Seeking the Truth: Four Approaches which may allow you to question Witnesses in Chinese Proceedings, and Why It matters

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Your day in court; Months of preparation. Millions on the line. But today your lawyers will finally press the other side's evasive CEO / CFO / Low-level Lackey with the tough questions. And this time, there is no escape.

Or is there?

If the arbitration is in China, there can be no guarantee that your opponents may have to answer the tough questions. Proper preparation permits no substitute here.

Cross-examination remains a dominant presence in international commercial arbitration proceedings in leading jurisdictions. China commonly recognizes this in foreign-related proceedings, but the parties must have opted for arbitration. This article discusses additional steps non-Chinese companies can take to preserve cross-examination when handling international commercial arbitration seated in China.

This post defines cross-examination. Then it explores why written testimony also requires that the other side be given the opportunity to question the witness. Chinese domestic arbitration often dispenses with testimony, both written and oral, altogether. This article proceeds to explain how to safeguard your privilege to cross-examination; select the right arbitrators, put it in writing in the agreement, and demand it at the very start of the dispute. In most international arbitration cases, China-seated tribunals will permit the parties to present witnesses and cross-examine the other side. But it is important to prepare in order to be certain.

Cross-Examination

Cross-examination allows one side the opportunity to confront the other side's witnesses. This is simple and straightforward at heart. The lawyer asks a witness a series of questions. The witness must answer truthfully and to the best of his or her ability. The witness's answers form the basis of his or her testimony.

Gary Born indicates that often cross-examination may address "any matter relevant to the dispute," although Tribunals may "sometimes limit[it] to matters addressed in the witness statement."[1] Notably, Gary Born stops short from including cross-examination or the examination of witnesses as a procedural given, even for seats where parties are guaranteed a 'full opportunity' to present their cases.[2]

[1] Gary Born, International Arbitration: Law and Practice, Procedural Issues in International Arbitration, p. 169, Sec. 8.07[T], Kluwer (2012).
[2] Gary Born, International Commercial Arbitration, Second Edition, Volume II: International Arbitral Procedures, pp. 2179-80, Sec. 15.04[B], Wolters Kluwer (2014).

The Value of Cross-Examination arises out of the Limitations of Written Testimony

The Tribunal often places more weight on answers given under cross-examination than the dead words which sit on the pages of the witness's statement. Few scholars have devoted so much of their life to gleaning the esoteric meanings of ancient dialectical written works as has Leo Strauss. Yet, even he admits to the limitations of reading. The most careful reader cannot "know anything of the expression of [the speaker's] face, of his gestures, and of the inflections of his voice."[3] Thus, a reader cannot divine which words "rang true and which rang false."

Furthermore, meticulous review alone may summon the more pressing questions from a witness statement, but rarely can it support definitive or reliable conclusions. Cross-examination in international arbitration provides the Tribunal with the witness's elaboration on both the witness's own written account as well as the commercial documents.

Chinese Domestic Arbitration and its 'Examination of Documents'

Normally, Chinese arbitration features no cross-examination whatsoever. Chinese domestic procedure gives prominence to documents; it dwells on their contents, provenance, and authenticity. Occasionally at conferences, Chinese practitioners may be heard praising the harmony or inquisitorial nature of Chinese arbitration and tradition, in implicit contrast to the combative or 'confrontational' style prevalent in international commercial arbitration. Chinese hearings can last an entire day, but only if they have gone long. More often, Chinese hearings conclude within the span of half a day.

Chinese courts offer no genuine opportunities to confront the other side's witnesses. If your agreement opted for Chinese litigation (or there was no dispute resolution agreement), you will almost certainly find yourself out of luck in this regard.

