for arbitrators from the common law tradition as well, because they are trained to conduct cross-examination after they have conducted the oral testimony. Since oral testimony is not common in international arbitration, common law arbitrators also find themselves in more or less equally unfamiliar territory. Written disclosures are restricted and are carefully constructed by legal counsels, and hence provide limited opportunities for cross-examination. Although international commercial arbitration does allow parties to choose procedures that best suit a particular case and that are agreed to by both the parties, the very flexibility in the choice of procedures and processes itself becomes a challenge for the tribunal to agree on a common strategy acceptable to both parties at dispute. The procedures are still evolving and may take a long time to develop. Rubinstein summarises this issue when he points out:

---

12 Bhatia, Vijay K. (2004) Worlds of Written Discourse: A Genre-Based View. London: Continuum, p. 35. Bhatia observes that most legal documents are intertextually and interdiscursively rich, as they have a complex textual relationship with others, both written and spoken, that have some relevance to what is being said or written, signaling links with them.


It is possible, although unlikely, that someday there will exist a set of universal procedural rules to govern international arbitrations, much like the rules of civil procedure that govern domestic litigation. In the meantime, though, the field of international arbitration will remain a new frontier, continually evolving at the crossroads of the common law and civil law traditions.

I would now like to highlight some of the important aspects of witness-examination in litigation and international arbitration before giving more substance to the issue of harmonisation between the two professional practices, cultures and jurisdictions.

6. Witness-examination in litigation

The courtroom is a highly formalized setting where disputes are negotiated and resolved through the questioning of witnesses. In an adversarial court system, the outcome of questioning is as much a function of the contributions made by the witnesses, the communicative strategies used by the legal counsels and the degree of credibility established by the witnesses and destroyed by the counsels, as it is of the supposed facts of the case. Facts, therefore, are not viewed simply as objective entities in this context; they are constructed and established through the questioning of witnesses. Courtroom questioning techniques are primarily used to win cases, not necessarily to help the court uncover the facts of the case. As a consequence, expert counsels do not present facts as they might be in reality, but as they want the court and the jury to see them. Much of this is made possible because of the highly institutionalized setting of the court, where forms of communicative behaviour – i.e., turn-taking, participant roles, questioning and responding strategies, and even the content of questions and responses – are strictly regulated and controlled by the rules of evidence. In one sense, it is often seen as a game being played by the two counsels, in which the judge and the jury may be seen as referees. The rules that govern this game include: (a) all interactions should be carried out in formal language, and turn-taking is pre-allocated and strictly controlled by the judge; (b) the type of speaking in which one engages is also pre-assigned and controlled by the rules of the court; the counsel is allowed to ask questions that are relevant, answerable and designed to elicit the evidence or statements of facts, and the witnesses are supposed to answer these questions appropriately and truthfully, often with a ‘Yes’ or ‘No’; and the counsel not engaged in questioning is allowed to make objections when he/she feels that inappropriate or irrelevant evidence is being offered or rules are being violated, and it is for the judge to decide whether the objections are valid or not.

So if we go by these rules of evidence, there seem to be two players, the counsel for prosecution and the counsel for defence, and in the end, one wins and the other loses. Unfortunately, there are no draws in this game. The decision is made by the judge or the jury. The jury cannot actively participate in the court proceedings. However, it is up to the counsel for prosecution to prove the defendant is, as it is often said in legal terminology, ‘guilty beyond a reasonable doubt’, which brings up the issue of the credibility of the witnesses. We shall consider this aspect of the credibility of witness testimony and attempts to undermine it by the counsels in more detail later. To sum up then, what happens in the courtroom is a game played by the two counsels, who are the primary players. Witnesses know relatively

---

very little about their own contributions, especially how they are being interpreted, what
effect they will have on the jury or the judge, or even on the outcome of the trial. This is so in
spite of the fact that the entire process of negotiation of justice crucially rests on the evidence
of the witnesses.

It must be noted at this point that in most two party conversations, it has often been observed
that superiors in such interactions talk more, hesitate less, interrupt more, control the
resumption of talk, control the introduction of new topics, etc., and in the courtroom
examination, the counsels seem to do all that, and a lot more. They control to a large extent
even the responses of the witnesses. Witnesses tend to acknowledge this coerciveness in their
copying of the question in their answers. If the counsels are not able to control the witnesses’
responses, they tend to undermine and often damage – even destroy – the witnesses’
credibility, and very few witnesses are clever or experienced enough to minimize the effects
of such attempts while they are being questioned.

