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#YOUNGITATALKS SOUTH AMERICA, A COMMENTARY: A DISCUSSION ON THE DO'S AND DON'TS IN DIRECT AND CROSS-EXAMINATION OF WITNESSES IN INTERNATIONAL ARBITRATION.

by Ignacio Rosales

I. INTRODUCTION

In August 2022, Young ITA South America and the Latin America Interest Group of the American Society of International Law (ASIL), in collaboration with Ecuador Very Young Arbitration Practitioners (ECUVYAP), Lima Very Young Arbitration Practitioners (LVYAP), Red Juvenil de Arbitraje de Bogotá and Red Juvenil de Arbitraje de Medellín, held a live webinar with the goal of providing young students and professionals in the region with tools to improve their oral advocacy skills, particularly in matters related to preparing and conducting direct, cross and redirect examination of a fact witness.

This article covers the first part of the webinar, a panel discussion on selection, preparation, and examination of witnesses. The session was conducted by the following well regarded speakers, with decades of experience in arbitration:

- Gaela Gehring Flores, partner in the International Arbitration practice at Allen & Overy in Washington, D.C. She has decades of focused experience representing both multinational corporations and sovereign states in international commercial and investment arbitrations.
- Ignacio Minorini Lima, partner of the Energy and Litigation, International Arbitration & Bankruptcy departments at Bruchou, Fernández Madero & Lombardi in Buenos Aires, Argentina. He has developed extensive expertise in energy & regulatory law, and international and domestic arbitration proceedings.
- Eduardo Zuleta-Jaramillo, partner at Zuleta Abogados in Bogotá, Colombia. Throughout his career, he has participated in more than 40 arbitration proceedings, acting as arbitrator and counsel. He is vice president of the International Court of Arbitration of the International Chamber of Commerce (ICC).

After the panel discussion, participants were paired in groups, led by a coach, to put in practice what was discussed in the panel discussion, by simulating direct, cross and redirect examination of a witness based on a fact pattern previously provided to

the participants.

II. SELECTING A WITNESS

Mr. Minorini Lima commented that the first interview is key to understanding witnesses and how their testimony can serve a case. He emphasized the importance of paying attention to the actual knowledge of facts that witnesses may have, as well as their personality, character, and their willingness to testify in the case. It is also important to investigate the witness' background as this helps attorneys choose the best witnesses to present.

He cautioned that witnesses that lie about their background, lack knowledge of the facts or simply display an unwillingness to testify, would be unconvincing for the tribunal and may be more helpful to the opposing party.

Another strategic decision to consider is how many witnesses to present to prove each point. With respect to this issue, Mr. Minorini Lima commented that presenting a high number of witnesses may help in giving more strength to an argument. However, it would also give an opportunity to the opposing counsel to cross-examine several witnesses, which could lead to them finding inconsistencies that could affect the credibility of all the witnesses presented. It can also make the proceedings last longer and increase the costs.

III. PREPARING A WITNESS

Fact witnesses in general are inexperienced. In most cases, it will be their first-time giving testimony in any sort of proceedings. Because of that, it is not advisable to subject an unprepared witness to examination of any kind.

Mr. Minorini Lima stressed the importance of explaining the procedure and the substance of the examinations the witness will be subjected to. Attorneys should always inform the witness in what order the questions will be asked, the stages of the examination, and what to expect from the lawyer that appointed them and from opposing counsel. It is especially important to warn the witness about the tactics that the other party's lawyer may use. The opposing party's lawyer may try to earn the witness' trust and lead them to reveal information that could harm the case of those who appointed the witness.

It is also important that witnesses know how to answer the questions, as well as what lawyers are allowed to ask.