Approach #1: Choose your Arbitrators Wisely

The companies embroiled in the dispute at arbitration have some say over the procedure. But much of that influence comes through the selection of the arbitrators. The old adage applies here; the proceedings are ultimately only as good as the arbitrators chosen. And it will be the presiding arbitrator, the chairperson, who exerts the greatest influence over the proceedings. Thus, in most disputes, a non-Chinese party can secure cross-examination in China through thoughtful arbitrator selection. Indeed, many

[3] Leo Strauss, On Tyranny, p. 46, University of Chicago Press (1948); The speaker was Xenophon's Hiero from the dialogue of the same name.

multilingual Chinese arbitrators, including nearly every one of the leading Chinese international commercial arbitration practitioners, understand and value cross-examination's purpose in revealing the truth.

The presiding arbitrator will make the ultimate decision as to whether cross-examination of witnesses will occur. Generally, the participation of a party hailing from a jurisdiction with a common law background should be sufficient reason for the presiding arbitrator to consider the adoption of cross-examination. The designation of English as the language of alone may likewise suffice.

Nonetheless, the prospect of no cross-examination scenario may present a low-risk, high-impact proposition. It is therefore worthwhile for parties to undertake certain precautions to preserve a cross-examination procedure for which Chinese law accords no particular guarantee or special favor.

Approach #2: Draft Cross-Examination specifically into the Agreement

In the arbitration clause, the parties should affirm the "opportunity to confront the other party's witness with questions." The agreement to arbitrate may otherwise allow the arbitrators to define the limits of such a right to cross-examine. Alternatively, the agreement may require that the presiding arbitrator have had at least one experience in cross-examination in a prior proceeding, either as counsel or arbitrator. This offers a softer mandate for cross-examination. It nonetheless lightly trespasses on the custom and guideline which limits qualifications imposed of arbitrators to a strict minimum.

Approach #3: Incorporate Guidelines on Evidence into the Agreement

The parties can select either the International Bar Association's Guidelines on the Taking of Evidence or the CIETAC Guidelines on Evidence.[4] The IBA Guidelines presume cross-examination. Likewise, Rule 17.1 of the CIETAC Guidelines on Evidence set forth that parties will be able to cross-examine witnesses. The CIETAC Guidelines on Evidence represent the leading comprehensive set of Chinese procedural rules applicable to international commercial arbitration.

Such rules layer over, but would not displace, the arbitration rules outlined by the institution. For example, the parties could select a CIETAC arbitration accompanied by the IBA Guidelines. The CIETAC Arbitration Rules would apply as supplemented by the IBA Guidelines. Or, a contract may designate a Hong Kong International Arbitration Center arbitration, supplemented through the CIETAC Guidelines on Evidence. Note that the CIETAC Guidelines on Evidence were designed for application to China-seated arbitrations.

Approach #4: Request Cross-Examination at the Outset of the Dispute

[4] The Prague Rules on the Taking of Evidence remains rather untested with regard to Chinese arbitrations.

Once the dispute arises, a party may demand cross-examination as early as the Notice of Arbitration or the Response to that Notice. It should also request the procedure again specifically at the initial procedural hearing. We sometimes recommend the appointment of a Chinese national as co-arbitrator, assuming all other considerations are equal; this will only increase the chance that the institution, or the co-arbitrators themselves, may select a non-Chinese presiding arbitrator. A non-Chinese presiding arbitrator is extremely unlikely to discard the procedure of witness cross-examination.

Singapore, Hong Kong, and related East Asian seats of arbitration have streamlined the structure and logistical planning of the procedure. However, parties should bear in mind that Chinese institutions have different approaches and assumptions when it comes to cross-examination support. Therefore, it is incumbent that the parties arrange proper transcription services, and do so well ahead of the hearing. Likewise, the parties should seek out any necessary professional translation services well ahead of the hearing.

Conclusion

It is a fair general rule for life: make a reasonable request, make it early, and repeat the request whenever possible. Arbitration in China is no different. If your agreement says you can have an opportunity to confront the other party's witnesses, you can be sure that you will. Failing that, you are likely to get it, as long as you make it a priority. And even then, China's leading arbitration practitioners often do respect the prevailing international customs.

Declare your right to seek the truth. When it comes to cross-examination, China can offer no ironclad guarantees.