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Where Common Law Litigation And Int'l Arbitration Divide

Law360, New York (December 7, 2015, 11:29 AM ET) --

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During my 40-year career as a litigator and trial lawyer, I have tried cases in a variety of U.S. forums, including state and federal courts, administrative agencies and domestic (usually AAA) arbitrations. In the last 15 years, I have pivoted to international arbitrations of all flavors: investment treaty arbitrations before the International Centre for Settlement of Investment Disputes ("ICSID") and the Permanent Court of Arbitration as well as commercial arbitrations before the International and Stockholm Chambers of Commerce. The experiences are very different. In this article, I strive to provide insights into some of the differences between U.S.-style, common law litigation/arbitration and international arbitrations, particularly as those differences inform the approach to arguably the most important task in any trial — cross-examination of the opponent's fact and expert witnesses.

I organize these musings according to three of the principal areas of difference:

- Pretrial procedure, which often determines the resources available to the cross-examiner at trial.
- Hearing duration, which may dictate limits on opportunities for pursuing lines of questioning.
- Identity of the trier of fact, whose predilections may inform the questioner's approach and technique.

Common Law Litigation

It would be impossible to distill all of the elements of civil litigation in common law jurisdictions like the U.S. into a few paragraphs. So this overview highlights aspects of common law litigation/arbitration that impact the breadth and approach of cross-examiners at trial.

1) Pretrial Procedure

The principal tools that U.S. litigators have in their toolboxes that international arbitration specialists lack are byproducts of the much more extensive discovery process. First, "scorched earth" document discovery is the norm. Under Federal Rule of Civil Procedure 26, a party is entitled to discover its opponents documents and data not only if they are relevant to the dispute but if they are "reasonably

calculated to lead to the discovery of admissible evidence." This means that for witnesses who are likely to appear at trial, the opposing counsel will have the benefit of reviewing all of the witness's emails, notes, calendars and correspondence that may relate in any way to the disputed issues.

Further, in U.S. litigation, the trial lawyer will have the opportunity to take the deposition, under oath, of all of the opposing party's fact and expert witnesses. Depositions provide the trial lawyer with the opportunity to look the witness in the eye, assess his breadth of knowledge and likely effectiveness on the stand, and obtain admissions that become fodder for cross-examination at trial. If the witness deviates from his deposition testimony at trial, the deposition transcript (or videotape) can be used to impeach the witness's testimony and thereby tarnish his credibility.

2) Duration

Litigation in the U.S. is notorious for lengthy trials, particularly in complex commercial disputes. A recent construction arbitration in which I was involved was scheduled for an evidentiary hearing of three months (after 50 depositions had been taken). These lengthy trials provide the opportunity, for good or ill, to keep key witnesses on the stand for days, during which cross-examinations become tests of will and stamina.

3) Identity of Trier of Fact

The conventional wisdom is that juries of lay people lose track of the detailed facts in dispute and tend to focus on how witnesses hold up on cross-examination, including whether they keep their cool under fire and, particularly, whether they are caught in any outright lies. Thus, a key objective, apart from locking in admissions obtained in deposition, is to destroy the credibility of the opposing witness. Judges presiding over bench trials are usually better educated than juries and are trained to absorb and sort through large bodies of evidence. They are also accustomed to U.S.-style litigation and cross-examination, so they also tend to emphasize witness credibility in weighing the evidence. The same is largely true for arbitrators.

International Arbitration

1) Pretrial Procedure

In contrast to U.S.-style litigation, document disclosures in international arbitration tend to be limited. For example, the International Bar Association Rules on the Taking of Evidence in International Arbitration, Article 3.3, provides that a document request must be "narrow and specific" and contain "a statement as to how the Documents requested are relevant to the case and material to its outcome." Disputes over document disclosures are customarily resolved through multicolumn "Redfern" schedules, in which the proponent of the document request must specify its relevance, the producing party records its objection, and the tribunal resolves each dispute based on whether, inter alia, "the issues that the requesting Party wishes to prove are relevant to the case and material to its outcome." IBA Article 3.7. American-style "fishing expeditions" are not possible under this regime. Unless a party can identify specific documents that are missing from the opponent's production, there is no way to police the completeness of the production.

Customarily, there are no pretrial depositions in international arbitration. The cross-examiner's only tool is a witness statement or statements. These statements are generally drafted with considerable input from the opponent's lawyers and tell one only what one's opponent wants to disclose. Bad facts are

generally explained away or ignored entirely.

