GLOBAL

Fairness & Impartiality:

Are witnesses truly independent in your jurisdiction?

Virtual Round Table Series

Disputes Working Group 2020

#IRPUBLICATIONS

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Are witnesses truly independent in your jurisdiction?

Global commerce is by its nature a complex beast and it is inevitable that sometimes disputes arise between companies doing business across the world.

As more international deals are signed off – often in greater degrees of complexity than will have been done in the past – it has also led to a rise in the number of disputes that end in arbitration.

Indeed, international arbitration was the preferred method of dispute resolution for 97% of respondents in the 2018 International Arbitration Survey, conducted by the School of International Arbitration at Queen Mary University of London, in association with White & Case LLP.

Moreover, 99% of respondents said they would recommend international arbitration to resolve cross-border disputes in the future – which shows the strength of the system across the world.

An important aspect of the arbitration process is the use of the expert witnesses. There are few cases where an expert witness is not called on to give evidence on a range of technical, financial, legal and, on occasion, scientific issues to help the arbitration tribunal to understand evidence on complex matters and help them form a decision.

Those involved in disputes must be aware of how expert – and also fact – witnesses are used in different jurisdictions, as this can vary markedly between territories.

The independence of witnesses is a subject that crops up repeatedly – especially around who they serve, their effectiveness and how they are viewed by judges in arbitration tribunal panels.

Another factor that must be considered is the differing rules between jurisdictions and the impact that can have on proceedings. Many jurisdictions have their own arbitration rules, and there are also the international ICC and IBA rules to consider, among others. Often, the litigant will try to steer proceedings to use their home rules – and if they are unfamiliar to the other party, they will need to engage experts in the local laws.

The following discussion took place between IR Global members from seven countries who are experts in arbitration. Their wide-ranging discussion addresses several topics including the importance of cross-cultural issues regarding arbitration rules and witnesses in their jurisdiction and how important IBA rules are in terms of rules in their jurisdiction and internationally. Their responses demonstrate the differences that exist across the world.

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THE VIEW FROM IR

Our Virtual Series publications bring together a number of the network's members to discuss a different practice area-related topic. The participants share their expertise and offer a unique perspective from the jurisdiction they operate in.

This initiative highlights the emphasis we place on collaboration within the IR Global community and the need for effective knowledge sharing.

Each discussion features just one representative per jurisdiction, with the subject matter chosen by the steering committee of the relevant working group. The goal is to provide insight into challenges and opportunities identified by specialist practitioners.

We firmly believe the power of a global network comes from sharing ideas and expertise, enabling our members to better serve their clients' international needs.

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Featured Members

AUSTRIA

SHARON SCHMIDT

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Sharon Schmidt joined Oblin in 2019 as an attorney within the Firm's International Arbitration Practice, focusing on international commercial and investment arbitration. With experience that spans across a wide range of industries, she represents international corporations and state-entities by combining an academically rigorous approach to law with her knowledge of working in different legal jurisdictions.

Sharon has a proven track record of providing quality technical advice, timely delivery and commercial acumen, all focused on helping clients meet the challenges that arise from complex, high-profile legislation and developing case law.

She previously acted on behalf of the Legal Service of the European Parliament (Brussels) and served as Consultant at the United Nations Industrial Development Organisation Office of Legal Affairs. Before joining Oblin, her legal experience also included working as Judicial Assistant to Lord Justice Henderson at the Court of Appeal (Royal Court of Justice) of England and Wales as well as for the Special Litigation Division of the Connecticut Attorney General's Office.

US - OHIO

CHRIS NIEKAMP

Partner, Niekamp Weisensell Mutersbaugh & Mastrantonio, LLP

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Chris Niekamp engages in a diverse Commercial and Corporate Law practice.

Chris has represented national and local banking institutions, large corporations and small businesses, debtors and creditors in all phases of Bankruptcy and Collection matters.

He has experience handling large and small Chapter 11 cases on behalf of Secured Lenders, Debtors, the Creditors' Committee and the Trustee. He has represented numerous large and small companies in issues ranging from start up through dissolution, employment law issues, collection, real estate litigation, real estate acquisition, commercial lease documentation, mergers and acquisitions, and shareholder disputes.

DOMINICAN REPUBLIC

PABLO GONZÁLEZ TAPIA

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With over 23 years of experience in the practice of Litigation and Corporate and Business Law, Mr. González Tapia has represented several clients in major court and arbitration cases as well as in international negotiations.

In addition to his legal advisory functions, Mr. González serves as Secretary on the Board of Directors of Antillean Gas, a company that is currently developing an international LNG pipeline in San Pedro de Macorís.

Featured Members

SPAIN

ROGER CANALS

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Roger has more than 15 years of experience as a lawyer. He has developed his career in top Spanish law firms, providing legal advice to both Spanish and International companies operating in a wide range of areas such as life sciences, retail, construction, real estate, engineering, chemical industries, automotive and pharma.

His command of English, French and Italian, along with Spanish and Catalan, has allowed him to build up a substantial international practice, managing relevant international clients' interests in Spain, including ongoing legal advice and /or managing of Court cases and restructuring processes on their behalf.