Courtroom examination generally consists of direct examination or what is also called
‘examination in chief’, cross-examination, re-examination, and also a possible examination
by the judge for clarification, if required. Direct examination is often viewed as a procedure
intended to secure the trust of the court. To facilitate this, the counsel for witness often gives
his or her own witness an opportunity to give an uninterrupted narrative account of events,
even though leading questions are generally not allowed. In cross-examination, on the other
hand, witnesses are invariably controlled by the counsel, and all forms of coercive
questioning strategies are used without any hesitation, unless they are seen as eliciting
irrelevant and inappropriate testimony. Cross-examination thus is regarded as a crucial
weapon in the armoury of the counsel not only to test the accuracy of evidence revealed in
direct examination but also, and perhaps more importantly, to challenge the testimony as well
as the credibility of the witness.16

Taking into account the background of this institutional framework for this kind of unequal
interaction in the courtroom, let us now examine the nature, function and status of witness
cross-examination in international commercial arbitration practice.

7. Cross-examination in arbitration

The best-known purpose of cross-examination is to test the credibility of the witness. But
there can be a number of other purposes as well: for example, to provide a more complete
story than the edited one presented during direct examination, to explore weakness in the
logic of the opponent’s case, and to gain concessions about facts17, thereby making them as
irrefutable as possible. Cross-examination thus is seen as a strategically powerful resource in
litigation as well as in arbitration. A Supreme Court judge once described successful cross-
examination as a process of ‘oozing’ the desired testimony out of the witness ‘drop by drop’18. It is generally believed that, like cross-examination in litigation, cross-examination in
international commercial arbitration seeks to destroy the credibility of witnesses. As Michael E. Schneider\(^{19}\) points out:

> 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 counsels in international arbitration often do not apply these techniques in the same manner, their principal objectives generally remain the same.

As a consequence, arbitrators, especially from the common law tradition feel that, despite the divergent practices across different jurisdictions, good cross-examination techniques are becoming increasingly important. Colin Ong\(^{20}\), speaking about the importance of cross-examination in international commercial arbitration, claims:

> Due to the emphasis on the written word, good cross-examination techniques are now even more important in assisting counsels to tip the balance between winning and losing a case. […] Despite the divergence in theories as to the meaning or function of cross-examination, it is now almost universally accepted that the main purpose of cross-examination is to weaken or discredit the evidence that has been given by opposing witnesses.

One of the major differences between courtroom trials and arbitration trials is that the courtroom setting is invariably very formal: the judge wears formal robes, and witnesses are separated and systematically constrained on the witness stand. The counsels can freely move about to make the witnesses uncomfortable. All these institutionalised features of the courtroom context are deliberately introduced to indicate the seriousness of purpose of courtroom trials. In comparison, arbitration trials often take place in less formal settings which may not encourage a rigorous cross-examination\(^{21}\). Moreover, business people are likely to be more comfortable in relatively informally organised conference room settings, in which the positioning of the witness in relation to the counsel is less intimidating. However, when it comes to the use of strategies in cross-examination, they tend to remain more or less the same, especially in common law jurisdictions. This raises another important issue: that is, to what extent the legal, arbitration, and business communities have shared perspectives on some of the challenges we have discussed above.

As mentioned earlier, the use of written statements in place of direct testimony is often a foreign concept to common law counsels, who are trained to rely upon oral testimony for the presentation of evidence\(^{22}\). In contrast, the civil law judicial system does not put as much evidentiary weight on oral testimony. This jurisdictional or cultural background plays an important role in witness examination in international commercial arbitration, especially in cross-examination, which becomes an additional potential source of conflict. Under the common law system, especially the American system, cross-examination is considered an important aspect of the trial, as it provides a testing ground for oral evidence, whether in the law court or in International Commercial Arbitration. The real trust in and credibility of the

---


\(^{21}\) See Drew *supra* note 15.

testimony is essentially established in the cross-examination of a particular witness. On the other hand, arbitrators trained in the civil law tradition do not regard oral testimony favourably. It is sometimes seen as ‘a process of trickery to confuse witnesses’. Newman\textsuperscript{23} points out:

The Civil Law system considers the concept of oral testimony with scepticism, and cross-examination with animosity. […] Within the European context, ‘American and English cross-examination is viewed as a process of trickery designed to confuse witnesses rather than to elicit vital information.

David Wagoner\textsuperscript{24}, an experienced arbitrator believes that as in litigation, in arbitration the witnesses are also prepared to testify, and some practitioners believe that it is a fair game:

In the major cases rightly or wrongly, the key witnesses are prepared to testify, and that’s accepted now in the international arbitration, it's accepted in litigation. That doesn’t mean you tell them how to testify, but you tell them what the issues are so you get them thinking about the issues, what the alternatives are, and then you get them to testify. And that’s fair game I think. So in general, I would say there’s less cross-examination in international arbitration, but who’s going to do it? In my Swiss case, the chair did it all, just as a judge in Switzerland would do, or in Germany. In the U.S. they never do it, almost never.