Some tribunals may limit cross-examination to the scope of the witness statement, although latitude may be given if the examiner can demonstrate the relevance of matters not covered in the statement. Further, there is customarily no direct examination of any consequence, but rather a brief introduction of the witness and affirmation of his/her witness statement. Thus, there is no opportunity to exploit inconsistencies between direct testimony and the witness statement.

In short, the trial lawyer in international arbitration has a toolbox that is much more limited than in U.S.-style litigation: no comprehensive disclosure of documents, and no deposition transcript with which the examiner can lock down admissions, impeach the witness with prior inconsistent statements and otherwise tarnish the witness's credibility. On the other hand, questioning a witness for the first time at trial has the advantage that the witness will have no preview of the lines of questioning the trial lawyer may pursue, as the witness would have had he been deposed.

2) Duration

Trials in international arbitrations are generally much shorter than in U.S.-style litigation. Investment treaty arbitrations often involve claims of hundreds of millions of dollars for a sovereign's expropriation of assets of a foreign investor. Nevertheless, such high stakes arbitrations are often resolved on both liability and damages after a hearing lasting one to two weeks. Given this, cross-examinations of even the most important witnesses seldom exceed three hours. In a couple of recent hearings in which I participated, time pressures at the end of hearings forced tribunals to limit cross-examinations of the damages experts to one hour per side. For a $300 million claim, that amounts to $5 million per minute. A further complication is translation. Typically, international arbitrations are conducted in English, but many of the witnesses for the sovereign testify in their native language. Even if translation is simultaneous, it slows down the process and makes cross-examination more laborious.

3) Trier of Fact

Arbitrators generally possess more advanced education and professional experience than a typical American jury or, in many cases, judge. There is a relatively small cadre of experienced arbitrators who are chosen for the bulk of international arbitration tribunals. Most have considerable knowledge and experience with the substantive issues affecting liability and the various methodologies for computing damages. Many of the most frequently tapped arbitrators are from civil law backgrounds, in which less emphasis is placed on witness testimony and credibility and more on the contents of contemporaneous documents. As a consequence, arbitral tribunals are often more interested in having witnesses explain to them the context and meaning of the documentary record than in assessing the credibility of witnesses.

While I can cite no empirical evidence to support these suppositions, I have been involved in several arbitrations, both commercial and investment treaty, in which the arbitral awards contain few if any citations to the record of the evidentiary hearing but rather rely almost exclusively on the exhibits and pretrial submissions of the parties. In some cases, this could be because the cross-examinations were not very effective, or the tribunals considered all witnesses, fact and expert, to be mouthpieces for the party they represent. The more likely explanation for the paucity of transcript citations in some cases is that the arbitrators considered that the purpose of the trial was to illuminate the documentary record, not to expose one of the other side's witnesses as liars. If the arbitrators are satisfied after the hearing that they understand the documents, they rely upon them for the award and see no need to cite witness

testimony. I recall an off-the-record chat with a Dutch (civil law) arbitrator in which he observed, in substance: "It's interesting how you American lawyers ask questions. You ask questions to make a point." In the end, whatever points we thought we were making on cross-examination do not appear to have influenced the arbitrators, all of whom came from civil law backgrounds. Their award was based entirely on the documentary record.

Implications of Differences Between Common Law Litigation and International Arbitration

Given the time pressures inherent in international arbitration, the cross-examiner must above all else be flexible. In U.S.-style litigation/arbitration, an examiner can slog through his entire 20-page outline, generally without fear of running into a stop sign that will preclude him from pursuing his most important line of examination. (Whether the trial lawyer should do this, of course, is another question.) In an international arbitration, with its compressed time schedule and the delays inherent in translation, the trial lawyer must be much more nimble and flexible. He should prepare the 20-page outline, but before entering the hearing room, he should ask himself: What are the three very most important points I want to establish in this examination? He should then structure the questioning in a way that ensures he will cover those three points. If a line of examination runs into roadblocks, he should abandon that line and proceed to more fruitful ones. If the witness is being nonresponsive, the examiner should appeal to the tribunal, which will usually be sensitive to the time limitations and thus sympathetic to the need for direct, responsive answers.

Sometimes, even opposing witnesses will cooperate. In a recent investment treaty arbitration, I cross-examined the respondent's damages expert late in the day on Saturday, the last day for taking evidence. In order to move briskly through my very time-constrained examination, I asked the expert to try to answer my questions based on document images being displayed electronically on the monitor rather than ask to see and review the hard copy documents, which witnesses are typically coached to do. Surprisingly, he complied, which allowed me to cover my main lines of examination in one hour.

