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The permissible scope of witness testimony in arbitral hearings—five proposed rules

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ABSTRACT

At least one surprise occurs in every arbitral hearing. One of those surprises is when a witness testifies beyond what has been submitted in his written witness statement. Often, such 'out-of-scope' testimony is unexpected, astonishing, and crucial for the outcome of the case. Surprisingly, the adequate handling of such unexpected testimony is unchartered territory: neither arbitral statutes, institutional rules nor the ever-expanding arbitral soft law addresses this important issue. This article reviews if and when arbitral tribunal should permit or reject such 'out-of-scope' testimony. The article establishes five clear-cut rules to deal with that issue.

1. THE QUESTION: IS THE EXPANSION OF WITNESS TESTIMONY PERMISSIBLE?

Witness testimony is a key element of arbitration. Like the majority of all procedural aspects, it is only loosely regulated. Arbitral rules adopt a liberal approach to determining both, who can be a witness and what the witness can testify to: A party to a dispute can act as a witness,[1] unlike in most state court proceedings.[2] And typically, witnesses can testify as fact witnesses on what they have actually and personally[3] observed, and as expert witnesses on what their opinion on certain facts is. The distinction between these two kinds of witness testimony[4] is blurry and rarely an issue for discussion. The general approach is to admit any kind of witness testimony, resulting in the better part of almost any arbitral hearing being spent on listening to witnesses. Against this seemingly unrestricted background, discussing the permissible scope of witness testimony seems, thus, to be far-fetched. Yet haste makes waste: such quick conclusions often turn out to be wrong.

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1 For example, art 4.2 IBA Rules on the Taking of Evidence in International Arbitration; art. 5.5 Prague Rules.

2 See eg for Germany: *Ahrens*, Der Beweis im Zivilprozess, ch 20, 18ff.

3 Even hearsay witnesses are often permitted. Restrictions regarding hearsay witnesses which are common in state court proceedings are rarely applied in arbitral proceedings.

4 Also the IBA Rules on the Taking of Evidence in International Arbitration distinguish between witness testimony and (party- or tribunal-appointed) experts, see arts 4–6.

The permissible scope of witness testimony becomes an issue when a witness, in the evidentiary hearing, is invited to address topics for which the witness was not initially put forward for. The initial scope of the witness testimony is defined by written witness statements.[5] Witness statements are submitted by the parties either along with their written submissions, or in a separate phase of the proceedings prior to the evidentiary hearing. These submissions have become the standard approach in international arbitration. The alternative approach is for the parties to only 'offer' witness testimony as a confirmation of a certain factual assertion in their written submissions. The arbitral tribunal then issues an evidentiary order specifying which witness it intends to hear for potentially verifying a disputed fact.[6] If the witness in his or her oral testimony then addresses, for whatever reason, issues which did not form part of his or her written witness statement or which were not specified in the tribunal's evidentiary order, the testimony is usually labeled as 'out-of-scope testimony'.

Four different scenarios can result in an out-of-scope testimony. First, it can be triggered by the questions of the party presenting the witness. The claimant initially offers a witness to testify to Fact A, and files a narrowly phrased witness statement. When preparing for the hearing, claimant's counsel discovers that the witness can also confirm Fact B, which is relevant for the claimant's case. During the oral testimony, claimant's counsel questions the witness about Fact B, attempting to enlarge the testimony initially offered. Secondly, opposing counsel may make a similar attempt during cross-examination, asking the witness to confirm Fact C, which forms the basis of the respondent's defense. Third, the arbitral tribunal may wonder why a witness was not offered for Fact D although the witness should know about it, for example because he or she participated in a crucial meeting in which Fact D was apparently discussed. The arbitral tribunal thus chooses to question the witness about Fact D. Finally, the witness may suddenly volunteer to testify to Fact E, be that on his or her own initiative or upon a hidden request by a party.

The (unexpected) 'out-of-scope testimony' can affect the outcome of the arbitration in all four scenarios. Proving or not proving Facts B, C, D and E can be crucial for the tribunal's decision on the merits. Thus, the question begs to be asked: when and to what extent can or should such 'out-of-scope testimony' be permitted?

