International Distribution Institute

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at the retail level

# The paramount importance of oral evidence in arbitration

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# I. Introduction: the common law and the civil law

- Two main legal systems in the world:
  - The common law
  - The civil law

2. The differences are obvious when it comes to the taking of evidence:
   - In common law,
     - the route to the facts is through the witnesses ;
     - oral evidence is given considerable weight ;
     - oral evidence usually prevails over written evidence.
   - In civil law,
     - the route to the facts is through the documents ;
     - the use of witnesses is unusual ;
     - written evidence prevails over oral evidence; if a claim is supported by a document, the judge does not usually go further.

# 3. The common law procedure (adversarial) :

- Parties in a dispute lead the proceedings
- the cross examination of witnesses
- the preparation of witnesses by counsels
- the Judge's main tasks
  - to oversee the proceedings and to ensure that all aspects of the procedure are respected.
  - as to the taking of evidence, to ensure that the questions asked to the witnesses are relevant, more than to interrogate himself the witnesses;

# 4. The civil law proceedings (inquisitorial):

– the Judge leads the proceedings

– the Judge examines the witnesses

- cross-examination is unknown
- the preparation of the witnesses is forbidden; subject to some exceptions, counsels may face disciplinary sanctions if they breach the rule

5. C.A. Rogers: *"An Australian lawyer felt that from his perspective it would be unethical to prepare a witness; a Canadian lawyer said it would be illegal; and an American lawyer's view was that not to prepare a witness would be malpractice"*

# II. The differences between common law and civil law procedures are not as significant in international commercial arbitration

6. In some civil law countries, it is now recognized that in order to guarantee a fair arbitration where all parties have equal rights, a parties' counsel is allowed to have preparatory contacts with the witnesses to assist and/or prepare them for a statement or a hearing

7. The IBA rules on the taking of evidence in international arbitration:
   - A formal attempt to reconcile the differences between common law and civil law procedures
   - *"it shall not be improper for a party, its officers, employees, legal advisors or their representatives to interview its witnesses or potential witnesses."* (Art. 4.3)

c. In international arbitration, Parties and Arbitral Tribunals are free to decide whether witnesses will be heard, prepared, examined and cross examined

- The pros of witness oral testimony:
  - Render the hearing more lively and interesting
  - It is better for a witness to use its own words than to read a statement prepared by a Counsel
  - Useful in testing witness' credibility
- The cons of witness oral testimony:
  - Duration and costs of the examination
  - Impact on the preparation of the cross examination
  - Risk of irrelevant and confused statements. Not all witnesses are fluent in the language of arbitration

# 8. Common standards of international commercial arbitration :

- When the Parties have not agreed on the rules governing the admissibility of witness statements, such admissibility is governed by common standards of international commercial arbitration.

- According to these standards, the Arbitral Tribunal may admit and, thus, consider as appropriate, all witness statements, even when originating from interested persons, provided the adverse parties are given the chance to challenge the credibility and reliability of such testimonies, and the criticisms raised are taken into account by the Arbitral Tribunal when weighing the collected evidence (see Gary B Born)

# III. Pro witness examination in distribution contracts

9. Sometimes, relying upon written evidence appears to be either impossible or useless

10. Agency contracts are the only distribution contracts subject to a specific set of European provisions, i.e. the Council Directive of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (hereinafter the 'Directive').

# 10. Witness evidence and oral contract.

According to Article 13 of the Directive :

- Each party shall be entitled to receive from the other, upon request, a signed written document setting out the terms of the agency contract, including any terms subsequently agreed. Waiver of this right shall not be permitted.

- the conclusion of an agency contract under an oral form is allowed, except when the law of the relevant Member State rules otherwise ;

But then, what if the parties are in dispute :

a. About the very existence of an agency contract ?

b. About the content of an oral agency contract ?

c. About the existence of an implicit agreement modifying the terms of a written agency contract (considering the evolutive nature of distribution contracts) ?

d. About the content of such an implicit agreement ?

In those circumstances, the parties might have no other choice than relying on witness evidence to prove their case.

11. Witness evidence and consensual processes.

According to Article 3 of the Directive:

i. *In performing his activities a commercial agent must look after his principal's interests and act dutifully and in good faith.*

*ii. In particular, a commercial agent must:*

*(a) make proper efforts to negotiate and, where appropriate, conclude the transactions he is instructed to take care of;*

*(b) communicate to his principal all the necessary information available to him;*

*(c) comply with reasonable instructions given by his principal.*

→ in performing his activities, the agent must act dutifully and in good faith, e.g. by making proper efforts to negotiate and, where appropriate, conclude a transaction.

→ the content of the negotiation process is rarely evidenced through written documents

→ it might be necessary

- for the principal to rely on witness evidence to demonstrate a potential lack of implication of his agent in the negotiation of a transaction;
- for the agent to rely on witness evidence to counter his principal's claims.

## 12. Witness evidence and negative evidence.

Article 3 and 4 of the Directive impose on both the principal and the agent a series of obligations to do something.

To demonstrate the failure of one party to comply with his obligations, it is necessary for the other party to bring evidence of an inexecution, i.e. to produce negative proof which, as its name indicates, implies a lack of written documents.

In such circumstances, it seems particularly appropriate to rely on witness evidence.

# 13. Witness evidence and factual elements.

According to the Court of Justice of the European Union:

*" [following the Directive],the commercial agent can claim commission on the basis of a transaction only to the extent that the principal acted, directly or indirectly, in the conclusion of that transaction.*

*It is for the national court to establish whether or not the evidence before it (…) allow it to establish the existence of such action, be that action of a legal nature, for example through the intermediary of a representative, or of a factual nature."* (Judgment of 17 January 2008, Heirs of Paul Chevassus-Marche v Groupe Danone, Kro bee brands SA (BKSA) and Evian eaux minerales d'Evian SA (SAEME), C-19/07, EU:C: 2008:23, paras 21-22.)

According, once more, to the Court of Justice of the European Union:

> *"[The Directive means] (…) that the concept of 'a reason for which the principal is to blame' does not relate only to the legal reasons which led directly to the termination of the contract concluded between the principal and the third party, but covers all the legal and factual circumstances for which the principal is to blame, which are the cause of the non-execution of that contract"* (Judgment of 17 May 2017, ERGO Poist'ovna a.s. v Alzbeta Barlikova, C-48/16, EU:C:2017:377, para 62.3)

With regard to factual action and factual circumstances, which are not necessarily evidenced through written documents, it might be necessary for the Parties to rely on witness evidence to prove their case for or against the payment of a commission.

## IV. Conclusion

It is often difficult for the Parties to a litigation involving distribution contracts to prove their case exclusively on the basis of written evidence.

There are indeed various circumstances in which the recourse to witness evidence appears to be the best or even the only way for the Parties to support their claims.