IV. WRITTEN STATEMENT

In international arbitration, it is common practice to submit a written statement containing the witness' recollection of the facts prior to the evidentiary hearing. The big question, as presented by Mr. Minorini Lima, is whether it should be written by the attorneys or by the witnesses themselves and then later edited by the attorneys. The International Bar Association (IBA) Rules on the Taking of Evidence only provide for "a full and detailed description of the facts, and the source of the witness's information as to those facts, sufficient to serve as that witness's evidence in the matter in dispute," with no mention as to who should be the one drafting it.[1]

It seems that the more sensible option is having a witness' draft reviewed by counsel. The cross-examination of witnesses over a testimony they didn't write could only bring problems, even if what's written is true, as they might try to follow what's written rather than providing a testimony based on their knowledge. There is also the risk of tampering with the witness' actual recollection of the facts, which would be counterproductive. Mr. Zuleta-Jaramillo commented on the issue that arbitrators can usually tell when the testimony was not written by the witness, which could end up affecting the witness' credibility.

V. DIRECT AND REDIRECT EXAMINATION

To better prepare for conducting the direct examination of a witness, Mr. Minorini Lima stated that it is important to consider the time available for conducting the direct examination and whether there was a written statement previously submitted. Time in hearings is not unlimited, so attorneys must be aware of what questions to ask. If there is a written statement, it could be convenient to focus on key topics to bring to the attention of the arbitrators, as most arbitrators disfavor lengthy direct examinations.[2] If there is not a written statement, more descriptive questions would

[1] IBA Rules on the Taking of Evidence in International Arbitration (2020), art. 4.5(b), *available at* https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b.

[2] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION § 15.08[11][c] (3d ed., 2021) (hereinafter BORN).

be necessary to better illustrate the witness' points. Additionally, questions in a direct examination must be open-ended or non-leading.

Another important issue to consider, when there is a written statement, is whether attorneys can ask questions outside of what was included in the statement. Mr. Minorini Lima warned that is important to know to what extent this is allowed in the procedural order and what the attitude of the tribunal is in each case. Usually, arbitrators allow this with very few exceptions and for good reason–such as testimony on recent events that happened after the submission of the written statement–unless agreed by the parties that this practice is allowed.[3]

As for the redirect examination, the matters covered in it are usually strictly limited to those addressed in the cross-examination, to prevent last minute testimony from the parties.[4] As Mr. Minorini Lima pointed out, parties must quickly decide whether to conduct it or not. Lawyers use this examination to correct mistakes, clarify issues, or to give witnesses a chance to better explain him or herself. Questions have to be precise and short so that the witness can briefly answer them. If questions are too long or too numerous, then this may be contra-productive to the credibility of the witness.

VI. CROSS-EXAMINATION

Cross-examination can be regarded as the central event in an evidentiary hearing.[5] Even though is not expressly provided for in particular rules of arbitration, common law-trained lawyers believe oral cross-examination to be "the greatest legal engine ever invented for the discovery of truth".[6] This tradition has made its way into the world of international arbitration so that today most proceedings include the cross-examination of witnesses.

It is usually said, however, that the oral direct and cross-examination of witnesses

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[3] *Id.*

[4] *See id.* § 15.08[11][d].

[5] Gabrielle Kaufmann-Kohler, *Beyond Gadgetry: Substantive New Concepts to Improve Arbitral Efficiency*, J. WORLD INV. & TRADE, 5, 69 (2004).

[6] JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367, at 32 , (James H. Chadbourn ed., 1974); U.S. v. Salerno, 505 U.S. 317 (1992).

is mainly supported by common law practitioners, while civil law-trained lawyers favor written testimonies.[7] In my opinion, as a civil law-trained attorney, oral testimony is the most powerful way to present testimony. It is more spontaneous and thus more authentic. Additionally, in recent years there has been a clear tendency to orality in evidence-taking by civil law countries.[8] For instance, in Argentina, a civil law jurisdiction, oral examination of witnesses is required even in written procedures.

For the preparation and conducting of cross-examination, Ms. Gehring Flores underscored the importance of time management. In preparing the cross-examination, attorneys should consider how much time it will take to prove each point by each line of questioning. To know this, she stressed the importance of knowing the ins and outs of the case. This includes knowing and understanding the arguments of the opposing party in the proceedings, as well as their intentions in selecting each witness. She also noted the importance of "living the experience," by being present and aware, including the ability to be able to adjust and respond to the variability of the cross-examination and not only reading the questions prepared in advance.

