Commentary:

Neither body language nor 'odour': the argument for non-prejudicial treatment of witnesses in arbitration proceedings particularly in the era of virtual hearings.

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The despicable COVID-19 pandemic has put all of us from various industries and professions in a survival mode by turning to technology to keep us going. It is remarkable how well people can adapt to prevailing circumstances and change whenever necessary; just a year ago, the general population may not have heard of online video telephony and work collaboration platforms more so than in the last eight months of this year, and also how the resistance to its use previously has dissipated. Hitherto, I do not think there is anything we can thank the pandemic for, although it further spurs technological acceptance and adoption. Also, during this pandemic time, we have observed an increase in the discussion on the subject of body language of witnesses in virtual arbitration. This topic is not new but I supposed the pandemic has encouraged more discourse on various aspects of virtual arbitral hearings more so than before. Needless to say, I am rather concerned specifically with some of the theories promoted because any misconception if not keep in check but perpetuated too often, too widely, might engender into the *de facto* new 'standard' for examining witnesses in commercial arbitration.

As it is, the current conduct of international commercial arbitration is not one that is particularly easy to follow. We have seen the adoption of processes and procedures commonly found in common law court litigation in the conduct of current international commercial arbitration. There is a likelihood that a non-English speaking practitioner from a civil law jurisdiction involved international arbitration today might be perplexed by some of the jargons used and certain aspects of the procedures. Someone once asked me, who is "Mr Scott" in the Scott Schedule, something ubiquitous in contemporary arbitration practice. The ensuing anti-climax reaction after seeing a Scott Schedule for the first time tend to be, 'Oh, it's just another Microsoft Excel table, a "Claim/Defence Schedule" with columns!' Unfortunately, many of us are 'guilty' for not making arbitration today simpler to understand, but this is a discussion for another time.

Nevertheless, in recent times, I have observed the existence of and attended some webinars relating to techniques in virtual arbitration and cross-examination of witnesses. They are an eye-opener and in part the reason for writing this short commentary. One such webinar relates to how to cross-examine witnesses in arbitration and reading the body language. Another webinar I attended, demonstrates the conduct of a virtual hearing with the actors portraying themselves as formidable advocates; in doing so, they were fairly successful in showing 'Hydra

rearing its ugly heads' in the cross-examination of witnesses. At the outset the counsels attempted to disturb the mental equilibrium of the witnesses with their vexatious requests such as asking for the web camera to be turned around the room three-hundred-and-sixty-degree, questioning the poster on the office wall, asking about the scribbles on the whiteboard, that stack of documents on the table, etc.

A simulation like the above is educational and rather entertaining but in my humble opinion can also be worrying. I dread the prospects of new entrants and arbitration students making personal notes while watching these acts, potentially embedding them into their mind as the gospel. I imagined the worst-case scenario of personal notes like, "INTERNATIONAL ARBITRATION HEARING – step 1, ask the witness to turn in a circular motion in two revolutions, holding the camera in the left hand with the right hand up in the air to show that he/she is not hiding anything. Exposing the hidden body language." Alright, I admit being a tad too harsh here, but is not emulation part and parcel of our learning journey?

For the record and unequivocally, I do not have anything against these training. I applaud these initiatives wholeheartedly. However, I am rather concerned with any attempts seen as contributing to the further judicialisation of arbitration when intrinsically, this method of dispute resolution alternative to courts is what its creators and users intend it to be. Here is the key thing to take note; arbitration is not court litigation.

I am conscious that there might be different schools of thought here; some might argue that riling up witnesses is perfectly acceptable to throw them off balance during oral hearings thus affecting their testimony. Others may say counsels must act hard to expose the witnesses' true colours as the body language would reveal it all. Indeed I can agree that not all witnesses are angels but can we strike a balance here and are some of these techniques or practices relevant to arbitration? According to the science of body language, how a person touches his/her face, the position of the clasped hands or even eye movements are said to mean something. Since when do we expect arbitrators to be psychoanalysts and psychologists?

In avoiding a detailed and protracted argument, here are the key salient points of my case for non-prejudicial treatment of witnesses in arbitration in the context of body language. Firstly, international commercial arbitration involves parties coming from a myriad of background, culture and legal traditions. Witnesses could be making their oral submissions via interpreters as the English language may not be their first language thus this can affect their composure. Secondly, not many witnesses of fact or expert witnesses are regular participants in arbitration (or litigation) hence they may be nervous or displaying 'adverse' body language. Finally, testifying before a web camera in virtual arbitration is not without its challenges; the uncertainty as to whether one can be heard clearly and possibly also technical problems can mar the performance.

Further and in reality, an oral hearing is not an indispensable and mandatory constituent of arbitral proceedings; arbitration can be conducted based on documents only. Recently on 9

April 2020, the ICC International Court of Arbitration released an "ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic" emphasising that the ICC Rules provides that the tribunal may adopt appropriate procedural measures and after consulting the parties may, among others, identify whether the entirety of the dispute or discrete issues may be resolved on the basis of documents only, with no evidentiary hearing.

It is sometimes said that good arbitrators may already have a good understanding of the dispute even before the oral hearings, not because they are making presumptions but because these days written submissions tend to be very well prepared and would have addressed all the necessary issues. Some observers went to the extent of suggesting that the tribunal hears the parties at oral hearings largely because this is what the parties want. However, in striking the balance, I think oral hearings are useful and I like to think that good arbitrators would not be easily swayed by theatrics and rhetoric; truth and reality can be very different from H/Bollywood movies showing courtroom dramas. Overzealous counsels being hard on the witnesses might result in the latter getting sympathy from the tribunal instead.

I would further argue that whilst the duties of arbitrators include deciding on the veracity of evidence presented before them, their primary role is as the arbiter of the disputes as a whole where they need to look at the big picture. Throughout the proceedings, they may encounter doubts but the good arbitrators should practice and promote magnanimity. Moreover, in arbitration, most disputes are argued largely on facts and technical points. Testimony of the witnesses during the oral hearing stage, being the last lap of the arbitral proceedings, arguably would not be a major game-changer for the entire arbitration. It is what it is, no amount of sweat or tears, in other words, body language, should be expected to change any facts.

Ultimately it is all down to the arbitrators acting also as effective managers of the arbitration. As the ancient Greek philosopher, Socrates said, the essential qualities of a good judge are: "To hear courteously; to answer wisely; to consider soberly, and to decide impartially." Lady Justice is blindfolded to personify impartiality and that no one should be judged according to his/her looks, stature or status. Arbitrators too should be 'blind' to the parties and look beyond their physical attributes; how they look, talk or move- the body language. In taking the argument further, perhaps witnesses testifying remotely should have the option of not been seen but only heard?

Even if testimony by the parties may 'smell fishy' and the tribunal may even smell a rat, they need not be prejudicial but to continue arbitrating the dispute magnanimously with an open mind. Incidentally, we would have heard of commodity arbitration which has its historical roots in adjudication, where the arbitrators examine products in dispute by way of "look-sniff". However, I do not think this should apply, whether literally or metaphorically, outside the domain of commodity arbitration.

I shall now end. I am cognizant of the fact that this discussion could potentially elicit a strong reaction of dissent from the proponents of body language in arbitration. I do apologise for

causing any unnecessary distress. However, one thing I will say to arbitration users; expect your arbitrators to see and 'smell' you not. No prejudice or sentiment should influence their decision making. An arbitrator exists simply because of your disputes and as an edifice of fairness and impartiality, he/she should neither favours nor disfavours any party.