Roger focuses his practice in:

- Commercial litigation
- Real Estate
- Restructuring and Insolvency
- Public Law
- White Collar crimes

GERMANY

FLORIAN WETTNER

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Florian Wettner specialises in domestic and international litigation and arbitration with an emphasis on disputes in capital markets and corporate matters. Furthermore, he focuses on advising companies with regard to compliance issues and internal investigations. Florian Wettner also has extensive experience with respect to the handling of complex claims and liability cases under insurance law (particularly in the area of D&O and other indemnity insurances).

Florian Wettner studied at the universities of Freiburg, Florence and Heidelberg. After obtaining his doctorate, he spent seven years with one of the leading German corporate law firms. From 2007 to 2008 he worked for an international corporate law firm in London in the area of internal investigations. In 2011 he was seconded to the compliance department of a DAX-listed company. Florian Wettner advises clients in German and English and also speaks Italian.

The current ranking list published by leading German business newspaper Handelsblatt and U.S. publisher Best Lawyers ranks Florian Wettner as one of the “Best Lawyers in Germany” for Litigation as well as for Mediation and Arbitration.

HONG KONG

KENIX YUEN

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Kenix qualified as a solicitor in Hong Kong in October 2012. She joined Gall in June 2013, having previously worked for another boutique litigation firm. Prior to commencing her career as a solicitor, Kenix worked in the Legal and Compliance Department of an international bank and the individual tax team of one of the Big Four accounting firms. She holds a Bachelor of Laws in conjunction with a Bachelor of Business Administration (Law) from The University of Hong Kong, a Master of Social Science in Health Care Ethics and Law from The University of Manchester, a Master of Science in International Finance from The Berlin School of Economics and Law.

Since joining Gall, Kenix specialises in cross border commercial litigation and international arbitrations (in particular, involving element(s) of the People’s Republic of China (“PRC”)) covering contractual disputes, shareholders’ disputes, directors’ duties, fraud and asset tracing, misrepresentation and mis-selling claims. She also has experience in advising on regulatory investigations conducted by the Securities and Futures Commission and a regulatory inquiry from the Insurance Agents Registration Board.

Featured Members

ARGENTINA

DR. ALFREDO L. ROVIRA

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Dr. Alfredo L. Rovira is the founder partner of Estudio ROVIRA. Dr. Rovira served for more than 20 years as Managing Partner of Brons & Salas, one of the most distinguished law firms in Buenos Aires, where he was Senior Partner and Co-Chair of the Corporate Department for more than 30 years and founded and Chaired the Arbitration Group or more than 10 years.

Dr. Rovira dedicated substantial time of his practice as part-time professor in Business Laws at the School of Laws and at the School of Economic Sciences, both of the National University of Buenos Aires, on top of teaching as visiting professor at other private universities.

Dr. Rovira´s current practice focuses on Corporate and M&A, complex contract drafting, negotiations and litigation, Antitrust, Insolvency, Arbitration and Dispute Resolution including complex mediations, also acting as expert witness on Argentine laws in international litigations and arbitrations.

KENYA

JAMES NYIHA

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James Nyiha is an advocate of the High Court of Kenya admitted to the bar in 1993. He holds a Bachelor of Laws degree from the University of Nairobi with a postgraduate diploma from the Kenya School of Law. He is the Senior Partner in Nyiha, Mukoma & Co. Advocates.

He is an alumnus of Strathmore Business School, the Wharton School, Said Business School and Harvard Law School having attended and successfully completed executive education programmes in the said schools.

James has special expertise in alternative dispute resolution, creation of securities and their realization. He is also involved in mergers and acquisitions, amalgamation and winding up of companies, loan recovery and drafting of commercial and conveyancing documents. He regularly handles commercial litigation cases, arbitration and mediation in construction disputes. He is an accredited mediator in Kenya and a certified executive leadership coach.

SESSION ONE

How important are cross cultural issues regarding arbitration rules and witnesses in your jurisdiction?

Chris Niekamp - Ohio (CN) The US system is more adversarial, especially with regards to expert witnesses. Generally, in our arbitrations, expert witnesses are more like hired hands for each side and they take on a more adversarial role. There are some examples we've found where arbitrators go out of their way to make sure that the experts are adversarial and not impartial. I think if you're dealing with the US you would want to make sure that your arbitrator maybe creates some rules to require witnesses to be more impartial, because in the US the attorneys would find experts who would be mouthpieces for their position.

Sharon Schmidt – Austria (SS) First and foremost, it is important to draw a distinction between witnesses and expert witnesses. I am going to solely refer to the latter.

Cross-cultural issues play a fundamental role in relation to witnesses and how arbitral proceedings are being conducted. They influence the line of questioning used and impact our notion of what constitutes permissible or adequate witness preparation. The willingness of parties to arbitrate often merely extends to a general agreement, while cultural considerations carry significant weight in actually helping participants reach a consensus on the detailed expectations with which they enter into the arbitration. Aiming to resolve arbitration disputes solely through employing legal tools falsely disregards the fact that many of the answers are likely to be driven by cultural understandings that if neglected can significantly impede the arbitral process. Cultural differences not only impact expectations of stakeholders, they can also determine the course of an arbitration. As such it may be the case that arbitrators assign less credibility to a witness that appears to have been 'coached' by a party in order to 'advocate on its behalf' even though such conduct may be regarded as common practice in the witnesses' home jurisdiction.

