Purpose, Scope and Law relating to Examination & Cross of Witnesses in Arbitration proceedings[1]

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Globally arbitration is becoming popular for various reasons and as per a recent survey by ASSOCHAM, in India about 90% of the commercial contracts have arbitration clauses these days. Many domain experts without a legal back ground are also deciding various legally and technically complex arbitration matters efficiently and taking the arbitration process to the next level. The government also is trying to reduce the interference by the national courts and contributing to the strengthening of the arbitration process. But still stake holders to the arbitration (Parties, arbitrators and lawyers) are not fully comfortable with the arbitration procedure, particularly examination & cross examination of fact and expert witnesses. Moreover, witness examination increases consumption of time and the cost of arbitration. Hence the stake holders have their own opinion and apprehension about the purpose, scope, necessity and law relating to examination of witnesses particularly cross examinations. In India, each arbitration has the procedure of chief examination and cross examination of witnesses, as if it is a mandatory procedure. It is necessary to understand that examination & cross examinations of fact and expert witnesses is a tool available to the parties to prove their case, which can be used if it is essential.

Witness Examination in Arbitration: In India and in many other countries, arbitration does not allow the usage of either Code of civil procedure or Evidence Act to avoid rigid and complex procedures, like the ones used in the courts. When there a bar to use the evidence Act in arbitrations, a question arises, how examination of witnesses was made a part of the Arbitration procedure. The origin of examination of oral witnesses, is the party autonomy to select the procedure of arbitration. This is because parties to the arbitration have all the powers to decide the procedure of arbitration, and when they do not decide, either the Rules of the chosen Arbitral Institution or the Arbitral tribunal will decide the arbitration procedure. Even if the arbitral tribunal decides the procedure, it cannot decide the necessity of a witness examination procedure. So, parties have the responsibility to choose the types of proof they require to prove their case, including examination of fact witness, examination of expert witness, independent witness, discovery, production of documents etc.,. The cross examination is a part of the witness examination process, which is there to ensure equal opportunity to both the parties. Some critics question whether witness testimony can ever be reliable and argue that the arbitral award must be based on the documentary evidence produced by the parties. It is true that witness testimony cannot be the sole basis and hence

[1] The Article was first Presented in the " Conference on Dispute Management in Infrastructure Projects: New Challenges" held on 19 & 20th May 2017 in Vigyan Bhavan New Delhi organized by Indian Institution of Technical Arbitrators.

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many arbitrators are preferring reliance largely or entirely on documentary evidence.[3] The reality is that, despite its flaws, in person witness testimony remains one of the most effective ascertaining what happened- to expand Wigmore's classic adage[4] , an indispensable engine of the truth finding process. The examination of witness becomes inevitable in India because of the admission & denial of documents procedure in each of our arbitrations. In the admission and denial most of the documents are intentionally denied by parties and such denied documents must be proved only by examination of oral witnesses. Those witnesses will be either the authors of the document or recipient of the document etc., Hence in India we have one more reason to examine the witnesses in all arbitration cases.

Unlike criminal cases where the credibility of interested witness is low, in commercial arbitrations there is no such aversion is shown towards the interested witnesses. This is mainly because only the parties who had some connection to the contract in some level can depose as a fact witness and there can be no independent witness can be used for this purpose. But in the case of expert witness, the arbitrator may choose to appoint a neutral expert witness. Hence parties are at liberty to choose the witnesses to prove their case based on the facts to be proved in their case and normally the tribunal never interferes in the selection of witnesses. Within the time ordered by the tribunal each party shall identify the witnesses on whose testimony it intends to rely and the subject matter of the testimony. Any person may present evidence as a witness, including the party or party's officer, employee or representative.[5]

International Practices: Internationally also there is no standard practice which is applicable to examination of witnesses. All the administering arbitral institutions have adopted certain procedure to be followed during the arbitrations conducted under their Rules. But arbitrators are given a large scope to decide the procedure relating to examination and cross examination of witnesses. In addition to the above said rules of the Arbitral Institutions IBA[6] UNCITRAL[7] and CIARB[8] have come out with a common guideline relating to examination of witnesses, namely IBA Rules on the taking of Evidence in International Arbitration, UNCITRAL notes on organizing arbitral proceedings and Protocol for the party appointed expert witness in International Arbitration. Parties while drafting their arbitration clause they an include any of these guidelines to be followed in an arbitration. (E.g., "Expert witness shall be adduced in accordance with the CIARB protocol for the party appointed expert witnesses".)