2. IN SEARCH FOR AN ANSWER: ARBITRATION STATUTES, INSTITUTIONAL RULES, SOFT AND CASES LAW

The ground rule for answering a legal question, though often ignored and replaced by unprincipled argumentation, is to look into the applicable legal rules. The law applicable to arbitration proceedings is provided by the statutory arbitral law at the place of arbitration and by the parties' agreement, either explicit or contained in arbitral rules referred to. To a lesser degree, applicable case law or even soft law can provide guidance. An analysis of these sources, dealt with respectively below, offers

5 The contents a witness statement shall contain is described in art 4 (5) IBA Rules on the Taking of Evidence in International Arbitration, see below for further details.

6 This approach is—if at all—mainly being pursued in arbitrations in which only parties from the same civil law jurisdiction, such as Germany, are involved.

underwhelming answers to whether a witness testimony can be expanded beyond its originally envisaged scope in an arbitral hearing.

2.1 Black letter law

Black letter law, determined by the arbitral regime applicable at the place of arbitration,[7] provides no guidance on how to deal with the issue in question. In many countries, arbitration law reflects the UNCITRAL Model Law, either exactly or in a slightly modified manner. That holds true for 83 states worldwide.[8] The Model Law contains no provision dealing with witness questioning in general, let alone the permissible scope of witness testimony. In essence, the Model Law restricts its guidance to the meager directive for the arbitral tribunal to discretionarily run the proceedings, including the taking of evidence and, hence, the interrogation of witnesses.[9] Arbitral regimes not based on the Model Law, for example, Swiss or French law or the English Arbitration Act, produce the same result. The bottom line always is: The tribunal is to decide, and it does so by exercising due discretion.

2.2 Parties' agreement and institutional rules

In the absence of any mandatory arbitral law at the place of arbitration, the parties are free to determine how they want to resolve their dispute in an arbitration proceeding.[10] In essence, they can customize the proceedings by way of mutual agreement. This includes setting the rules on the interrogation of witnesses, with a possible expansion of the scope of witness testimony.

The latter is, of course, too special an issue to be dealt with in the arbitration agreement itself. It could, nevertheless, be dealt with in the arbitration rules of an arbitral institution. Such rules can be incorporated in the parties' arbitration agreement by way of reference.[11] A standard arbitration clause stipulating that, eg all disputes shall be referred to arbitration under the Arbitration Rules of the ICC has the effect that those arbitration rules become an integral part of the parties' agreement.

The vague hope that arbitral rules would address and solve the problem of 'out-of-scope' testimony is quickly disappointed: None of the major arbitral institutions address this topic. The taking of witness testimony in general remains unregulated. Once again, guidance is restricted to the broad statement that the arbitral tribunal has discretion as to how to structure proceedings, including the taking of evidence, and that it shall establish the relevant facts of the case. Most of the Rules are,

7 Baumann and Pfitzner, in Weigand and Baumann (eds), *Practitioner's Handbook on International Commercial Arbitration* (OUP, 3rd edn) 1.128ff.

8 Legislation based on the Model Law has been adopted in 83 states in a total of 116 jurisdictions. An overview of the jurisdiction can be found under <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status> accessed 28 April 2020).

9 art 19 (2) UNCITRAL Model Law reads: 'Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.'

10 Baumann and Pfitzner (n 7).

11 ibid; Gary Born, *International Commercial Arbitration* (2nd edn) 168ff.

however, silent as to how this objective is to be achieved. That holds true, inter alia, for the ICC-Rules,[12] the DIS-Rules,[13] the Swiss Rules[14] and the UNCITRAL Arbitration Rules,[15] to name just a few. The SCC-Rules[16] and the LCIA-Rules[17] provide for more details regarding the taking of evidence. However, the question of how to deal with 'out-of-scope' testimony remains unanswered.

This finding is in itself not surprising, as arbitration rules are designed to offer parties the possibility to shape the arbitral procedure as they wish. The answer to the issue has more chances to lie in soft law rules, created to ease parties' and arbitrators' tasks during the arbitration procedure by giving them the opportunity to adopt or follow a defined set of rules.

2.3 Soft law: IBA Rules and Prague Rules

At the outset, soft law in international arbitration is nothing more than a mere recommendation or proposal by some institution or working group. Soft law has no binding authority by nature, since it is neither rooted in the law-making power of the arbitration state (black letter law), nor in party autonomy (arbitration rules). In the arbitration world, however, soft law has become increasingly influential. Examples include the IBA Rules on the Taking of Evidence in International Commercial Arbitration ('IBA Rules') and the Rules on the Efficient Conduct of Proceedings in International Arbitration ('Prague Rules').