In Austria, cross-examination is not relied on in the same way as it is compared to common law jurisdictions like the U.S. Witness questioning is mostly carried out by the judge while additional supporting questions may be posed by counsel afterwards. However, the focus really is on the inquisition and therefore diverts quite remarkably from adversarial common law jurisdictions. Witnesses in Austria are mainly called upon to provide insights on issues that require specific technical knowledge or expertise and it is up to the judge to evaluate these statements and determine its weight. One could say that the function of the witness is that of an adviser to the tribunal rather than an advocate acting on behalf of a party.

James Nyiha – Kenya (JN) It is a largely British system that is common law based: we approach things in the way that the courts do in London.

What happens is that you will have somebody from a legal system that, for example, relies on memorials and all the work he's done before. And they don't expect discovery and then they come to our system and find that we have issues of discovery. We go through it more like a litigation process. Then, of course, it is for the arbitrator to try and balance the two and see how to proceed.

Alfredo L. Rovira – Argentina (AR) From an Argentine law perspective, it's important to distinguish between types of witnesses. First, a witness of fact will declare he or she participated or made a declaration based on something that has been learned not because somebody else has told him or her, which would not be taken as a valid testament.

On the other hand, a witness expert is somebody who is called on to testify on technical issues that he or she should be an expert in, and they should be able to prove sufficient qualification to do so. Myself, I am an expert witness in Argentine law, in international litigation, and the fact that I am a professor of law qualifies me to do that kind of job.

Qualifications for acting as an expert witness would depend not necessarily on the fact that you are a professor of law. But if you can prove to an Argentine court or an arbitration being held in Argentina that you have enough expertise supported by evidence that can illustrate that.

Pablo González Tapia – Dominican Republic (PGT) After hearing Alfredo, I feel like we are talking about similar issues because what happens in the Dominican Republic is very similar to Argentina. We have a very clear distinction between witness of facts and technical witness.

Dominican law follows the civil code system in arbitration, which are commercial and civil matters and, in these issues, the documents are the evidence for action.

You only call witnesses in commercial and civil cases when there are facts that cannot be proven by document.

As for the expert, in the Dominican Republic you appoint three different experts – everybody's entitled to one expert and then the court appoints its own expert. It's a way of one party says, the other party says, and then there is the expert for the court. There is the possibility of having a sole expert that the parties agree to and are confident that that expert is independent and will provide the expertise in accordance with his best knowledge. But that is very rare. Usually every party will look for their own expert and allow the court to have a star expert who's like the casting vote in the case.

The judge or arbitrator is smart enough to realise by the line of questioning and the way that they respond to these questions, whether the witnesses are reliable or not.

Argentina - AR The Argentine legal system is similar to the Dominican Republic system. If you're talking about a judicial proceeding, the judge appoints the expert. The parties do have the chance to appoint a party expert. But, in reality, the judge only relies on the opinion of the expert appointed by the court, who is deemed to be neutral and independent, and who must make a declaration of independence upon accepting the office that has been appointed. The Supreme Court of Justice of Argentina, the chambers of a few different jurisdictions, do have a roster that is updated on a yearly basis, which comprises experts on different areas such as engineering and architecture.

Kenya - JN In Kenya, the witness's independence is normally very low because if you are a lawyer or an attorney in a matter, you have a specific point that needs an expert to clarify; you will not look for an

expert who will say the opposite of what you want, you would look for an expert who will back up your case.

How do you get an expert who is clear and gives objective reasoning? We have this saying: 'he who pays the piper calls the tune.'

To maintain the independence of expert witnesses, maybe experts should only be called by the tribunal or the courts, then they have no loyalties and are only answerable to the court.

Where you have multiple experts, each one will be giving their opinion but that supports the side that calls them. Then if you have one expert who is a neutral expert, he will be listened to by both sides, whether he agrees with one side or the other.

Ohio - CN In the US it's very rare that the court would appoint an expert. They have done it in federal court on occasion, but it's pretty rare. I'm just curious – is the appointment appealable either in the Dominican Republic or Argentina? Could you appeal who they appointed before they make a decision? Seems like that expert would carry a lot of weight. Would there be some way to challenge that expert if you thought there were bias, or you didn't agree with their opinion?

Dominican Republic - PGT The law only allows you to recuse the expert. Thanks to jurisprudence we have learned about differing situations like the expert has already had litigation with the party who is charging him. Or if there is a substantial evidence that the expert might be biased and that you can recuse him.

The law requires that you do that before the expert takes oath before the court. You have a really limited time between the appointment and the time that the judge takes the oath of the expert for doing the recusal.

Argentina - AR Argentina has exactly the same policy. We need to make a distinction between arbitration and judicial proceedings in arbitration. Normally, you provide statements in writing from the expert witness. Later in the tribunal the positions put in writing by the expert witness may be challenged by the opposing party and conduct a kind of cross-examination.

