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Arbitration News

Newsletter of the International Bar Association Legal Practice Division

VOL 16 NO 1 MARCH 2011

the insured until the insured's liability to the third party and the amount of that liability have been established by judgment, award or agreement. They argued there could be no 'dispute' about the insurer's liability until its liability to indemnify the insured had actually arisen, that is, until L's liability to the claimants and the amount of that liability had been established by way of the earlier court judgments.

The court, however, held that from the moment an insurer notifies an insured that he will not be granting indemnity in respect of a potential claim, the circumstances of which have been notified by the insured in accordance with the terms of the policy, and that refusal to indemnify is unjustified, then the insurer is in breach of contract because he is effectively saying that he will not perform his primary obligations under the policy in respect of that claim. In the case in hand, if the defendant insurer's refusal to indemnify L was unjustified, L had an accrued cause of action against the defendant for breach of contract which would entitle it to seek redress – in this case by arbitration – seeking a declaration that the defendant had no grounds under the policy for refusing to indemnify it against the claim arising out of the fire.

The 'dispute' for the purposes of time running in the arbitration agreement was therefore found to have existed at the moment when the defendant notified L that it denied L's entitlement to an indemnity. More than nine months had lapsed since then and the claimants were therefore time barred from commencing arbitration.

Points to note

This case provides helpful reminders on a number of issues. Selecting arbitration can mean that limitation periods are reduced by agreement without any access at all to the courts. Incorporation of terms is often an area for conflict, and it is helpful to have a reminder that impractical consequences of incorporation were regarded as a relevant (but not, in this case, determinative) factor when deciding the issue. As the court also made clear, 'unusual' does not automatically mean 'onerous', and that is also relevant to incorporation. The reminder that contractual limitation periods run from the accrual of a cause of action seems innocent enough, but is a point to bear in mind in similar contexts, as communications with insurers can run on for some time, and it would be good to keep an eye on the possible expiration of rights.

Note

1 The case was heard in the Technology and Construction Court, a specialist civil court of England and Wales, which deals principally with technology and construction disputes. It was heard by Mr Justice Edwards-Stuart.

Witness conferencing involving witnesses of fact: a good idea whose time has not yet come?

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Powerful and persuasive arguments have been circulating in international arbitral circles for nearly a decade[1] in support of the use of witness conferencing (also known as 'hot tubbing') not only to examine expert witnesses – for which the practice is better-known and more firmly established – but also to examine witnesses of fact. Barring any reliable (or even, to the author's knowledge, unreliable) survey evidence of the use of witness conferencing for fact witnesses, one is left with anecdotal evidence and intuition to assess the extent to which the practice has become – and, in the near-term, may be likely to become – institutionalised.

The author's recent experiences and anecdotal evidence do not suggest that

the witness conferencing of fact witnesses will become the 'next big thing'. Quite the contrary, in circumstances (one in a purely domestic arbitration and one in a purely international arbitration) which literally cried out for the use of witness conferencing, the practice was ultimately used in only one of the cases, and even then it was used in a very limited and stilted form. This suggests that, despite all of its promise, the time may not yet be ripe for the frequent use of witness conferencing for fact witnesses in international arbitration.

The basics: what witness conferencing is, its advantages, and arguments for its use

In what can be considered the foundational (and rather 'radical') definition of the concept, Wolfgang Peter stated in his 2004 piece, cited above, that:

> 'Witness conferencing consists of the simultaneous joint hearing of all fact witnesses, expert witnesses, and other experts involved in the arbitration. It is not simply an occasional confrontation of two fact witnesses or two expert witnesses, but involves all witnesses and experts appearing simultaneously throughout the entire hearing. Witness conferencing is therefore not a witness-by-witness hearing, but a team-versus-team hearing.'

According to comments made by Wolfgang Peter himself to the author, the purpose of his provocative 2004 formulation was precisely to highlight the applicability of the concept of witness conferencing to fact (as well as expert) witnesses, and that the proper use of the practice must be decided on a case-by-case basis. Thus, it is the arbitrator, with the input of counsel, who must decide whether the proper handling of a particular case would include witness conferencing, and if so whether it should be used only for experts, for experts and fact witnesses heard separately, or the more 'radical' approach – which Peter has occasionally used, with the consent of the parties, for merger and acquisition and construction matters – of using the concept for experts and fact witnesses, all together simultaneously in the 'hot tub'.

Another, more nuanced definition is that used by Michael Hwang SC in the Singapore section of the 2008 issue of the *Legal Media Group Guide to the World's Leading Experts in Commercial Arbitration*:

> 'Witness conferencing is a novel evidentiary process, in which witnesses testifying on a common issue sit together and give evidence in a panel discussion led by the tribunal. It allows multiple witnesses to give testimony simultaneously, and counsel and witnesses are able to pose questions to other witnesses. Witness conferencing is commonly used for gathering oral testimony from expert witnesses, but it has been gradually extended to deal with oral testimony from factual witnesses.'

