

Dossiers

ICC Institute of World Business law

Arbitration and oral evidence

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The world business organization

Published in November 2004 by

ICC PUBLISHING S.A.

An affiliate of ICC: the world business organization

38, Cours Albert 1er
75008 Paris – France

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International Chamber of Commerce, ICC

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ICC Publication 689

ISBN 92 842 1344 4

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Foreword

By Serge Lazareff

Avocat, France

Chairman, ICC Institute of World Business Law

THE TRADITION IS REBORN!

Arbitration – Money Laundering, Corruption and Fraud, the publication of our 2002 General Annual Meeting, has been a success and the Institute owes its gratitude to its contributors and to ICC Publishing.

The present publication – our General Annual Meeting of 2003 – includes contributions by well-known and respected practitioners on the key issue of “Arbitration and Oral Evidence”.

All practitioners of international commercial arbitration have witnessed the considerable progress made over the past years to bring in line different traditions. Roughly speaking, there are no longer major differences between substantive laws or rules of law in the field of international commercial arbitration. Evidence is the only area where there are still different approaches because of legal tradition. The aim of this publication is to give the reader a thorough picture of the practical issues raised by the oral presentation of evidence. Where is the solution? The reader will find in this book the best possible approaches to this key question.

The Institute is endeavouring to discuss at its yearly General Meeting matters of current interest to the arbitration world.

The topic for our AGM 2004 to be held in Paris on 16 November 2004 is “*Parallel State and Arbitral Procedures in International Arbitration*”. We have chosen this topic because, as you know, arbitration is suffering today from an excess of procedural questions being raised as preliminary issues. The multiplication of recourses to courts, even when there is a valid arbitration provision, has increased problems raised by parallel proceedings before State and arbitral tribunals. Similarly, Counsel do not hesitate to initiate multiple procedures

for the same dispute, even in different countries. Hence, the importance of this topic. Of course, the proceedings of the 2004 AGM will be published.

I thank the reader for his renewed attention to our publications. The Institute hopes to welcome each of you to one of its next events.

With my best regards,

Serge Lazareff
Chairman

Introduction

By V.V. Veeder

Co-Editor

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At the oral hearing, under the adversarial process, the task of the international tribunal deciding factual and expert issues has rarely been more difficult. Yet the original purpose of written witness statements and expert reports was intended to facilitate that task. Arbitrators could work from paper beforehand more easily than oral evidence alone at the main hearing; written witness statements and reports could prepare the parties' counsel more effectively for the hearing than subsequent oral evidence alone; witness statements and expert reports exchanged before that hearing helped prevent "trial by ambush" where, not invariably under the entirely oral procedure, testimony was sprung unheralded at the hearing deliberately to surprise an adverse party (like the white rabbit from the magician's hat); and it was also easier for the less controversial, geographically distant or busy witness: the written statement or report could stand as that witness' evidence-in-chief, subject to oral cross-examination only if required. For all these reasons, oral testimony at the main hearing could be fairer, more efficient and less unpredictable. For arbitration users everywhere, hearing time can be expensive; and uncertainty can preclude effective and timely settlement negotiations.

After two decades of this new practice for transnational arbitration, borrowed from different legal traditions but approximating exactly to none, where then do we stand now? On one view, at the brink of the abyss. Written witness statements can bear little relation to the independent recollection of the factual witness, with draft after draft being crafted by the party's lawyer or the party itself, with the witness's written evidence becoming nothing more than special pleading, usually expressed at considerable length. It rarely contains the actual, unassisted recollection of the witness expressed in his or her own actual words. Accordingly, in the eyes of certain arbitrators, the use (or abuse) of witness statements has made them unreliable, expensive and often unfair. Still worse,

with the cloak of legal professional privilege (together with the continued absence of any global code of ethics for arbitration practitioners), witness statements can be subjected to unsavoury practices. And expert reports, albeit relatively a smaller problem, can result from ill-informed or over-imaginative expertise as to the relevant facts; or even the work of technical advocates, rather than independent experts seeking objectively to assist the arbitration tribunal. Justice, truth, fairness and efficiency are thus all ill served; and the pure well of oral testimony at the main hearing has become gravely polluted by the current practice of written witness statements and expert reports.

On another view, a superlative procedure has evolved unique to international arbitration, neither common law nor civilian, neither anglo-saxon nor franco-phone, neither English nor US, neither fish nor fowl. The written exposition of expert opinions allows experts to agree expert issues or to agree on the reasons why they disagree long before the main hearing, thereby facilitating the task of the parties' counsel and arbitrators but also greatly enhancing the possibility of an amicable settlement before the main hearing; the written witness statement allows much of the factual brushwood to be cleared from the arbitral stage, leaving only the critically important issues to be addressed orally at the main hearing; and only forensic dinosaurs could desire a return to the old "trial by ambush", including the dramatic production of white rabbits. Indeed, the new procedure (albeit now not so new) has grown so superlative that it is no longer unique: it is copied by national State courts for their reforms to civil procedure, such as England (in the Commercial Court and, more widely, with Lord Woolf's recent reforms). Accordingly, albeit discarding deliberate abuse which can infiltrate any procedure, the mixed written and oral procedure serves well efficiency, fairness, truth and justice at the main hearing.

The following papers from distinguished practitioners and arbitrators demonstrate with succinct clarity that the true position lies somewhere between these different views. There is grave disquiet at certain of the more alarming practices (or potential practices) developing with witness statements, particularly in the absence of an appropriate opportunity for effective cross-examination by the adverse party's counsel; but there is no pressing demand for an arbitral retreat into the primeval slime. It seems generally accepted that an overall benefit will result from developing what is generally good and redressing what is only partly wrong – without spoiling the whole. There is perhaps a need to understand better what is good and what is wrong on the

part of both practitioners and arbitrators; and a balance must be struck (or re-struck) between efficiency and fairness, without injustice. How far was the subject of much debate at this seminar. As these papers make clear, there is no single, easy answer. International arbitration is not a pure science; and international arbitrators do not practise their craft as if painting by numbers. Of all developments, the most important may now be transparency: if the witness has been assisted by others in producing his or her witness written statement, then the witness should be required to disclose in the statement their names and professions, the time taken and the form of assistance provided by them; and as regards experts, the report should also record the expert's understanding of his independent and overriding duty to assist the arbitration tribunal as an expert, not an advocate. These and other good general practices can only encourage both fairness and efficiency in the receipt of oral testimony at the main hearing.