The witness of fact doesn't make any declaration in writing, they have to appear at the court. There is a hearing where the party testifies in front of the court or sometimes the court clerk, if the judge is unavailable. In some courts now they film the witness testimony so that the judge may see their face and their reaction to the cross-examination and determine the independence of the witness.

Roger Canals – Spain (RC) Economic globalisation has brought along the globalisation of litigation. Therefore, it is becoming difficult to come across a court procedure or an arbitration procedure whereby there is not a witness who comes from a different legal culture and must speak in a different language than the one used by the Tribunal. Furthermore, it is well known that between civil and common law jurisdictions there are remarkable differences in the way of examining either a factual witness and/or an expert witness. Just to give some examples, pursuant to Spanish rules of civil procedure:

- witnesses' written statements are not admitted, as they have to personally appear before the Court to declare
- witnesses have to be announced by the parties sufficient at an early stage of the procedure; beyond this point, the parties will not be entitled to propose further witnesses
- there is no rule in Spain preventing the previous preparation of witnesses by lawyers (and, thus, it is very likely to face witnesses in Court who have been previously prepared by lawyers of the party which has proposed the witness
- there is no rule in Spain preventing that any employee of an any given company acts as a witness in support of his/her employer company (only officers with binding faculties are prevented to act as witnesses in support of their company).

These general principles of the Spanish civil procedure statute are not always in line with those principles generally accepted in other jurisdictions or by international organisation (such, for instance, IBA rules on taking of evidence in international arbitration).

It is thus increasingly important in Spain to adequately prepare the witnesses prior to declaration before a Spanish state court or arbitral Tribunal, especially those witnesses coming from other legal cultures than Civil Law.

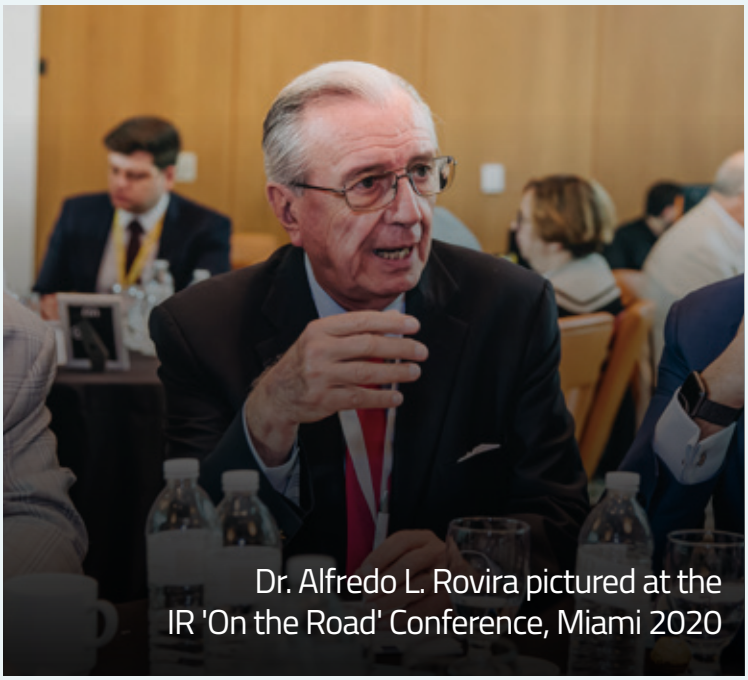
Kenix Yuen – Hong Kong (KY) In my experience, practitioners and tribunal members from different jurisdictions (in particular, having different legal systems) have different interpretations of the arbitration rules, which are somehow influenced by their court procedures.

> "I always encounter cross cultural issues concerning the differences in legal system, practice culture, professional code of conduct, language between Hong Kong and Mainland China."

In my practice, I always encounter cross cultural issues concerning the differences in legal system, practice culture, professional code of conduct, language between Hong Kong and Mainland China, which are important in stakeholders' expectation and legal risks management.

For instance, from the aspects of costs recovery, many arbitration rules are unclear or give the tribunal a wide discretion as to what costs incurred by the winning party can be recovered from the losing party. Very different from Hong Kong parties, Mainland Chinese parties who are inexperienced in international arbitrations may not expect that the winning party can also recover fees paid to the winning party's lawyers, in addition to other arbitration costs.

I recently also encountered a Hong Kong (HK) seated arbitration about a shareholders' dispute in which all parties involved were Mainland Chinese parties. The opponent's Chinese lawyers act for the shareholders of the other camp and the company from which the dispute arose. Apparently, even if there is no actual conflict, there is a potential conflict and the HK professional code of conduct (only applies to HK lawyers) prohibits us from putting ourselves into this situation. The Tribunal acknowledged the potential conflict but ruled that this was out of the Tribunal's jurisdiction to rule on this question and the arbitration rules indeed allowed the parties to choose their legal representatives.