The former rules are nowadays factually observed in many, if not most, international arbitration proceedings. Soft law rules gain relevance for an arbitration in three ways. First, the parties can explicitly agree on a certain set of rules, which is rarely done in practice. Secondly, an arbitral tribunal can declare a set of rules applicable for a given arbitration. This happens occasionally, in particular with regards to the IBA Rules, often modified by the restriction that the 'arbitral tribunal may take guidance but is not bound' by those rules. Third, soft law gains influence when an arbitral tribunal, confronted with a particular procedural problem, must exercise its discretion to resolve this issue. A seasoned tribunal then often reviews the soft law, widely considered as 'best practice'. Following best practice is easy to justify in a procedural order. And it does not expose the tribunal's decision to the risk of being objected as an 'obvious misuse of discretionary power'.

The IBA Rules or the Prague Rules appear to be the obvious source for ultimately finding an answer to the question whether a witness may testify to other topics than those for which he or she was originally put forward for:

Article 4 IBA Rules deals with witness testimonies. The arbitral tribunal can order that written witness statements be submitted, a practice which is nowadays the rule in international arbitration proceedings. Article 4, para 5 (b) provides that the witness statement shall contain 'a full and detailed description of the facts . . . sufficient to serve as that witness's evidence in the matter in dispute'. The requirement to

12 art 22(2) and (4), art 25 ICC-Rules (2017).
13 art 28.1 and 28.2 DIS-Rules.
14 art 24 Swiss Rules.
15 art 25 (2) UNCITRAL Arbitration Rules
16 art 33 SCC Rules.
17 art 20 LCIA-Rules. See also art 14.5 LCIA-Rules on the tribunal's discretion.

provide a 'full and detailed description' advocates against the possibility to orally extend the scope of the testimony to new facts, at least not during the direct examination by the party offering that witness. This conclusion is supported by the preamble of the IBA Rules formulating the principle that each party shall 'be entitled to know, reasonably in advance of any Evidentiary Hearing or any fact or merits determination, the evidence on which the other Parties rely.' However, Article 9, para 2 IBA Rules, which enumerates possible objections to the admissibility of oral testimony, does not address the issue of 'out-of-scope' testimony. The only objection potentially covering the issue is the broadly phrased objection in Article 9, para 2 (g) allowing an arbitral tribunal to exclude oral testimony for 'considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling'. This rule allows almost any reasoning and is far from providing meaningful guidance, let alone a clear-cut answer, on the issue in question.

In December 2018, a more civil law-oriented approach to the taking of evidence was presented: the Rules on the Efficient Conduct of Proceedings in International Arbitration or so-called 'Prague Rules'.[18] The underlying concept of the Prague Rules is to move away from the Anglo-American approach more or less embodied in the IBA Rules. The Prague Rules advocate proceedings closer to the practice in civil law jurisdictions with judges/arbitrators taking a very active, if not inquisitorial, role in the evidentiary phase. With regards to the admissibility of an expansion of witness testimony, Articel 5.1 Prague Rules requests a party to identify factual witnesses indicating the 'factual circumstances on which the respective factual witness(es) intend(s) to testify.' The wording 'intends to testify' is more cautious than the one in the IBA Rules ('full and detailed description of the facts'), and again does not provide an answer to whether the expansion of oral witness testimony to new topics is permissible. Article 5.9 Prague Rules stipulates the right of the arbitral tribunal to reject questions posed to a witness if the arbitral tribunal finds them 'irrelevant, redundant, not material to the outcome of the case or for other reasons'. This wording grants ample leeway to the arbitral tribunal, and provides no guidance to the issue in question.

2.4 Case law

Finally, it might help to examine how arbitral tribunals have decided this issue. The legal reasoning might serve as guidance for arbitral tribunals, and reference to such reasoning reduces the risk for a decision to be attacked as arbitrary. A search in the Kluwer Arbitration Database produces an unambiguous result: no award or decision explicitly dealing with this issue has ever been published.

This outcome, as frustrating as it is, comes as no surprise. Arbitration proceedings are generally conducted in a confidential manner,[19] and decisions made by arbitral tribunals are rarely published. This applies in particular to decisions on purely

18 The Pragues Rules which were signed on 14 December 2018 can be found under <https://praguerules.com/upload/medialibrary/9dc/9dc31ba7799e26473d92961d926948c9.pdf> accessed 28 April 2020.

