CHAPTER 5

Calling Uncooperative Witnesses With or Without the Arbitral Tribunal's Assistance

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Matthias Scherer touches on a problem frequently encountered in international arbitration, that of recalcitrant or otherwise unavailable witnesses and their forced production. His chapter illustrates practical and legal issues and how an arbitral tribunal might determine them. The chapter reports orders issued in international arbitration proceedings as well as a recent decision of the Swiss Federal Supreme Court (4A_36/2020) reviewing an arbitral award rendered in Switzerland under the SCC Rules. Production of witnesses is ordered only exceptionally, in particular if it involves request to state courts to compel a witness.

A 2020 decision of the Swiss Federal Supreme Court (the 'Federal Tribunal') brought to light a matter that could not be more suited for a Swiss author's publication in the Stockholm Arbitration Yearbook: An arbitration with its seat in Switzerland, but governed by the Stockholm Chamber of Commerce (SCC) Rules.[1]

The case touched on a problem frequently encountered in international arbitration, that of recalcitrant or otherwise unavailable witnesses. This chapter illustrates, through the 'Swiss SCC' case and a few other examples, how an arbitral tribunal might determine such issues.

The plaintiff in *Federal Tribunal case no. 4A_36/2020*, a German pasta manufacturer, had been the unsuccessful respondent in the underlying arbitration initiated by its former United States (US) distributor. The arbitral tribunal had granted damages to the distributor (claimant in the arbitration) among others based on a sales contract between the distributor and a US customer which the distributor was unable to perform as a result of the German company's termination of the exclusive importation and sales

1. Swiss Federal Tribunal Decision 4A_36/2020 of 27 August 2020 based on an arbitral award rendered in SCC arbitration V 2017/164. The matter was reported in Global Arbitration Review, 13 October 2020, Sebastian Perry, Pasta Maker can't rehear fraud claim, https://globalarbitrationreview.com/pasta-maker-cant-reheat-fraud-claim

agreement. In the arbitration, the German company contended that the sales contract and the subsequent out-of-court settlement between the US distributor and its alleged US customer were a sham. The arbitral tribunal did not accept the argument.

After the award had been issued, the German company conducted discovery proceedings in the US. It obtained the deposition of the daughter of the US distributor's founder as well as documents in discovery proceedings before the United States District Court of the Eastern District of New York. The daughter, a lawyer, testified that she had not drawn up or negotiated the settlement. This and the metadata of emails found appeared to show that the contract and the settlement had been drawn up later than the distributor had stated before the arbitral tribunal. The German company considered that this was proof that the contract and the settlement had been created only for the purpose of artificially creating a damage claim in the arbitration.

The German company requested the Swiss Federal Tribunal to review the award. It is indeed possible under Swiss law to seek to revise an arbitral award based on decisive evidence that could have been introduced in the arbitration had it been discovered previously. A strict test applies to determine whether the party seeking revision was diligent in seeking the evidence it now pretends to be new.

The Federal Tribunal rejected the revision request on the grounds of both relevancy and diligence. The new evidence was neither decisive nor had the respondent been unable to procure it during the arbitration. True, the distributor had stated that the daughter had drawn up the settlement, which the arbitral tribunal had accepted as a possibility. True also that the arbitrators had assumed that the contract and the settlement had been established earlier than what seemed to flow from the newly found evidence. However, neither element had been decisive for the arbitral tribunal in rejecting the respondent's fraud defence. The evidence on which the arbitrators relied primarily was the testimony of an officer of the customer company which it found credible. The officer had testified to the genuine nature of the sales contract and the settlement.