According to Ms. Gehring Flores, it is essential to have an outline of the case. This outline should explain in detail each point an attorney is trying to prove by examining the witness. It must always include citations and references to relevant documents to help the witness and tribunal to easily locate them. This saves time, which is essential, as mentioned previously.

The questions intended for the witness in the cross-examination must be leading. These are the types of questions that that call for a "yes" or "no" answer. As for the line of questioning, it is frequently accepted by parties and tribunals, in general, to address matters not included in the witness' written statement, subject to the control

[7] *See* BORN, *supra* note 2, § 15.08[10].

[8] Katarina Sevcova, *Civil process in the context of orality*, VISEGRAD JOURNAL OF HUMAN RIGHTS, *available at* https://journals.indexcopernicus.com/api/file/viewByFileId/906232.pdf.

of the tribunal.[9]

Finally, Ms. Gehring Flores stated that the most important factor in conducting a successful cross-examination is practice. I will elaborate further about this in the conclusion.

VII. AN ARBITRATOR'S POINT OF VIEW

Regardless of the parties being the ones who conduct witness examination, the hearing is subject to the control of the arbitrators. In exercising their authority, the arbitrators should conduct themselves with a "mixture of firmness, diplomacy and careful preparation," to achieve the most efficient and successful examination of witnesses.[10]

In this sense, it can be quite difficult for the tribunal to know when and how to intervene. Mr. Zuleta-Jaramillo stated the importance for the tribunal to set clear rules with the parties at the beginning of the proceedings on how everyone should conduct themselves during the examination. He commented that one important issue in this sense is establishing beforehand if questions can be made outside of the matters addressed in the witness' written statement. This was mentioned before and is a key issue to resolve as the witness may know relevant information that would help arbitrators better understand his or her testimony and the dispute. Another relevant issue discussed is whether the arbitrators can call on witnesses whose testimony was cited by the parties but who were ultimately not selected for examination. This should be agreed upon first but could be very useful for the tribunal in case of contradicting arguments based on the same testimony.

Mr. Zuleta-Jaramillo also noted that is important for the arbitrators to intervene for the sake of the examination's efficiency. This could be done in the form of questions. Arbitrators should–and usually tend to–ask questions at the end of an attorney's examination, as it may be disruptive for the attorney making an argument to be interrupted during their presentation.[11] However, interventions during the

[9] *See* BORN, *supra* note 2, § 15.08[11][d].

[10] *See id.* § 15.08[14].

[11] *See id.* § 15.08[11][f].

examination of the witness can be necessary when, for example, the attorney is repetitive with a question that is answered consistently by the witness, the line of questioning is irrelevant to the matters in dispute, or the attorney is asking the witness to simply read documents that are already on the record. In my opinion, the arbitral tribunal should also intervene when the attorney gets excessively aggressive with the witness.

VIII. CONCLUSION

It was mentioned by Ms. Gehring Flores and Mr. Zuleta-Jaramillo that practice is a key element for conducting a successful examination of witnesses in an international arbitration.

Practice can be achieved first in law school. Law students should take practical courses (*e.g.*, mock seminars) and participate in many of the arbitration moot competitions available throughout the world.

For young attorneys, attending training sessions like the one I am commenting on are important tools that prove instructive. As a young attorney, it has been critical in my experience to observe and learn how senior attorneys perform and advocate. It is important for law firms to allow and encourage young attorneys to perform examinations of witnesses in order to further develop this practical skill. It is also our responsibility as young attorneys to commit to this task and seek out opportunities to do so. As discussed above, it is essential to be very well prepared, know the case to perfection, and as Ms. Gehring Flores mentioned, prepare an outline and "be present" during the entirety of the hearing in order to be able to adapt to its developments.

Learning skills, practicing argumentation, and following the advice of those more experienced than us will help us young practitioners shape the future of international arbitration.

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INSTITUTE FOR TRANSNATIONAL ARBITRATION
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