Since arbitration tribunals have been given considerable flexibility in almost all jurisdictions to decide on procedural matters in consultation with the disputing parties, it is possible for them to rule in favour of or against direct testimony in the form of written statements. A tribunal from a common law jurisdiction might go for oral testimony, whereas one from civil law may choose written statements instead. Whatever the context, one might consider oral face-to-face direct examination of witnesses to elicit more accurate and truthful witness testimony as opposed to written witness statements, which are more likely to offer a carefully drafted testimony by the legal counsel rather than truthful and genuine testimony by a witness. It is difficult to preserve the integrity of true witness testimony if legal counsels are involved in the process.

Cross-examination can be time-consuming in that it can focus on trivial inconsistencies sometimes at the expense of the real issue under consideration, and may even overshadow the role of the arbitrator. On the other hand, cross-examination can expose a lying witness, weakness in logic, or inaccuracy in facts that may not surface when the only means of challenging veracity is by an affidavit or testimony from another witness\textsuperscript{25}. Although international commercial arbitration most commonly turns on issues of contractual interpretation as to which written documents provide the most reliable evidence, oral testimony and the credibility of witnesses can still be very useful.

8. Harmonisation of jurisdictional traditions and cultures

Having highlighted some of the main features of witness-examination in litigation and arbitration, let us discuss the extent to which the present-day cross-examination practice in international arbitration reflects harmonization of different legal traditions. In the civil law

\textsuperscript{23} Ibid.
\textsuperscript{24} David Wagner, an experienced arbitrator, in a specialist interview for this project.
\textsuperscript{25} See Drew supra note 15.
tradition, the judge often conducts testimony, and counsels come in marginally at the end; however, counsels from common law are often shocked by the fact that they are not allowed to cross-examine witnesses. As Lowenfeld\textsuperscript{26} argues:

The [civil law] model would have the judge do the questioning, with the lawyers making suggestions or filling in at the end, and some arbitrators model their role on that of the judge in their home country. I have seen [common law] counsel surprised and shocked that they were not expected to conduct the examination of their witnesses and the cross-examination of those of their opponents.

A similar view is expressed by Lazareff\textsuperscript{27}; when speaking about the use of written evidence instead of oral testimony in arbitration, he points out:

It remains, nevertheless, a fact [...] that the English and the American are more inclined to rely on the testimony of witnesses than their sceptical Continental colleagues who are more apt to rely on contemporary documentary evidence. This difference in underlying attitude explains why total harmonisation cannot be achieved by simply instituting a unified set of procedures.

Cross-examination in international arbitration, in a similar manner, has attracted opposing views. As arbitration trials are viewed as more informal than litigation trials, both the arbitrator and the legal counsel can ask witnesses questions in a friendly environment. It is also possible that direct examination and cross-examination are not distinct phases, as is often the case in litigation, especially in common law practice. Moreover, arbitrators have the final discretion to allow cross-examination in arbitration trials; they also have the freedom to devise innovative ways of making sure that the witness testimony is accurate and credible. An excellent example of this kind of innovative approach that has been reported in arbitration literature is the case of IBM v. Fujitsu, in which IBM brought a claim against Fujitsu that it had copied its mainframe operating system software. The arbitrators appointed by the two parties agreed to function as neutral arbitrators and also made the two parties agree to go without a third arbitrator. Instead, the two arbitrators, with the consent of the parties, decided to hire a professor of computer science to give them the disciplinary knowledge they thought was crucial for the case, which also made it possible for them to avoid the need for any witness cross-examination in reaching a just and amicable award.

Concerning the issue of arbitration as an alternative to litigation, a very experienced and well-established professor and arbitration practitioner\textsuperscript{28}, in a one-to-one interview for this study, points out:

\textsuperscript{28} Several interviews of experienced and well-established international arbitrators were conducted by the international project mentioned in note 1 above in order to study their varying perspectives on different aspects of international commercial arbitration practice, especially focusing on issues, challenges, and opportunities for the future development of the institution of arbitration. Some of these comments and perspectives are kept anonymous to preserve the confidentiality of the interviewees.
Well, I don’t necessarily agree to that; they often refer to arbitration as an alternative dispute resolution method. [...] I don’t think so. What is alternative to litigation and arbitration is mediation and conciliation and negotiation, and there are a number of other methods. Arbitration is not an alternative, it is a part of that process that makes firm and binding decisions. When I am teaching arbitration law, I never tell my students that it is an alternative. It is not, in my opinion. Of course, you have to be clear as to what an alternative means.

