

A witness outside your control...

17 June 2020



Bailiff swearing in witness

*Latham & Watkins' global co-chair of international arbitration **Claudia Salomon** and associate **Abhinaya Swaminathan** look at how parties can set about obtaining evidence from a witness in the other party's control in international arbitration.*

Parties in international arbitration may occasionally wish to obtain testimony from a witness who is within their opponent's control, such as an employee, agent, or business partner of the opponent. For instance, a party might wish to present evidence from a whistleblower within its opponent's business.

Arbitral tribunals, on their own initiative, may also wish to hear from such a witness if the testimony would shed light on important issues in the case.

Assuming that a party does not wish to make a witness within its control available for testimony, a tribunal interested in hearing from that witness, whether based on the request of a party or on its own initiative, may be empowered to request that the witness appear and provide testimony. If the witness does not voluntarily appear before the tribunal, in exceptional circumstances, the tribunal may also compel a party to produce the witness, or order the party to use its best efforts to produce the witness.

In some cases, the tribunal may also be empowered to directly compel the witness to appear at a hearing, rather than order the parties to make the witness available.

The tribunal's authority in this matter is determined and constrained by a matrix of legal and practical considerations, including the parties' agreement, the procedural rules applicable to the arbitration, and the nature of the relationship between the witness and the party.

Consistent with the principle of party autonomy, as in all aspects of arbitration, parties can agree on the procedures and circumstances that may allow a witness in a party's control to be called to provide testimony. Parties may also agree to limit the ability of the tribunal to call a witness under a party's control without that party's consent, irrespective of the arbitrator's authority to do so absent such agreement between the parties.

Assuming the parties have not specifically agreed on the issue, the parties' choice of the seat of the arbitration (and the corresponding *lex arbitri*) and the procedural rules in their arbitration agreement determine the authority of the tribunal to compel a witness under a party's control to testify. In addition, other legal and practical considerations may guide or constrain the tribunal's ability to call a witness within a party's control without that party's consent, including the legal relationship between the witness and the party.

The law of the arbitral seat

Most national arbitration laws confer broad powers on the tribunal to decide all procedural and evidentiary matters, including which witnesses should be called and whether the tribunal may take certain measures on its own initiative to gather fact testimony. Section 34 of the 1996 English Arbitration Act, for instance, provides that "[i]t shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter" and specifies that "procedural and evidential matters" include "whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law."

In England and Wales, tribunals are empowered to order a witness within the control of a party to appear, and a national court can be called upon to support that order. Likewise, Article 184 of the Swiss Federal Code on Private International Law provides that “the arbitral tribunal shall itself conduct the taking of evidence,” subject to the overriding principles of equal treatment of the parties and the parties’ right to be heard, and that tribunals and parties may petition Swiss national courts to aid in the taking of evidence, including by compelling a witness to appear.

Other countries, including China, South Korea, Japan, Germany, Brazil, and the Netherlands, have enacted similar provisions that contemplate the tribunal’s power to order that witness testimony be provided on its own initiative.

Section 7 of the Federal Arbitration Act in the United States not only empowers tribunals to call witnesses within a party’s control, but also authorises tribunals to summon “any person” to provide evidence. However, the tribunal’s summons to the witness must be drafted and served in accordance with the United States Federal Rules of Civil Procedure.

Should a witness fail to comply, national courts can enforce the arbitral summons, although courts in different regions of the United States take different views regarding the proper scope of an arbitral summons directed at a third party.

Institutional and other rules governing the proceedings

The IBA Rules on the Taking of Evidence in International Arbitration allow the tribunal broad powers to fashion the procedures of the arbitration in the manner that the tribunal sees fit. Such powers include the ability of the tribunal to order a party to produce, or use its best efforts to produce, a witness within the party’s control.

Article 4.10 of the IBA rules provides, “At any time before the arbitration is concluded, the arbitral tribunal may order any party to provide for, or to use its best efforts to provide for, the appearance for testimony at an evidentiary hearing of any person, including one whose testimony has not yet been offered.”

Article 8.1 further provides that the tribunal may request testimony from a witness that neither party has called.

The IBA commentary on the revised text of the IBA rules clarifies that Articles 4.10 and 8.1 are intended to empower the tribunal to direct “any *party*” to produce, or use its best efforts to produce, a witness (emphasis added). In other words, the tribunal’s power under Articles 4.10 and 8.1 can only be exercised over the parties. However,

Article 8.5 of the IBA rules goes one step further, and provides that “the arbitral tribunal may request any person to give oral or written evidence on any issue that the arbitral tribunal considers to be relevant to the case and material to its outcome.”

The IBA commentary notes that Article 8.5 is not intended to empower the tribunal with “sweeping inquisitorial powers,” but rather that the article merely contemplates a situation in which the tribunal may call a “key witness...whom the parties for some reason failed to persuade to appear.” Article 8.5 also provides that any witness so called by the tribunal “may also be questioned by the Parties.” Should a tribunal wish to compel a witness directly as provided in Article 8.5, the tribunal may need to resort to the applicable procedures for compelling a witness to testify in an arbitral proceeding under relevant national laws, which may involve turning to national courts.