Dr. Alfredo L. Rovira pictured at the IR 'On the Road' Conference, Miami 2020

Witnesses from other jurisdictions have a different perception and understanding of the law. In Hong Kong, we see more often than before that parties in dispute tend to commence contempt proceedings against the other sides' witnesses for knowingly making false statements. Those witnesses (especially those from Mainland China) are surprised that civil litigations can potentially lead to criminal penalty.

Florian Wettner - Germany (FW) Depending on the matter in dispute, cultural issues might play a role regarding the formation of the arbitration tribunal. When choosing the arbitrators, advisers should have in mind their cultural and, as part of this, legal background and if this fits with the case of the client and its strengths and weaknesses. In particular, as regards the taking of evidence it can make a difference if the arbitrators have a common or a civil law background, even if a given set of procedural rules applies.

Cross cultural issues have been addressed institutionally in the 2018 amendments of the arbitration rules of the German Institution of Arbitration (Deutsche Institution für Schiedsgerichtsbarkeit, or "DIS"), Germany's most important arbitration institution. The so called Arbitration Council was created which consists of 15 members from at least five different countries. Since the council is empowered to hear and decide upon various procedural issues, necessarily different views from different jurisdictions will be considered in that regard.

SESSION TWO

How important is witness independence when attempting to solve complex, transnational disputes? What roles can practitioners play to test for independence?

Ohio - CN In the US, of course, it's in the discovery process. Generally, arbitrations are held according to American arbitration rules, and most US practitioners would try to steer the arbitration to those rules. So where you'd have some limited discovery prior to the arbitration and have set up a discovery deadline, you would depose the other side's expert and try to figure out by talking to your expert where there's holes in their arguments.

The practitioners play the role of questioning the experts, preparing their own expert and preparing for the arbitration, and then presenting up an adversarial arbitration process, and cross-examining the other expert, and trying to find weaknesses in their arguments.

Argentina - AR Basically, we are dealing with the same issues. The rules for arbitration are critical in determining the proceedings to be followed. And normally if you go into international arbitration, the proceeding you use most often is the ICC.

ICC arbitrators, at least in this jurisdiction, are inclined to use the IBA rules on producing evidence, which is something which generally has been accepted by our community and considered to be a good guideline for arbitrators to follow as well as to counsel to the parties so that everybody knows what is going on.

Cultural difference may have a heavy impact in the testimony, knowing the individuals, knowing the social profile of the individual is something important in order to also determine how he could react in a cross-examination process.

Normally, you have an interview prior to the to the hearing to understand how the guy will react to different questions he might be posed. Not to induce him to tell a lie, but to make sure that he understands the process, that he doesn't get surprised, that he doesn't get into a situation where he feels himself nervous and forgets to testify on the relevant issues of the case.

In Argentina, we don't have the discovery process that they have in the US. So one of the difficulties you have when you are entering into litigation, either in judicial courts or arbitration, is that you need to know the evidence you are going to be using in court or the arbitration tribunal from day one, because you cannot do what we would call a 'fishing expedition' in trying to find out which evidence you can find useful in defending your case. That on one side gives you a limitation but on the other side prevents surprises that sometimes happen when you go through a full discovery process.

Dominican Republic - PGT With the Dominican Republic being always the smaller country when dealing with international investors, when we go to arbitration one of the parties, usually the foreign one, will impose an international arbitration usually because of their reluctance to be submitted to local arbitration and potentially be subject to bias.

Going through an international arbitration, on the Dominican side, you always need to be concerned that the arbitrator appointed – especially if Dominican law is going to rule – is knowledgeable of Dominican law, which is not usually the case.

Also, as in Argentina, we are fond of ICC. The typical Dominican negotiation of an international arbitration would be either ICC in Paris or ICC in Miami for the locality and the possibility of finding a lawyer who also speaks Spanish and can discuss the case with a client in Spanish.

There's a larger situation here, which is about appointing arbitrators who might know Dominican law. With ICC we could find that the arbiter panel would be composed of perhaps a Dominican lawyer or a Dominican law expert. And that would be fine, but that would create some sort of advantages. Then we might see the possibility that the arbitrators have to appoint a local expert in the law, that it would be like a consultant for the job to understand the minutiae of local law that might be involved in the case. That for me is the more challenging part; to make sure that the lawyers of that practice in the country where the arbitration is taking place get familiarised with the law and also offer arbitrators who could understand the law and what is in play in the conflict ahead.

Kenya - JN Under Kenyan law we have the Nairobi Centre for International Arbitration and under the rules of that centre international arbitration is free to agree on the procedure and the rules of procedure that will be used, so you don't necessarily use local procedure. You can agree local laws of evidence, visibility and relevance, although in this jurisdiction those very strict rules of evidence are not applicable.

The Nairobi Centre for International Arbitration has its own rules for arbitration modelled more or less according to IBA rules. This means that you can have an international arbitration going on in Kenya, but the substantive law is not Kenyan law, it is what the parties have agreed. If the parties can't agree it will be Kenyan law that will be applicable.

Another aspect within the centre is that you can choose the seat of arbitration that you want – so you can be under the auspices of the Nairobi Centre for International Arbitration, but the seat is not in Nairobi. If there is no agreement of the seat, then the seat automatically becomes Nairobi. The issue then, of course, with all these freedoms is enforcement because you must use local Kenyan law to enforce any decision of the tribunal that comes out of the Centre.

