How Do We Get the Best Out of Cross Examination in Arbitrations? Views from the SCL-CIArb India Conference

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Introduction

The Society of Construction Law India and the Chartered Institute of Arbitrators India Branch together held an International Conference on Construction Law and Arbitration in New Delhi, India in December, 2019. The conference was well attended by practitioners and participants from various jurisdictions. Needless to say, the construction industry is one of the fastest growing industries on a global scale. Disputes wise, it takes precedence both in terms of the complicated or technical nature of merits and the quantum of monies involved.

The opening address of the conference was delivered by Honourable Ms Justice Indu Malhotra, presently a judge of the Supreme Court of India. Justice Malhotra alluded to the global state of affairs in the construction and infrastructure industry and how alternative disputes mechanisms, such as arbitration, are the preferred ways to resolve disputes in the sector. She emphasized India's commitment to be an arbitration friendly jurisdiction and referred to several decisions of the Indian Supreme Court passed in the last five years in support of this commitment. Justice Malhotra concluded her speech by throwing light on the latest amendments of 2019 to India's Arbitration and Conciliation Act, 1996 ("the Act") (see further discussion in previous post). As a member of the High Level Committee in the Ministry of Law and Justice to review Institutionalization of arbitration mechanism in India, she discussed the issues relating to institutionalization of arbitration, accreditation of arbitrators and changes to the timeframe prescribed for completing proceedings under Section 29A of the Act.

This blog focusses on the panel discussion held on Cross Examination of Fact and Expert Witnesses. The panel comprised of Amarjit Singh Chandhiok (Senior Advocate, President of Council for Conflict Resolution – Madhyam); Thayananthan Baskaran (Partner at Baskaran, Kuala Lumpur); Jess Connors (Counsel at 39 Essex Chambers); and Shruti Sabharwal (Principal Associate at Shardul Amarchand Mangaldas). The panel was chaired by David Brynmor QC (39 Essex Chambers).

David started the session by introducing the topic and asked whether cross examination was an art, as it is commonly referred to or an acquired skill.

Overview of Cross Examination in International Arbitration

Jess gave an overview of cross examination in international arbitration. She raised the pertinent issue as to whether a party must necessarily introduce witnesses and whether every witness should be cross examined. She explained that every witness should serve a purpose beyond that found in documents. A witness could be used to explain the context of a document on record, the understanding of the parties when they entered into a contract, information from meetings or events not documented or to prefer the opinion of an expert. As for cross examination, it was suggested that one must consider how much of the witness testimony was relevant to the case and whether or not cross examining a witness could lead to a dangerous situation. Importantly, as in several international arbitrations, the use of the chess clock method by tribunals should also lead to counsels considering which witnesses and what part of their testimonies are priorities or critical to deal with. Jess also referred to the often confusing practice of introducing documents at the time of cross examination. She highlighted a number of factors to bear in mind, during cross examination, like who created and received the document in question, when, what was the context and was there a response before confronting the witness with it. Another aspect which was interesting was Jess's advice on how documents could be used in a cross examination – mainly to point out inconsistencies in the witness's own testimony or in the testimony of other witnesses. Quite rightly, she emphasized the nature of the cross examination to tell the Tribunal a story which is not always so clear in the documents. Jess concluded by encouraging counsels to use the process to speak to the tribunal, especially since in international arbitrations, tribunal members tend to be sophisticated, hailing from different jurisdictions (civil and common), different cultures, etc.

Hot Tubbing of Expert Witnesses

Thaya spoke on experts and hot tubbing in international arbitration. He began with an introduction on hot tubbing, or witness conferencing as it is more formally called. Essentially, this approach involves evidence being given by witnesses concurrently and in confrontation with each other. Thaya then spoke about the advantages of hot tubbing, in particular, how it helped to narrow down the issues and allow the witnesses to respond to these issues simultaneously in a collegiate atmosphere. He also noted potential drawbacks to hot tubbing, for example, where the quality of evidence may be affected, and proceedings disrupted, where witnesses in conference prove to be unfriendly, hostile, or even rude to each other. Thaya concluded by suggesting that the advantages of hot tubbing can be best achieved if all parties concerned are suitably prepared. Hot tubbing may remain, though quite rarely nowadays, a relatively novel process to some parties concerned. To overcome this, the experts and the counsel should familiarize themselves with the process. Besides, counsel should describe the hot tubbing process to the expert, so that the expert knows how the hearing room will be set up, how the questions will be posed, who is allowed to ask questions, and that the expert may be under cross examination during the whole of the hot tubbing process, and they will not be allowed to discuss their evidence with anyone (including counsel) during breaks.

Cross Examination Techniques for Fact and Expert Witnesses

Shruti then took the floor to provide some tips for cross examination of fact and expert witnesses. She referred to important considerations to bear in mind while preparing for a cross examination in an international arbitration. These included a multi-cultural setting of both tribunal members and witnesses, language and time considerations. She stressed on the use of leading questions and how it was helpful in controlling the process and witness response. She also advised that counsel should

prepare a plan in advance for each witness with a clear objective of what is required to be established. Counsels should be fully prepared to bring out the critical inconsistencies in the witness's own testimony, in the testimonies of different witnesses or inconsistencies based on the documents on record. She warned counsels against using cross examination as a fishing expedition given the dangers of receiving new evidence one may be unprepared for. Speaking on construction arbitrations in particular, Shruti also guided the audience in the use of technical documents, a common feature of construction arbitrations, during cross examination, which the tribunal members may be unfamiliar with. She suggested that correspondence be used so as to give context to the technical documents and to segregate documents into issues and sub-issues to avoid confusion. Interestingly, she pointed out that the sequence of the questions should also be framed in a manner where the first and last set of questions should be most impactful to create a lasting impression in the minds of the tribunal members.

Experienced Practitioners' Outlook

Amarjit aptly concluded the panel discussion with specific instances in cross examinations from his long career. Not only did he advise the audience on using every witness to make a precise point but he also suggested that counsels should know when to stop pursuing a line of cross examination. Amarjit alluded to the dangers of badgering a witness for answers and suggested the use of cross examination with documents on record to build a story for the tribunal. He also suggested the limited use of techniques such as questioning the credibility of a witness unless counsels were sure of establishing a lack of personal knowledge or expertise. As regards expert witnesses, Amarjit agreed that hot tubbing could be an effective tool but must be approached with caution. He agreed with Thaya that hot tubbing of experts may not be helpful where experts are using completely different methodologies to arrive at their opinions.

Once the panel had concluded their discussions, David opened the question and answer session for the audience. Questions ranged from hot tubbing techniques to whether cross examination could be done away with in arbitration proceedings to the use of confidentiality clauses, all of which were discussed and answered by the panelists.

Conclusion

Given that cross examinations continue to play a vital role in arbitrations, the session was well appreciated by the audience comprising both in-house legal officers and practitioners alike. It is needless to state that adopting the correct techniques in conducting cross examinations can go a long way in the outcome of a case. The emerging trends such as adoption of the chess clock methodology, hot tubbing of experts and introduction of witness panels for fact witnesses are techniques, which are increasingly being adopted in proceedings. This is to enable a more efficient system of cross examination, which, when unregulated, has the potential to take up several days, if not weeks on average. No longer do parties have the patience and time, not to mention the money to spend on protracted legal battles in courts or before tribunals. Counsels are more accountable today as to how proceedings are managed. Conferences such as this allow a free exchange of ideas which goes a long way towards the fine tuning of arbitration processes in the construction/ infrastructure industry, which continues to emerge as the largest disputes sector in the world.