The German party had apparently argued before the Federal Tribunal that it was de facto impossible to obtain evidence through discovery proceedings during the arbitration.[2] The Federal Tribunal noted that it did not have to engage with this issue since the new evidence (testimony from deposition) stemmed from steps that could and should have been undertaken during the arbitration. In the Federal Tribunal's

2. Depending on the location of the court, it would have been possible to commence proceedings under 28 USC 1782 while the arbitration was under way. There is currently a circuit split as to whether the statute, which allows discovery in the United States in aid of a foreign or international tribunal, is available in matters involving international commercial arbitration. The more important question is whether discovery would have yielded evidence in time for it to be used in arbitration, including any possible stay or extension ordered by the arbitral tribunal to account for such discovery proceedings. A similar possibility exists in the English courts. *See A, B v. C, D and E* [2020] EWCA Civ 409 where the Court of Appeal held that section 44(2)(a) of the Arbitration Act 1996 empowered the English courts to compel a witness, present in England and Wales, who was not a party to the arbitration agreement, to give evidence for use in arbitration proceedings seated not only in England and Wales but also in other jurisdictions (James Freeman, Karolina Latasz, *Non-identical twins: judicial assistance for obtaining evidence under sections 43 and 44 of the English Arbitration Act,* ASA Bulletin 1 (2021), 61.

view, the German party had not been diligent. It had argued in the arbitration that the settlement was a fraud and would have had every reason to call the alleged author and negotiator of the settlement to testify (the daughter of the distributor's founder). The German company argued that the applicable arbitration rules (the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce – SCC Rules) did not provide for the possibility of calling witnesses. As the Federal Tribunal pointed out, this was wrong since the SCC Rules provide that 'In advance of any hearing, the Arbitral Tribunal may order the parties to identify each witness or expert they intend to call and specify the circumstances intended to be proven by each testimony.' [3]

The Federal Tribunal could also have referred to Article 184(2) of the Swiss Federal Act on Private International Law (Swiss PIL Act).[4] The place of arbitration was in Geneva/Switzerland. Therefore, the Swiss international arbitration law (Chapter 12 of the PIL Act) applied to the proceedings, in addition to any specific institutional rules the parties had agreed upon (the SCC Rules in the present case). At the relevant time Article 184(2) of the Swiss PIL Act provided that:

> 2 If the assistance of state judiciary authorities is necessary for the taking of evidence, the arbitral tribunal or a party with the consent of the arbitral tribunal may request the assistance of the state judge at the seat of the arbitral tribunal; the judge shall apply his own law.[5]

Article 184(2) PIL Act does not create a monopoly. A party is not obliged to seek the assistance of the Swiss *juge d'appui*, with or without the arbitral tribunal's consent, but can directly apply to any foreign judge willing to assist with the taking of evidence in support of the arbitration seated in Switzerland. Regardless of Article 184(2) PIL Act, it would thus have been open to the German party to apply to a US court under 28 USC 1782.

A further example of a belated application to hear witnesses who are not under the applying party's control is provided in a procedural order in *ICC Case No. 20441 of 2016*. In that case, the claimant had called several individuals under the respondent's control. It had done so during the arbitration, and before the hearing, but only on the deadline when the parties were to call their witnesses as per the procedural timetable. In the prevailing circumstances, the arbitral tribunal found this to be late. The deadline by which the parties had to identify the witnesses which were to attend the hearing was not meant to provide an opportunity to call new witnesses who had not previously been identified in the parties' pleadings submitted in accordance with the procedural timetable:

> The Respondent objects to the Claimant's application, considering that it is untimely and unwarranted. The Respondent relies on 4.10 of the IBA Rules. This provision states that a party who is ordered to provide for the appearance of a

3. The Federal Tribunal referred to Article 33 of the SCC Rules.
4. *See* Michael E Schneider, Matthias Scherer, Basler Kommentar zum IPRG, 4th edition 2020, n 70 ff ad Article 184.
5. In its current version (since 1 January 2021) Article 184 provides that the judge can also apply or consider other laws. The Swiss judge could thus take depositions or other forms of evidence unknown in Swiss law.

person whose testimony has not yet been offered, may object for any reasons set forth in Article 9.2 of the IBA Rules. According to the Respondent, several of the grounds of Article 9.2 apply, in particular that the request is overly burdensome and not material.

It is the Claimant's position that its application was made timely, namely on the date provided for pursuant to the Procedural Timetable, i.e. the date for the identification of witnesses and experts to be cross-examined (8 April 2016). However, the milestone for the identification of witnesses of 8 April 2016, in accordance with the Procedural Timetable, concerns only witnesses who have provided a witness statement. It serves merely the organisation of the hearing (which starts on 22 May), not as an opportunity for the parties to make applications for new evidence. The timeliness of the Claimant's request therefore needs to be assessed on its own strength.