Austria - SS Reaching a settlement in an arbitration proceeding may require intricate knowledge or technical skills that extend beyond the purview of the experience of counsel or arbitrator. Therefore, the central task of a witness is to provide an objective account on the subject matter by offering an independent and unbiased perspective on the disputed issue. This is particularly crucial since the perception of a witness as partisan can undermine any credence accorded to their testimony. It also prevents counsel from assessing the client's chances of reaching a satisfactory outcome in a meaningful manner.

It would therefore serve practitioners well to ensure that witnesses are sufficiently qualified in their respective fields, that their conclusions are supported by sufficient facts or data and that reliable methods are applied in supporting their findings. Practitioners may also want to consider whether the witness has been author of reputable publications, whether these contributions concern issues identical or similar to the disputed subject matter as well as whether the witness has prior experience in acting both in the same capacity and with respect to the same subject matter for which their expertise is being sought. Practitioners would also be well advised to conduct interviews and consult law or consultancy firms that keep a database of witnesses with a good reputation in their respective fields. One may also instruct a legal team to test the witness' ability to respond to conflicting views, strategies or theories. Procedurally it is also useful to find out why the witness reached a particular conclusion, whether other methods have been used before and if so whether these led to different outcomes. Similarly, practitioners ought to determine whether a witness has previously served in a similar capacity during other arbitration proceedings and if so whether they did so on behalf of one or either side of the issue that is being disputed.

Spain - RC It is obvious that credibility of witnesses is intimately linked to their independence and lack of interest in the outcome of any given court and/or arbitral procedure. This rule applies either in domestic or in international disputes. However, in Court cases in civil law countries, witness statements are not as important as they are in common law Jurisdictions (as in civil law countries, documents submitted by the parties have a key role amongst the evidences provided).

Nevertheless, as most international arbitration rules are in between civil law and common law systems, for civil law practitioners to ensure witnesses independence within an international arbitration procedure is of greater importance than in a domestic procedure (where documented evidence prevails).

In Spain, witnesses are requested by state courts (and, increasingly, by arbitral tribunals) to render its statements/declarations under oath. Thus, perhaps the most efficient way to ensure witnesses' independence is by considering a false statement of a witness rendered before a court as a criminal offence (in Spain, perjury is punished with imprisonment that, depending on the circumstances, may reach up to two years). It is common among Spanish practitioners to warn the witnesses of the severity of committing perjury in Spain. It is uncommon to carry out any other specific tests to ensure witness's independence (apart from those reasonable investigation to find out their connections or links with the parties of the dispute).

Hong Kong - KY I would say that one can fairly expect that witnesses who give evidence for one party are not entirely independent. Expert witnesses would be more independent because they usually abide by professional rules. In HK arbitrations, experts are used to stating their agreement to the code of conduct for experts similar to those in our court rules (although it is not a must) in the expert reports. The code of conduct includes the duty to be impartial. In general, I think practitioners are well trained in finding out the truth by asking the right questions and paying attention to details. Regardless of whether the witness is giving evidence for the other side and the client's side, we always stay alert in reading/obtaining evidence, identifying gaps and asking the right questions.

Germany - FW In German litigation, the main distinction is to be drawn between witnesses in fact on the one side and experts (expert witnesses) on the other and, as regards the latter, between experts appointed by the court and experts appointed by one of the parties.

Witnesses in fact do not have to be independent or impartial by definition. Actually, in many cases they won't be neither the

one nor the other. Their testimony just has to be credible. When assessing their credibility the court has to factor in aspects as a possible dependence from one of the parties (economically, on a relationship level, etc.). From a common law perspective it might be notable that German courts in view of the credibility of witnesses generally do not appreciate if those have been too much prepared by the advisers. Therefore, mock trials are rather unusual, and generally preparatory measures should be applied diligently in order not to disavow the own witnesses.

The independence and impartiality of an expert (witness) is key in order to be appointed by the court. Such experts can be challenged and dismissed for not being independent and impartial. As regards experts appointed by the parties, however, that's a different matter. A party will appoint a particular expert just because he is able and willing to support the position of that party which, last but not least, also pays him. But in order for that party-appointed expert to have value, it must be someone reputable in the special field of expertise. Such reputable expert will not render an opinion contrary to what is professionally arguable. Therefore, experience shows that well-chosen party experts can generally be a useful means of evidence in German litigation.

SESSION THREE

Although IBA rules are not binding internationally, how important are they for arbitration rules in your jurisdiction?

Ohio - CN I think the IBA rules are refreshing. You have a third party expert, also the discovery process seems much less cumbersome than the American discovery process, which is just so expensive. It really limits the number of cases that can be arbitrated because you get so bogged down in the States and discovery, and unless it's a really expensive case a lot of clients are forced to mediate rather than arbitrate because the American system and the courts usually allow for more extensive discovery. I think the IBA system would be welcome to smaller businesses that are trying to cut down on the amount of discovery and just get to the case. The experts can be expensive as well. I know the costs weren't really part of this discussion, but it's a real factor in whether the parties are going to go through this this.