[3] Landau, Tainted Memories; Exposing the fallacy of witness testimony (Kalpan Lecture,2010)
[4] J Wigmore, 32 Evidence 1367 (J Chadbourn Rev 1974)
[5] 2010 IBA Rules on taking of evidence Article 4.1 & 4.2

[6] International Bar Association
[7] United Nations Commission on International Trade law
[8] Chartered Institute of Arbitrators

Need analysis for Examination of Fact Witnesses: These days due to increased use of email for communication between the parties, most of the facts of the case can be proved by the parties by way of documents, copies of communications etc., But still in some cases, the documents on record may not exhibit certain facts, which are critical in determining the issues between the parties to the arbitration. In such situations parties, should make use of the examination of fact witnesses to prove their case. Some Arbitral Institutions like ICC provide for a Fast track proceeding without examination of oral witnesses and the arbitral tribunal can decide to examine the witnesses only if the parties request for examination of oral witnesses. While deciding the need for a fact witness examination the following process can be followed:

1. Are there any disputed facts as per the pleadings of the parties?
2. If there are disputed facts, are they relevant and material for deciding either one or more issues in the dispute?
3. If there are disputed facts as per the pleadings and that are relevant to the case, can they be proved by production of documents alone or essentially there is a need for proving them through fact witnesses.
4. Is there any need in the interest of the arbitration, to call a fact witness to make a general presentation on the facts and circumstance of the case?
5. Is there any need for the arbitrators, to examine some fact witness since the pleadings of both the parties does not cover all the essential points of the case?

If this process is followed by the parties, they can take an objective decision about the requirement and scope of examination of a fact witness. If there is no real need for examination of fact witness, parties should avoid examination of fact witness because in some cases fact witness further confuse the case.

Need analysis for Examination of Expert witnesses: Whether to appoint experts can be a complex question requiring consideration of several factors, including the nature of the issues, the legal and cultural back ground of the tribunal, the availability of experts, case strategy and impact on time and cost. In matters involving technical issues, like infrastructure disputes where there are certain technical issues which require the analysis by experts, warrants the examination of technical issues. But at the same time, it must be understood that all the arbitrations, involving technical contracts do not always require examination of expert witnesses. Expert witnesses are normally examined only when there is a requirement to get a technical opinion of an expert when the issues to be decided by the arbitration tribunal involves technical points. There are many cases in which the main contract may be a technology contact but the issues to be decided by the arbitration tribunal, are not technical in nature and in such cases the requirement of examination of a technical witness shall be less. Another key consideration will be whether the cost and time associated with expert witness is justified by a genuine need in the case at hand. Hence parties should take decision about the need of examination of an expert witness after considering the above said aspects.

Purpose and Scope of Chief Examination of Fact witnesses: The party producing the fact witness in the arbitration shall have the right to examine the witness, to prove certain factual aspects. Some lawyers confine the chief examination to only to the facts, for which the said fact witnesses was examined. But in most of the cases the chief examination becomes a reproduction of the entire case of the party, which produces that witness. Hence chief examination also becomes lengthy like a claim statement. In most of the arbitration cases, chief examination is not an oral examination and it is an affidavit filed by the witness. Such affidavits are normally lengthy and reproduction of everything stated in the claim petition. In India, now arbitration must be completed within 12 months from the date of formation of the arbitral tribunal and hence filing elaborate chief affidavit is not going to yield the desired results. More over such long affidavits will lead to very long cross examinations, which will result in loss of time and increased costs. Hence in the opinion of the author the chief affidavits must be brief and just covering the factual points to be proved by that witness.