Article 9.2 of the IBA Rules allows any party or witness subject to such an order from a tribunal to object to the order and request that the proposed evidence be excluded for a variety of reasons. These include that the evidence is not relevant or material; there is a legal impediment under the applicable legal or ethical rules to the admission of such evidence; there are compelling grounds of commercial or technical confidentiality in favor of not disclosing the evidence; and that complying with the order would place an undue burden on the party.

Institutional rules are generally in accord. For instance, Article 34 of the ICSID arbitration rules authorises the tribunal to call upon the parties to produce witness if the tribunal deems it necessary and requires the parties to “cooperate with the tribunal in the production of the evidence.”

Article 27(3) of the UNCITRAL Arbitration rules provides that “[a]t any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or *other evidence* within such a period of time as the arbitral tribunal shall determine” (emphasis added). The UNCITRAL rules’ reference to “other evidence” has been widely accepted to encompass witness testimony, as discussed in **David Caron**’s commentary on the rules.

Article 22.2 of the HKIAC rules has similar language, providing that, “[a]t any time during the arbitration, the arbitral tribunal may allow or require a party to produce documents, exhibits or other evidence that the arbitral tribunal determines to be relevant to the case and material to its outcome.” Those rules, and similar provisions in the Permanent Court of Arbitration 2012 arbitration rules (Article 27(3)), the ICDR/AAA arbitration rules (Article 19(4)), and the arbitration rules of the Swiss

Chambers' Arbitration Institution (Article 24(3)), all empower the tribunal to direct *parties*, rather than witnesses directly, to produce evidence.

On the other hand, Article 25(5) of the ICC rules simply provides that "[a]t any time during the proceedings, the arbitral tribunal may summon any party to provide additional evidence," without limitations on whether the tribunal may direct such an order to the witness or the parties. The Secretariat's Guide to ICC Arbitration clarifies that the tribunal may exercise its Article 25(5) power either at a party's request or on the tribunal's own initiative.

Similarly, Article 22.1(iii) of the LCIA rules allows tribunals to "conduct such enquiries as may appear to the arbitral tribunal to be necessary or expedient, including whether and to what extent the arbitral tribunal should itself take the initiative in identifying the issues and ascertaining the relevant facts and the law(s) or rules of law applicable to the arbitration agreement, the arbitration, and the merits of the parties' dispute."

While the language of the LCIA rules is not as expansive as that of the ICC rules, Article 22.1(iii) arguably allows tribunals to compel witnesses to provide testimony under their authority to ascertain the relevant facts.

The LCIA's Notes for Parties on the LCIA Rules only states that "[t]he Arbitral Tribunal may request that a party present the testimony of any witness *in written form*, whether as a signed statement or otherwise" but is silent on oral testimony or the tribunal's power to make such requests to a witness directly (emphasis added).

Other considerations

Although a tribunal may be empowered by the law of the arbitral seat and the procedural rules to call a witness within a party's control without that party's consent, other legal or practical considerations may prevent a tribunal from calling the witness or may guide the tribunal in making its decision to do so.

First, in exercising its discretion to use its power to call a witness within a party's control, the tribunal should evaluate whether the evidence to be obtained from the witness is relevant and material to the case. That principle is reflected in Article 9.2(a) of the IBA rules, which allows a party or witness to object to providing evidence on the basis that such evidence is not relevant or material.

Second, the tribunal should be conscious of any constraints arising from the legal relationship between the witness and the relevant party, which may limit the witness' ability to testify or even provide documentary evidence. For example, if the witness is

an employee of the party, the witness' employment agreement may contain non-disclosure or confidentiality provisions that cover the subject matter of the proposed evidence to be obtained from the witness. Such constraints may inform the witness' willingness to provide evidence for fear of legal exposure under the employment agreement.

The scope of the tribunal's power to compel a party to produce a witness despite such legal constraints depends both on the nature of the constraints themselves and the applicable law based on the location of the witness and the arbitral seat. For instance, a court may find that a party cannot comply with an arbitral order to produce an employee if doing so would breach the contractual provisions of the employment agreement.

Finally, as a practical matter, the tribunal may wish to implement certain procedural safeguards when requesting or compelling a witness within a party's control to testify. For instance, regardless of whether the applicable rules direct that the parties be allowed to question a witness called by the tribunal on its own initiative, the tribunal would be well served by allowing parties to do so in order to ensure that the factual evidence is fully developed.

Similarly, regardless of whether a party specifically makes an application to the tribunal for a certain witness to be called under the tribunal's authority or the tribunal wishes to call the witness on its own initiative, the tribunal may wish to provide both parties an opportunity to fully present their position regarding whether the tribunal can or should call such a witness in order to ensure that any potential concerns have been adequately considered and addressed.

The tribunal may also wish to strictly limit the scope of questioning to avoid delving into topics that may expose the witness to legal risk based on any obligations the witness may owe to a party (such as obligations under an employment agreement), and to prevent parties from exploiting the hearing to gather irrelevant information detrimental to their opponents.

A powerful procedural tool

The tribunal's potential authority to request, and even compel, testimony from a witness within a party's control is a powerful procedural tool for developing factual evidence.

Both parties wishing to present evidence from a witness in their opponent's control and tribunals seeking to fill in important evidentiary gaps should consider their

options under the laws and rules governing the arbitration to determine if this tool might be available.