In America, depending on which client has leverage in the transaction, they would probably steer towards a choice of US law. And you're probably more likely to see the AAA commercial arbitration rules apply if the American company has leverage. If Americans look at these a little more closely this system is actually less expensive and probably gets better results since you have that third party expert.

Argentina - AR Chris – when you work in arbitration in the US under the AAA rules, you would not normally accept that as IBA rules interfere with AAA rules?

Ohio - CN Correct. They would apply AAA exclusively.

Argentina - AR That's an issue that normally is presented in cases where Latin American parties go into AAA. They think they have to make that choice in the contract whether to submit to AAA or not. Most people tried to go through ICC proceedings because they believe that the ICC would be more welcoming. The IBA rules as opposed to going into the AAA, which they are scared of because of the cost of the proceedings. Even though AAA is less expensive, the proceedings themselves look to be more expensive under the AAA rules than under the ICC. Correct?

Ohio - CN Mainly because of the pre-arbitration discovery process. It's more expensive to go into AAA and the AAA arbitrators are expensive and not necessarily very good. We try to steer clients away from AAA arbitration. We might apply the AAA rules but create a separate system for picking an arbitrator. It is more common now to have mediation rather than arbitration.

There's a lot of case law applied in AAA so I think American attorneys are more comfortable with that.

Argentina - AR ICC arbitrators, at least in this jurisdiction, are inclined to use the IBA rules on producing evidence, which is something that generally has been accepted by our community and considered to be a good guideline for arbitrators to follow as well as to counsel to the parties so that everybody is knowing what is going on.

Dominican Republic - PGT We don't usually follow the IBA rules in the Dominican Republic. In my experience, the only aspect of the rules that I see arbitrators using in many cases are on conflict of interest.

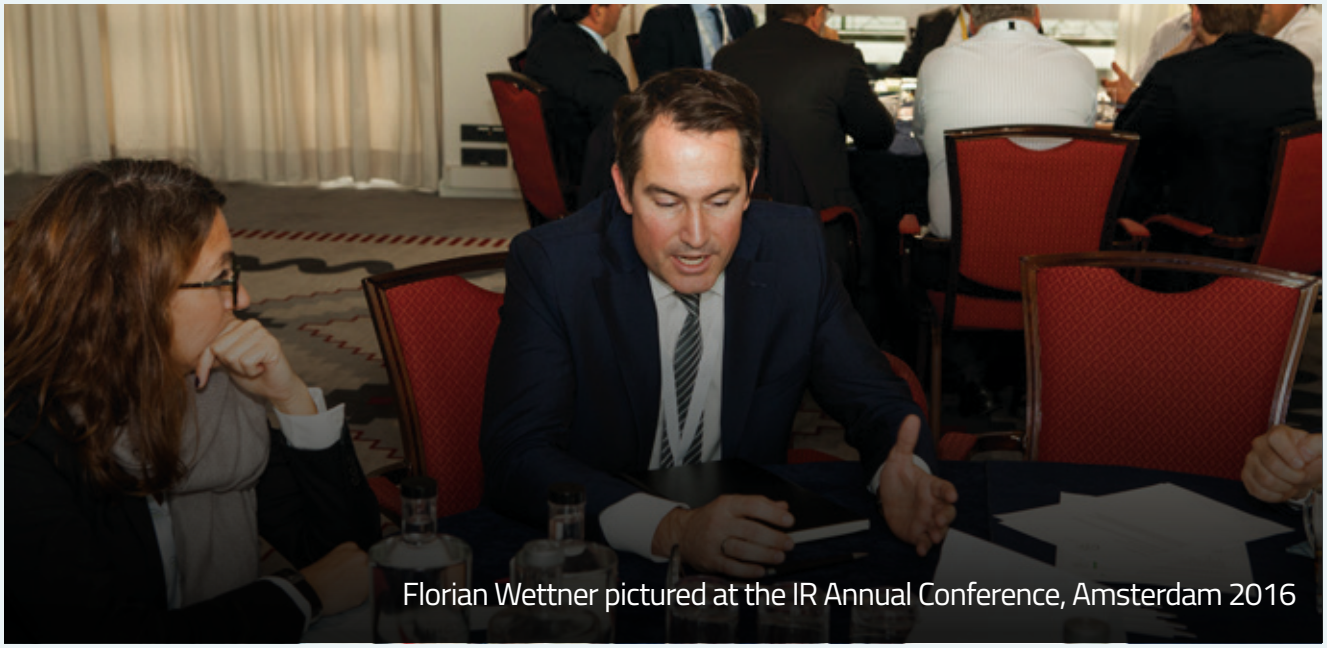
That's basically the only reference they do to the guidelines, which is in order for the arbitrator to disclose different levels of potential conflict of interest in their being appointed as arbitrators in the matter. Other than those guidelines I'm not familiar of any other of the aspects of the rules that are implemented in the Dominican Republic.