The Tribunal accepts that a party may seek the assistance of the Tribunal for the production or evidence, be it documentary or witness evidence. However, this is not an unfettered right. It has to be exercised in keeping with the overall procedural timetable. The parties were to establish their case in fact and law in their written submissions, including all witness statements, or at least identification of witnesses not under a party's control for which no witness statement could be adduced. The Claimant has not identified the prospective witnesses in its submissions. Nor does the Claimant state that it has approached the prospective witnesses directly with a view to obtain a witness statement from them.

It would not be appropriate for the Tribunal to order either party to procure the attendance of a witness, unless the party who wanted to rely on that witness had demonstrated reasonable efforts to obtain his attendance at the hearing, and that the other party was likely to be able to do so. The Tribunal is not satisfied that either of these matters has been demonstrated by the Claimant.

The reason why the Claimant did not approach the prospective witnesses may have been that the Claimant expected the Respondent to produce witness statements by these individuals. However, it has been clear since the exchange of the witness statements on 1 March 2016 (or in any event, since the exchange of the rebuttal witness statements on 25 March 2016) that the Respondent will not adduce witness statements. The Claimant was therefore in a position to make its request earlier, and should have done so given the close hearing dates, and the ongoing organisation of the hearing. The Claimant did not mention that there could be additional witnesses when the hearing schedule was discussed with the Tribunal. The Tribunal would then have been in a position to assess the relevance and materiality of any evidentiary application at this stage, as it did with regard to the document production requests on 27 January 2015.

There may be situations where witnesses can be called by a Tribunal even closer to the hearing than would be the case in the present arbitration. In its letter, the Claimant referred to such examples which it summarizes as follows: In *Rumeli and Telsim v. Kazakhstan*, ICSID Case No. ARB/05/06, Award dated July 29, 2008, where Claimant requested, on September 19, 2007, the Tribunal to order Respondent to cause the production of two witnesses, which the Tribunal chaired by Prof. Bernard Hanotiau granted on September 24, 2007, with the Hearing scheduled to take place less than four weeks thereafter, on October 19, 2007. Similarly and most recently, in *Caratube International Oil Company and Mr. Devincci Hourani v. Kazakhstan*, ICSID Case No. ARB/13/13, the Tribunal chaired by Prof. Laurent Levy granted, a mere two weeks before the Hearing (i.e. on October 13, 2015, the Hearing being scheduled to begin on November 2, 2015), the Claimant's request made on September 28, 2015, to order the Respondent to cause the production of two witnesses.

> Request for production of witnesses are necessarily fact specific. The Tribunal finds that in light of the above circumstances the Claimant's request for the production of witnesses is belated and therefore dismissed.
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> The Tribunal also, and in any event, has doubts about the relevancy of the testimony which the Claimant hoped to obtain from them.

In another illustrative case, *ICC Case No. 13706* seated in Geneva/Switzerland, the claimant informed the arbitral tribunal that one of its witnesses could not attend the hearing for medical reasons. He would be available by video link, or alternatively a hearing could be arranged in his hometown. The respondent questioned the alleged health issues and objected to an examination in a separate hearing or by video link. Extracts of the arbitral tribunal's directions (of 2008) are reproduced below:

> 2. The seat of the arbitration is Geneva, Switzerland. Therefore the arbitration proceedings are governed by the Swiss arbitration law (chapter 12 of the PIL Act) and by the ICC Rules of Arbitration that the parties have selected as they are authorized to do under Swiss law.
> 3. The Tribunal issued Procedural Order no. 1 on 21 September 2005 which addressed the issue of witness hearings. According to Section 3 of this Order, the Tribunal may refer to the IBA Rules on the Taking of Evidence in International Commercial Arbitration ('IBA Rules') without being bound by them.
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> **A. The examination of Mr XX**
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> 4. The Claimant argued that it has no control over Mr XX. However, Mr XX has signed a witness statement at a time where he was already retired. With respect to the Claimant's control, or absence of control, no change has occurred since that time. It is the Claimant's responsibility to summon Mr XX and make him available at the hearing (Article 4.7 of the IBA Rules).
> 5. If a witness who has submitted a witness statement does not appear without a valid reason for testimony at the hearing, the Tribunal shall disregard the witness statement except in exceptional circumstances, where the Tribunal may determine otherwise (IBA Rules, Article 4.8).
> 6. While medical reasons can certainly constitute an exceptional circumstance preventing a witness from attending a hearing, the Claimant has not demonstrated the existence of such medical reasons, although they have allegedly existed since at least August 2007. Moreover, Mr XX's purported medical condition is apparently not the only reason for Mr XX's unavailability. He seems to be generally unwilling to be involved in the arbitration.
> 7. Thus, the Claimant has no valid excuse for not making Mr XX available at the hearing at the very least through a video link, a possibility which Article 4.7 of the IBA Rules does not exclude. Consequently, the Tribunal will grant a short time limit to the Claimant to confirm that Mr XX will either be available for examination by video link on 17 March 2008 or be present in person on that date in the hearing room in London. Should Mr XX fail to be available for examination by either of these two methods, the Tribunal will disregard his witness statement.
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> As to the alleged practical difficulties regarding examination by video link, the Tribunal considers that in spite of presenting certain unavoidable disadvantages compared to in-person hearings, video examination is a valid alternative to the latter. If the cross-examiners' ability to examine the witness were indeed substantially hampered, as the Respondent maintains, video link hearings would not have become as widespread as they have.

> In any event, it is in the Tribunal's sole discretion to weigh up the evidence tendered by the Parties in light of all circumstances, which includes the nature of the facts on which testimony is offered, and the refusal of a witness to avail himself for an in-person hearing.
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> As to the suggestion of the Claimant to hold a hearing in Kiev to examine Mr XX after the hearing in London, there is no justification for splitting the hearing merely for the convenience of a witness alleged by the party who produced him. Moreover, as the Claimant pointed out in its letter, it would be disproportionate for the hearing to be held in Ukraine, in whole or in part.
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> **IN LIGHT OF THE ABOVE THE TRIBUNAL ISSUES THE FOLLOWING ORDER**
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> 1. The hearing will take place in London on 17 March 2008
> 2. […]
> 3. The Claimant shall inform the Tribunal and the Respondent on 22 February 2008, 5 p.m. London time at the latest whether Mr XX will be physically present at the hearing on 17 March 2008, or if he will be available by video link, or if he will not be available during the hearing in person or through video link.
> 4. If Mr XX is neither present at the hearing nor available by video link, his witness testimony shall be disregarded.

In 2021 it has become common place to conduct entire hearings virtually, as a result of the COVID-19 pandemic. As the above procedural order of 2008 recalls, examinations by video are no novelty:

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In an *ICC arbitration reported in Swiss Federal Tribunal Decision 4A_539/2008,*[6] the tribunal upheld an arbitral award that had been challenged on the ground of a violation of the right to be heard. The plaintiff (in the annulment proceedings before the Federal Tribunal) complained that the arbitral tribunal sitting in Geneva had refused to order the examination of two of its witnesses by letter rogatory in Milan. The facts were as follows:

The plaintiff had filed two unsigned witness statements from two former employees. When several weeks after the production the other party called the two witnesses for cross examination at the hearing, the plaintiff informed the tribunal that the two witnesses were unwilling to attend the hearing in Switzerland. The plaintiff then sought the tribunal's assistance under paragraph 10 of procedural order no 1.

Procedural order no. 1 of the arbitral tribunal laid out ground rules for the arbitration proceedings. The procedural order addressed the issue of recalcitrant witnesses as follows:

6. Swiss Federal Tribunal, Decision 4A_539/2008 of 19 February 2009, ASA Bulletin 4 (2009), 801.

8.

Each party shall name the witnesses upon whom it intends to rely and, to the extent possible, it shall file written witness statements of each such witness. The Arbitral Tribunal will decide issues such as possible filing of rebuttal witness statements or the refusal of witnesses to cooperate. If it proves impossible for a party to obtain a written witness statement from a witness (who is not under the control of such party), the party shall at least specify, when it provides the name of the witness, on what issues this witness will have to testify at the witness hearing.