Purpose and Scope of Chief Examination of Expert witnesses: Normally expert witnesses both party appointed and tribunal appointed, are expected to prepare an expert report, covering all the points referred to them and file it in the arbitration tribunal after serving copies to all the parties. The said expert report is considered as the chief affidavit of the expert witness. Expert witness report must give not only his/her opinion on the issues but also the reasons for coming to that conclusion with citations and references. Arbitration Tribunal appointed arbitrators, are normally respected as impartial witness or neutral witness. Arbitration tribunal has powers to make an appointment of an expert witness either on the application of parties or on its own. In a such a situation, a question arises, where the arbitrator has appointed an expert witness, if he is bound by the opinion of the expert witness appointed by him. The Hon'ble Supreme Court of India in Malay Kumar Ganguly[9] case, held that the arbitral tribunal is not bound by the opinion of the expert witnesses since the opinion of experts are advisory in nature. Hence even though the expert witness was appointed by the tribunal, tribunal is not bound to follow the opinion of the expert witness.

The expert witness to get reliable stature, should demonstrate his expertise over the subject matter and to the issues where technical expert opinion is necessary for the arbitration tribunal to decide the disputes properly. Such an expertise of an expert witness can be understood from his educational qualifications, work experience, justifications and explanations given in his report etc., In State of Himachal Pradesh [10] case, Supreme Court of India held "*in order to bring the evidence of a witness as that of an expert, it has to be shown that he has made a special study of the subject or acquired special experience there in, in other words that he is skilled and has adequate knowledge in the subject*". More over the expert witness also should give his/her reasoning for each and every point along with the basis for his opinion (like references, citations etc.,) and just a mere assertion is not sufficient. In State

[9] Malay Kumar Ganguly Vs Dr Sukumar Mukherjee (2006) 6 SCC 269.
[10] State of Himachal Pradesh Vs Jailal and others (1999) 7 SCC 280

of Maharashtra[11] case Supreme Court held that mere assertion by the expert is not sufficient to make the report reasonable and reliable. It is worth bearing in mind the words of Kierans J. cited with approval by Iacobucci J. in *Canada (Director of Investigation and Research)*[12] *which is reproduced below:*

Experts, in our society are called that precisely because they can arrive at well-formed and rational conclusions. If that is so, they should be able to explain, to a fair minded but less well informed observer the reasons for their conclusions. If they cannot, they are not very expert. If something is worth knowing and relying upon, it is worth telling. Expertise commands deference only when the expert is coherent. Expertise loses the right to deference when it is not defensible. That said, it seems obvious that [Appellate Courts] manifestly must give great weight to cogent views thus articulated [emphasis added].

Cross Examination of Expert Witnesses: In India, in addition to the right of the opposite party to cross examine an expert witness appointed by the party, the arbitrator also has the powers to ask questions and get clarified. The most important use of an expert witness is the opportunity for the arbitrator to ask questions and understand the business process, business practices and the technical details relating to the issues involved in the arbitration. Party appointed expert witnesses are paid by parties and hence most of them try to support the case of the party paying their fees but still a reputed expert may not give a technically wrong opinion since the other party may expose them. Hence an expert witness is expected to behave as an expert than a party witness. But as held by Supreme Court, change of stand by an expert in his oral evidence from that taken in his written opinion, if deliberate can amount to perjury by such expert witness **(Prem Sagar Vs State 2012 (8) SCC 21).** Hence the biggest challenge faced by arbitrators is to find out the truth from the expert report of the expert, the cross examination of the parties and formulate their own view to ensure justice.