Kenya - JN Like in the Dominican Republic, IBA rules are generally not applied in Kenya unless parties have specifically stated that they want to apply them. Normally, in Kenya we follow the Chartered Institute of Arbitrators rules or the Nairobi the Centre for International arbitration rules.

Here we model our rules according to the IBA rules, so we don't need to use them as we have already copied them.

Austria - SS The Austrian Supreme Court has repeatedly drawn on the IBA rules, particularly in relation to independence and impartiality questions, but also regarding rules of evidence.

With respect to the former, the Austrian Supreme Court continues to highlight the importance of IBA Guidelines as an instrument to assist parties and the tribunal in the proper application and definition of the terms 'independence' or 'impartiality'. This has been reinforced by a recent Austrian Supreme Court decision (18 ONc 1/19w). In this case, the arbitrator who had been jointly appointed by six respondents, disclosed that his law firm had been retained by a party to an unrelated arbi-



Florian Wettner pictured at the IR Annual Conference, Amsterdam 2016

tration. It was revealed that this party had also engaged counsel for two of the respondents to the present arbitration. The issue thus centred on whether an arbitrator acting in a dual capacity of party counsel in one arbitration and co-counsel in another would offend the principle of arbitrator independence and thus give rise to disqualification. The Court adopted a stringent standard reinforcing the notion that justice must not only be done, but must be seen to be done. It established that an integral part of these efforts is not only a display of competence but of trust in independent, unbiased state court judges and an impartial judicial system as a whole. The Supreme Court referred to the IBA Guidelines and underlined their importance in arbitral challenge proceedings. However, unlike the IBA Guidelines, which suggest that acting as current co-counsel or having done so during the course of the past three years could cast doubt on the impartiality of arbitrators, the Supreme Court took a more rigorous stance by singling out current co-counselling as a legitimate justification for removal. In that sense one could argue that the Supreme Court at least in this very instance reached even further than the scope of the IBA Guidelines.

The issue of evidence in the context of arbitration is largely left untouched by national legislation and institutional rules. Austria for one, does not provide specific disclosure rules. As a matter of practice, parties may mutually authorise arbitral tribunals to refer to the IBA Rules on the Taking of Evidence in International Arbitration and make determinative decisions as to the material's admissibility, collection and submission by resorting to the guidelines thereunder.

I believe the IBA Rules can serve as a fundamental tool in bridging the gap between common and civil law jurisdictions by offering a hybrid approach between e.g. the U.S. tradition (expert recruitment by parties on technical matters) and the continental approach (individual line of inquiry by arbitrators/judges). Although often criticised for lacking in efficiency when it comes to document production, fact and expert witnesses, they also help to complement existing national legal frameworks while establishing the necessary foundation for a richer global arbitration landscape.

Argentina - AR I believe the IBA rules have been a wonderful attempt to narrow the bridge between the Anglo-Saxon system and the civil law system, particularly in terms of how to approach the basics of producing evidence. Defining what impartiality means when it clearly sets the principle that independence means not only that the work has to be alien to the parties, but also to the legal advisers intervening in the case as well as the members of the tribunal. So there is no possible bias that may affect the neutrality and independence of the witness testimony. That would apply not only for expert witnesses, but it is also helpful for a witness of fact.

Spain - RC Neither the Spanish Arbitration Act (Ley 60/2003, de 23 de diciembre, de arbitraje), nor the arbitration rules of the main arbitral institutions in Spain, does not provide any single provision on witnesses' examination. To fill these gaps, it is increasingly common in Spain to apply accepted international rules providing guidance on witnesses' examination procedures, such as IBA rules on taking evidence in international arbitration (Article 4 of the last version of IBA rules passed in 2010, provides several relevant provisions on witnesses' examination). As in Spain, the parties have absolute flexibility and freedom to decide on the rules and procedures of witnesses' examination in any given domestic or international arbitration procedure. IBA rules are commonly accepted by the parties as a sort of guidance to design examination procedures in the procedure statements (nevertheless, other international rules are, from time to time, invoked, such as Prague Rules on efficiency in international arbitration – its Article 5 provides several provisions on witnesses' examination procedures).

Based on the international rules mentioned, it is common within the international arbitration procedures conducted in Spain to agree by the parties that written statements of witnesses must be submitted. Only those who are requested by the parties must appear before the tribunal to declare that the tribunal or the arbitrator is entitled to refuse the statement of any given witness as evidence.

Hong Kong - KY The IBA rules are highly regarded in HK arbitrations. Even if the parties have not agreed to adopt rules on evidence in the arbitration agreement, tribunals usually welcome such suggestion to adopt the IBA rules on the taking of evidence in international arbitrations. In the event that there are uncertainties in the applicable arbitration rules, international practice (like the IBA rules and commentaries) is relevant and tribunal does take it as reference.

Germany - FW In mere national cases parties and tribunals stick to the evidentiary rules they know, i.e. based on the civil, ultimately German, law principles. In transnational disputes, in particular with parties from common law as well as from civil law jurisdiction, the IBA rules are often referred to by arbitral tribunals and parties. The rules are particularly helpful in strengthening the consensual nature of the arbitral tribunals and in enhancing acceptance of procedure and awards by the parties.

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