At its essence, witness conferencing involves 'concurrent evidence':[2] witness conferencing substitutes the classic separate and sequential parade of witnesses – each of whom is typically led through a purely counsel-driven ('adversarial') direct examination, cross-examination and re-direct – for simultaneous joint testimony of multiple witnesses in a free-flowing panel discussion chaired by the tribunal but permitting and indeed encouraging questioning by counsel, and even by the witnesses themselves.

The virtues ascribed to witness conferencing are multiple and include efficiency, pragmatism, time-saving, flexibility amongst others.[3]

The practice was first employed, and today appears to remain principally employed, in the area of expert evidence. See, for example, the references to various Australian studies and commission reports cited in M Hwang's article noted above, the general tenor of Lord Justice Jackson's comments in his report noted above, and David Rivkin's recognition of the similarity of the technique with the English method of an expert's meeting and joint report (the purpose of which is to narrow issues and focus the hearing and the tribunal's attention on the critical, disputed issues).[4]

In cases of a technical nature, which can turn on the evidence of experts, witness conferencing can be said to be rather broadly accepted in international arbitration: with all experts having addressed an issue being present in the hearing room and at the witness table (or tables) at the same time, the arbitrators are able to 'home in' on the key contentious issues faster as witnesses speak directly to the tribunal rather than through questions posed by counsel.[5]

Witness conferencing for fact witnesses, which is not widely used, shares the same positive benefits as witness conferencing for expert witnesses, a practice which is more widely used

In the author's view, the rationale supporting the use of the witness conferencing technique for expert witnesses is equally valid for factual witnesses. Again, the classic formulation of the argument supporting this broader application of the technique is that of W Peter in his 2004 article, providing as follows:

> 'In arbitration concerning matters such as mergers and acquisition, construction, turnkey projects, research and development, intellectual property, and other fields where the contractual process based on complex technical facts, systems and procedures involved most of all potential witnesses, the method of witness conferencing can be ideally used. Practically speaking, a number of people have worked in these cases in common on the negotiation and performance of the contract, experienced together disputes over contract performance of the contract performance, and, finally, witnessed the termination or breaking down of the relationship. These persons have detailed knowledge of all facts and to the extent that the matter concerns specialised know-how, these witnesses are often far more knowledgeable in the particular field than members of the arbitral panel or even well-prepared counsel. While these persons are generally employed by the parties, which may be seen as an impediment to their objectivity, they also know each other well and have altogether an in-depth understanding of the issues which divide the parties. These are precisely optimal prerequisites for a successful witness conferencing. It should however be noted that witness conferencing has also been used very successfully in arbitrations which were not characterized by complex facts of a technical nature, which suggests that *the method is suitable for most types of arbitration procedures.*' (emphasis supplied)

There is resistance to witness conference of facts witnesses among arbitrators and practitioners, as demonstrated by the author's experience in trying to get witness conferencing of fact witnesses in two separate arbitrations.

Two recent experiences in matters in which the author acted as counsel suggests that, in practice, witness conferencing of fact witnesses will often meet with substantial resistance from both counsel and arbitrators. As a result, witness conferencing of fact witnesses may never reach its full potential as an agile and efficient tool for accelerating and focussing oral testimony in order to reach the truth quickly and efficiently.

Neither case was of extraordinary complexity. Both involved purchase and sale arrangements and some ongoing 'joint venturer'-type relations between the parties. In both cases, initially, the parties' principals could and did consider each other as partners. The arduous and ultimately successful negotiations of the agreements at issue in the two disputes were attended by a number of representatives of each side. When things began to go badly in each case, due to a greater or lesser extent to events not entirely within either party's control, the same representatives corresponded extensively and engaged in a number of meetings in order to find an agreed way forward. Ultimately, in both cases, these efforts failed, the air became increasingly poisoned and the two partnerships headed inexorably towards divorce and then to arbitration. At issue in both, essentially, was simply the question of what the parties had agreed (or intended to agree) in the contracts at issue, and what relevance the changed or allegedly-changed factual situations, and the conduct and/or statements and/or alleged agreements of the parties as a consequence of such situations, might have had on those agreements; in other words, both cases took the form of a classic contract dispute.

Thus, the issues in each case involved rather concrete aspects of a long-term relation, established and carried out over the relevant months by and between a handful of key personnel from each side (each intimately familiar, as a result, with each other), without particular 'specialisation' of one or another insofar as concrete issues or sub-issues in dispute were concerned.

Neither case seemed, in the author's view, particularly suited to the 'traditional', sequential, one-by-one testimony of multiple witnesses for each side. This approach would have been, simply put, boring, redundant and inefficient. But efforts to procure a non-traditional, witness conferencing-inspired approach were largely frustrated.

Without going into unnecessary and unduly compromising detail as to the cases, the tribunals and the proposals made, it is

noteworthy to indicate that one case was purely 'domestic' in nature – local law, local language, local seat, local parties, local firms as counsel, local nationals as arbitrators etc – while the other was purely 'international' – foreign/treaty law, arbitration conducted in English, neutral seat, parties from two non-English speaking jurisdictions, arbitrators from three different jurisdictions, international firms involved on both sides, etc.