He continues:

If you come to think about arbitration and litigation, they have so many characteristics which are actually similar or even the same, so that it is actually not possible to say that one is an alternative to the other. Talking about the actors involved in arbitration, there are counsels, of course, and there are the arbitrators. The counsel really acts as an advocate, except, of course that you sit down, which is very, very important, that you sit down [at] the table in a businesslike type of environment, but otherwise you behave as a counsel would. Your job is to ensure your side to win. You will develop legal arguments, you will tell the arbitrators as to why your side should win, based on law and practice and so on. And therefore the counsel behaves very much like a counsel in litigation.

Having discussed arguments from both sides, one tends to reassert what Cymrot noted earlier, when he pointed out that the formality of the courtroom setting, where one finds the judge in formal robes, the witnesses separated in different stands, and the counsels relatively free to move around, often unnerves witnesses. These formal features of the courtroom setting are deliberately designed to intimidate witnesses and to instill in them the seriousness of court procedures. Business stakeholders in commercial arbitration, on the other hand, Cymrot claims, feel comfortable in conference rooms, where arbitration proceedings often take place. These conference rooms are relatively less formal, and the positioning of witness at the same time is less nerve-racking. However, the strategies of cross-examination used in international commercial arbitration remain more or less the same, thus confirming the impression that there are no major differences in witness examination in the two contexts, i.e., litigation and arbitration.

9. Concluding remarks

We have in this paper attempted to outline some of the fundamental issues arising from the mixture of processes and procedures of witness examination in the supposedly informal and non-judicial setting of international commercial arbitration trials, which have been viewed as a site of contention across a number of different forces, which are essentially intercultural, interdisciplinary, inter-jurisdictional, and most importantly inter-professional practices. The paper is based on the assumption that international commercial arbitration practice has its own integrity, with its own professional culture, which is distinct from that of its close cousin litigation. There is also an implicit assumption that, unlike litigation, which is essentially jurisdictional in nature, international commercial arbitration as professional practice is a harmonization of various jurisdictional characteristics which should be visible in all aspects of arbitration practice, including witness examination. However, based on the current practices and perspectives of the members of the arbitration community, this paper claims that though such a harmonization is intensely desirable, it is unlikely to take effect any time

---

29 Cymrot supra, note 17, p. 55.
Judicialisation of International Commercial Arbitration Practice

in near future primarily because of the involvement of members of the litigation community from different jurisdictions, most notably from the common law and civil law jurisdictions; these members are so deeply rooted in their individual legal cultures and jurisdictional practices that they find it difficult to switch their hats when they operate in arbitration. The essential consequence of this is that commercial arbitration practices are increasingly coming closer to litigation in all respects, including witness examination. The idea of discovery and direct oral testimony, which is so familiar to litigators from common law jurisdictions, invariably creeps in when the arbitration tribunal is dominated by members of the common law community. On the other hand, these very practices are underplayed and even completely ignored when the tribunal is dominated by specialists from civil law jurisdictions.

The practice of international commercial arbitration remains contentious, and there is no independent way of establishing the processes and procedures as the doors to any kind of critical inquiry are intensely guarded and most often completely closed by the invocation of a general duty of privacy and confidentiality, which is taken as given, rather than negotiable, in all arbitration procedures. Unlike courtroom practices and proceedings, which are open to the public, and court judgments, which are readily available in published form, arbitration proceedings are held in private, and the procedural details of the trials and their outcomes, including the arbitration awards, are confidential. Privacy sometimes helps firms keep trade secrets and financial dealings confidential from competitors and the general public, but the parties never hesitate to bring the dispute and even arbitration decisions into the public domain when they see specific advantages from such publicity.

Redfern and Hunter, two very well-established international commercial arbitrators, point out that investigating the practice of international commercial arbitration is like peering into the dark. Very few arbitration awards are published, and very few procedural decisions are ever made available. Information mainly comes from tapping the experience of the principal arbitral institutions or by looking at individual cases that come before the courts, either as the result of enforcement proceedings or because an arbitral award is challenged by the losing party. It therefore brings a veil of secrecy and lack of transparency to the whole process of arbitration in international commercial contexts, which, in the long run, is likely to encourage the vested business interests of the participants, be they lawyers, arbitrators, or corporate stakeholders, and will certainly be detrimental to the development of international commercial arbitration as an institution with its own independent culture and integrity in practice.

References