Because of the time limitations in international arbitrations, it is more difficult, and less productive, to impeach a witness with prior inconsistent statements. To reiterate, the arbitration practitioner does not have the benefit of deposition admissions with which the witness can be confronted if he tries to back away from them at trial. A witness can be impeached with prior inconsistent statements in documents he authored, but the amount of time required to set up and execute the impeachment may not be justified, particularly if the tribunal is composed of civil law lawyers who are less interested in assessing witness credibility. It may be more productive to simply use the witness to showcase a document that contains admissions helpful to your client's case.

A nuance worth considering is that assertions in a witness statement can sometimes be undercut by showing the absence of any support for that assertion in contemporaneous documents. For example, the claimant in an investment treaty case alleged that bearer shares of certain valuable utility companies were transferred to the claimant ("Company X"), a foreign investor, before the state seized the utilities. As proof of this, a witness for the claimant testified that before the expropriation, he saw the utility shares in a bank vault stored in wrappers marked "Company X." After the expropriation, a banking official for the state conducted an inspection of the bank and prepared detailed minutes of everything he saw during the inspection. In his witness statement, he rebutted the testimony of claimant's witness by testifying that he saw the shares of the utilities being stored loose in the bank's vaults, without any wrappers designating them as belonging to Company X. On cross-examination, I first asked the banking official to confirm that he strove to keep complete and accurate minutes of his bank inspections. This was a safe question because he was unlikely to admit that his work was in any way

slipshod. I then was able to cast doubt on his witness statement by establishing that his "complete and accurate" minutes contained no reference to his seeing the utility shares. For arbitrators who are focused on the documentary record, this type of impeachment can be effective.

Documents can also be the key to cross-examining expert witnesses in international arbitrations. The expert's opinions will carry less weight with the tribunal if the examiner can establish that the expert did not consider certain key documents in reaching his opinions. In some cases, an expert may cite one portion of a document as support for his opinion and ignore another portion that supports the opposing expert's analysis. Frankly, the testifying expert may rely on his assistants to identify documents that support one of his opinions without taking the trouble to determine whether or not the document is a two-edged sword. For example, in a recent investment treaty case involving expropriation of a mine, the claimant's expert testified to his discounted cash flow valuation of the mine, which yielded a value of several hundred million dollars. The respondent's expert argued for a much lower value based on the claimant's market capitalization at the time of the expropriation. He then attempted to reduce the value even further by citing a report of a mining market analyst attributing millions of dollars in value to another mine property owned by the claimant. However, the analyst's report also contained an analysis of the claimant's stock price indicating that it was considerably undervalued based on the mineral reserves of the expropriated mine. When further corrected for the increase in the price of the mineral at issue, the analyst's report actually supported a value for the company that was very close to the valuation proposed by claimant's expert. Confronting the respondent's expert with the portion of the analyst's report he had apparently overlooked accomplished two purposes: it cast doubt on the thoroughness of the expert analysis, but more importantly, it provided the arbitrators with an independent documentary basis for accepting the valuation of claimant's expert.

Although the documents may be more important than witness testimony in some international arbitrations, advocates should not go overboard. Some practitioners have the habit of showing every witness the same set of documents that they consider most supportive of their client's position and asking each witness to read the key passages. While some repetition of key points may be helpful in cementing those points in the minds of the arbitrators, this practice can become annoying, particularly given the time constraints that usually prevail. In a recent arbitration, when opposing counsel asked a witness to read a passage from a document that had been read out several times before, the president interjected: "Don't ask the witness to read this document. We know it by heart already."

Finally, as noted above, document disclosures in international arbitrations tend to be quite limited. Further, there is no opportunity to probe the scope of the disclosures in depositions, as there is in U.S.-style litigation. However, an advocate should be alert during the hearing to the potential that his opponent has withheld critical documents. In a recent arbitration, the claimant alleged that the state had terminated a real estate development project in violation of an investment treaty to which the state was a party. The reasons for this decision were recorded in minutes of a board of directors meeting of the state entity that supervised the development project. During the cross-examination of one of the witnesses called by the state, I asked him whether there were any other documents relating to the termination decision. He identified three additional documents that had never been produced. The tribunal ordered the respondent to obtain the documents from the witness, have them translated and enter them into the record. Two witnesses, including the one who had identified the additional documents, were recalled for further testimony regarding the newly disclosed documents. These documents indicated that the reasons given for the decision to terminate the development project in the official record were pretextual. In short, the arbitration practitioner should not assume that the documentary record is complete, even after the hearing has commenced.

Conclusion

Common law litigation/arbitration differs from international arbitration in many important dimensions, including pretrial procedure, hearing duration and identity of the trier of fact. The practitioner must be alert to these differences and plan his cross-examinations at trial accordingly.

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