10.

Where a witness should ultimately not be able to attend even for a valid reason, the Arbitral Tribunal shall in principle not be entitled to consider his written statement, except if extraordinary circumstances so warrant. In such event the Arbitral Tribunal shall hear the parties and decide by taking, however, into account all relevant circumstances, including the parties' legitimate interests.

…

The parties shall be responsible for ensuring the presence of the witnesses at the hearing. Upon request, the Arbitral Tribunal will assist the parties with respect to witnesses not under their control.

The arbitral tribunal wrote immediately to the two witnesses inviting them to attend the hearing the following week. Both responded that they had already provided the plaintiff's counsel with a jointly signed statement to which the plaintiff could refer. The tribunal convened a telephone hearing with counsel during which it was averred that the witnesses refused to sign their statements. At the telephone hearing, the plaintiff requested that the two former employees were heard in Milan by letter rogatory. The tribunal did not accede to the request. Instead, it proceeded with the hearing and invited the parties to address the witness issue after the hearing. In these post-hearing submissions, the plaintiff produced the witnesses' signed joint declaration and explained that this joint declaration had not been considered satisfactory. The plaintiff had instructed its counsel to draw up proper witness statements based on notes and internal memos from the two former employees. Counsel had sent them to the witnesses and allegedly received assurances that they would be signed. Based on such assurances, counsel filed the unsigned witness statements rather than their signed joint declaration. For unknown reasons, the witnesses did not agree to sign the statements after all.

In a procedural order issued after the hearing, the tribunal found that the witness statements were inadmissible, and that the plaintiff had foregone its right to seek the tribunal's assistance calling the witnesses. It was noted that rather than seeking such assistance immediately when it became clear that the witnesses would not sign the statement drawn up by counsel, the plaintiff had waited until a few days before the hearing.

The arbitral tribunal's award was challenged by the plaintiff among others on the ground that the tribunal's handling of the witness issue offended due process. The plaintiff noted that the procedural rules did not impose any deadline for seeking the tribunal's assistance. It was therefore wrong for the arbitral tribunal to find that

plaintiff had forfeited its right to such assistance. Furthermore, the plaintiff observed that the arbitrators' position was contradictory. At first, they had granted assistance and invited the witnesses to attend. However, in their procedural order after the hearing, they declined to assist.

The Federal Tribunal found no inconsistency. The arbitral tribunal had actually noted in its procedural order that when it first granted assistance it was on the basis of an incomplete account of the relevant circumstances. At that time it had not known that the two witnesses were not merely unwilling to attend the hearing but actually unwilling to sign the witness statements they had allegedly authored. As to the question of forfeiture, the Federal Tribunal could simply have approved the arbitral tribunal' conclusion for want of the plaintiff's good faith procedural conduct. Ultimately, the tribunal stopped short of this and merely noted that the plaintiff's annulment request did not engage with the issues raised by the plaintiff's procedural conduct. Regardless of the characterisation of the plaintiff's conduct, the right to seek assistance had not been exercised in compliance with the procedural rules. Consequently, the arbitral tribunal had not violated the plaintiff's procedural rights.

What **conclusions**, if any can be drawn from these few cases?

First, it is clear that there is a right to obtain the arbitral tribunal's assistance to try to compel witnesses to give testimony. However, the right must be exercised timely and the witnesses whose testimony is sought need to be relevant. A prudent party will request the arbitral tribunal's assistance early and not leave such a request until the moment when it has to call witnesses under the applicable procedural rules.

In many instances, a party will not call witnesses over which it has no control. Indeed, it would be naïve to think that recalcitrant witnesses are necessarily helpful to the party forcing them to appear. Another downside of forced appearance is the possible disruption of the arbitration timetable. The delays which these procedural incidents inevitably entail may not be worth the effort. The risk of disruption of the arbitration is also why arbitrators will think twice before compelling witnesses or suspending the arbitration during evidentiary proceedings in state courts. Arbitrators are rather liberal in writing to a called witnesses upon request of a party, but will only in very special circumstances allow a party to put a hearing date at risk by compelling witnesses through court proceedings. Ultimately, however, every case will have to be assessed on its own specificities.