Because I wanted to accelerate, and even enliven, the proceedings, and because I was convinced of my side's witness credibility and correctness on the facts, it occurred to me in the 'domestic' matter to propose a form of witness conferencing: instead of hearing sequentially the three fact witnesses for the claimant (all of whom would surely testify in substantially identical terms) and then the two for the respondent (both of whom would surely do the same), I proposed the simultaneous hearing of just one witness for each side (chosen by such side or even by the other). In this exercise, as I envisioned it, the tribunal could probe either or both of the two witnesses to its heart's content

Opposing counsel was on board with the proposal. But the tribunal was, at best, lukewarm, expressing a preference to do things the 'traditional' way. As a result, a hybrid arrangement was agreed/ordered. Each party, as proposed, brought only one fact witness, who testified 'normally' via direct, cross and re-direct. Only then did the tribunal invite both witnesses to be seated side-by-side, where the tribunal (not counsel) asked each witness one or two questions and that was the end of the exercise.

In the end, the path chosen saved a substantial amount of hearing time by eliminating the need for three of the five witnesses originally identified, and required the panel to do some meaningful 'homework' in advance of the hearing. But the process was so watered-down that it is hard to say that it addressed the concerns and goals I had in mind when I proposed witness conferencing in the first place.

The 'international' case, similarly, involved a number of witnesses on each side most of whom had attended a series of key meetings in the relation between the parties, and whose testimony would accordingly be to a large extent overlapping or redundant with testimony of other witnesses from their respective side. Moreover, the clear majority of the named witnesses would have to travel halfway around the globe to attend the hearing at the seat.

Again, to accelerate and enliven the proceedings, and because I wanted to save costs and was assured of – and hoped to establish – the credibility of my witnesses, I floated the idea of witness conferencing. Both opposing counsel and the tribunal were disinclined. The hearing took two days and was not very lively: the testimony was overlapping and it is not clear how much light was shed on the questions of credibility or the facts themselves, or more importantly, if any more light was shed by virtue of using the 'traditional' form of testimony rather than some form of interactive, simultaneous form of joint testimony/discussion.

While I could not have imagined cases better-suited for witness conferencing of fact witnesses, it was simply not to be as tradition reigned supreme in both the domestic and international case.

Conclusion: Unless the arbitrator himself pushes it, witness conferencing of fact witnesses will largely lose out to the traditional ways of presenting witness testimony

Subject to the possibility – which cannot be disregarded, at least in the absence of reliable field work – that the experiences recounted above are not reflective of currently-prevailing attitudes of arbitrators and counsel, it would seem to the author that the utilisation of witness conferencing techniques (whether the 'radical' team version advocated by Peter, or the looser issue-by-issue or category-by-category version seen in practice) for witnesses of fact in international arbitration is likely to remain peripheral. Unless the arbitrators themselves push the issue up-front and counsel are receptive, the more likely format for fact witness testimony will be the 'traditional' format, more familiar and comforting to the arbitrators and counsel and less innovative and mold-breaking, albeit perhaps less efficient and less illustrative.

Which seems a real shame…

Notes

1 The seminal article on the topic is Wolfgang Peter's 'Witness Conferencing', 18 *LCIA Arbitration International* No 1 (2002), which was revised and re-published as *'Witness Conferencing Revisited' Reports of the International Colloquium of CEPANI* (2004).

2 See the voluminous UK Government-commissioned

report entitled *Review of Civil Litigation Costs* released in January 2010 and authored by Lord Justice Jackson, Chapter 32, Article 3.12.

3 As summarised by Wolfgang Peter's 2004 article, see note 1 above, witness conferencing involves and allows all those who have relevant knowledge to efficiently testify; it is oriented towards precise examination of the facts based on documents, witness statements, expert reports, and other materials; it is efficient as it brings out the real facts to the largest extent and therefore answers most open questions; it is pragmatic and will be described by those involved as the most reasonable and natural way of hearing witnesses; it saves considerable time; it is flexible: it can be structured in panels of witnesses for certain relevant questions, it can focus on issues chronologically or by theme, and it does not rule out cross-examination of certain witnesses on specific points; it is interactive and dynamic and will reduce the type of frustration that endless questioning of single witnesses sometimes triggers; it appeals to common sense and each participant very quickly understands the method adopted and carries it out efficiently; it largely reduces theories and speculations, biased or untrue presentations; it quickly disposes of redundant, over-formalistic and top-down positions; it is conducive to settlement.

4 In *Towards a New Paradigm in International Arbitration. The Town Elder Model Revisited*, published as Documento de Trabajo Series Arbitraje Internacional y Resolución Alternativa de Controversias, No 1/2007.

5 Michael S Greco and Ian Meredith, 'Getting to Yes Abroad', 16 *Business Law Today* 4 (March/April 2007), ABA Business Law Section.

Further articles are available in the full-length version of Arbitration News online at tinyurl.com/arbnewsmarch11. See the table of contents on page 3 for more details.