Law relating to Cross Examination of fact Witnesses: The purpose of cross examination is to satisfy the natural justice because, a witness during chief examination when makes a statement in support of a fact or a technical proposition, which may tilt the case in favour of the other party. Hence the other party gets an opportunity to question the witness to prove either the witness is wrong or tutored to support a party or unqualified to make the statement, which is made in the chief examination. Hence the right to cross examine the witnesses produced by the other party is an absolute right and if the arbitrator does not allow one party to cross examine either the witnesses produced by the other party or the expert witness appointed by him, it will be treated as misconduct of the arbitrator. Denying an opportunity to one party the opportunity to cross examine a witness examined by the other party is a violation of natural justice and hence award can be set aside[13]. The said Rules of natural justice also includes an opportunity to cross examine the witnesses produced by the opposite party. But at the same time, a non-co-

[11] State of Maharashtra v/s Damus/o Gopinath Shinde and others, (2009)9 SCC 221

[12] *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at 780:

[13] Vengamma Vs Kesamma (1953) SCR119

operating party cannot be permitted to derail the arbitral award on the ground of denial of opportunity to cross examine, in a belated stage[14].

Law relating to Cross Examinations:

It is known to everybody that cross examination even though a concept of Law of Evidence it is followed in arbitration proceedings, to ensure fairness and equal opportunity. But Evidence Act is expressly excluded in arbitrations to avoid complex and rigid procedures. But the stake holders should understand the purpose and scope of examination & cross examination. Such a knowledge will help the parties to decide whether they require examination of oral witnesses and if required how to effectively use them to prove their case. In the same way if the arbitrators have a clear understanding and knowledge about examination and cross examination of witnesses, they can effectively manage the oral examination process and fulfill the legal requirements in a cross examination. Even now chapter X of the Indian Contract Act,1872 can be used as a guiding reference relating to examination of witnesses. More over as stated above, even though Code of Civil Procedure and Evidence Act does not apply to an arbitration proceeding, since there is an express bar provided in the Arbitration Act[15] rules of natural justice must be followed[16]

Many of us have a general feeling that, it is safe to state all the facts stated in the pleadings once again in the chief affidavit and complete the cross examination successfully to reassure best results, which is not correct. Some of us think that examination of witnesses is a mandatory part of an arbitration process and hence we require to examine oral witnesses in all cases, which is also wrong. Even though examination of witness has become an important part of the arbitration process, parties have the liberty and powers to decide if they require to examine a witness to prove their case. But if the other party examines a witness and the opposite party unconditionally did not use the opportunity to cross examine the witness, the arbitrator may infer that as an admission, regarding the statements made by the witness in the chief examination. Hence Cross examination opportunity should not be missed by any counsel, without a recording from the arbitrator that they do not admit the statement of the witness. Normally the purpose of cross examination of a witness is to prove how the witness is wrong or witness is not aware of the facts, witness is not a reliable witness, witness is deposing because of enmity etc., Hence the person doing cross examination should focus only on the points which would help them in that process. But at the same time, arbitrator can refuse questions if they are aimed to insult the witness or if the questions are beyond the pleadings of the parties, if the questions are to ask the opinion about the documents on record etc.,

Even though the right to cross examine the witnesses produced by the other party and the expert witness appointed by the arbitrator are part of natural justice globally, the said right is

[14] M.S. Commercial Vs Calicut Engineering Works limited. (2004) 10 SCC 656
[15] S.19. of Arbitration & Conciliation Act,1996.
[16] (2001) SCC Online Bom Rajesh P Thakkar Vs M/S. kotak Mahindra Bank

not always absolute. In International Arbitrations, the right to cross examine the witness produced by the other party may have certain procedural requirements, limitations or higher scope based on the Arbitral Institution Rules selected by the Parties. But still the Rules of the Arbitral Institution if not in line with the Procedural law applicable to the seat of Arbitration, then the Procedural law will prevail[17].

Hence the party representatives and counsel should use the tool of examination of witness in an arbitration process carefully taking to consideration, time and costs in the interest of the parties.

[17] National Thermal Power Corporation Vs Singer Company (1992) 3 SCC 551