19 However, it is a misconception that arbitration proceedings are confidential by nature, ie even without the parties' agreement. Arbitration proceedings are only non-public, but each party is - in the absence of a confidentiality undertaking—free to report about the proceedings, see Joerg Risse and Max Oehm, (2015) 14 ZVglRWiss 407.

procedural issues such as the admissibility or non-admissibility of evidence, which, as a rule, do not form part of the final award. In general, they are dealt with in procedural orders, which are almost never published. Further, decisions on the expansion of oral evidence to new topics are often made by an arbitral tribunal on the spot in an evidentiary hearing, and are thus only communicated orally, without being written down in a reasoned decision. The absence of respective case law is understandable and does not mean that the issue in question is mute because practically irrelevant or legally resolved.

3. IN SEARCH FOR GUIDANCE: LEGAL SYSTEMS AND ORGANIZATION OF WITNESS TESTIMONY

Roughly speaking, two different approaches to witness questioning exist:[20] The Anglo-American system (common law) delegates the witness questioning to the parties' attorneys; the judge's role is restricted to that of an umpire ensuring that fair play rules are observed during the questioning. The continental European system (civil law) follows a more inquisitorial approach, conferring the leading role to the judge. Only once the judge has interrogated the witness are parties' counsels allowed to question him or her. Neither legal system has a direct impact on arbitral proceedings, since the arbitral law of a country (ie that at the place of arbitration) is to be kept separate from the regime governing state court proceedings.[21]

However, the concepts underlying these legal systems and the provisions which govern certain points of law might provide some argumentative guidance on how to address and solve the issue when and to what extend witness testimonies might be extended in oral hearings.

3.1 Anglo-American approach is indecisive

In English courts, witnesses testify by submitting a written witness statement which stands for their evidence in chief, and thus replaces direct testimony.[22] Voluntary exchange of written witness statements was introduced in 1981 by the Woolf Reform. The concept stemmed from the idea that it would encourage a faster and fairer outcome of the case and, by eliminating the element of surprise, would allow parties to better understand and anticipate the strengths and weaknesses of their position.[23]

Hence, the question whether the witness can expand his or her testimony in direct examination is a non-issue: there is no direct examination. However, where oral testimony is given, the judge can—in exceptional cases—grant the witness the right to amplify his or her written witness statement or to address new matters which have arisen after the written witness statement had been filed.[24] Cross-examination also is restricted to topics addressed in the written witness statement. That holds true despite the rather ambiguous wording in Civil Procedure Rule 32.11 suggesting the opposite.[25]

20 n 7, 1.256 et. seq.
21 ibid; Gary Born, *International Commercial Arbitration* (2nd edn) p. 70.
22 Civil Procedure Rule 32.5 (2) (1998), cp. White Book 2018, Civil Procedure Rule 32.5.1.
23 Lord Woolf, Access to Justice: Interim Report, London, 1995, ch 22.
24 Civil Procedure Rule 32.5 (3) (4).

In the USA, federal court proceedings are governed by the US Federal Rules of Evidence, which provide in Rule 611 (b)[26] that 'cross-examination should not go beyond the subject matter of the direct examination' but permits the judge to approve inquiry in additional matters. In state court proceedings, this restrictive approach is not always followed. Some states explicitly permit questions in cross-examination addressing new topics. To name one example, the Mississippi Rules of Evidence provide in Rule 611 (b)[27] that the 'court may not limit cross-examination to the subject matter of the direct examination'. A rather liberal approach is also followed in Canada and Australia.[28] The majority of common lawyers do not restrict cross-examination to the subject matter of direct examination.[29] At best, the approach taken by the common law is indecisive.

3.2 Civil law approach is rather liberal

In civil law court proceedings—hereinafter exemplified by referring to the German Code of Civil Procedure[30]—the scope of witness testimony is not determined by a written witness statement filed with the court prior to the oral hearing. Instead, a party may offer a witness for a certain factual topic, stating the witness' name and address plus the fact to which he or she shall testify.[31] A rather general description of the fact to be testified on is sufficient. If the judge finds the reported fact or topic to be relevant for the outcome of the case, ie because the topic is controversial between the parties and addresses a relevant element of the underlying cause of action, the judge issues an evidentiary order. In this evidentiary order, the judge identifies a certain controversial fact and the witness who is to testify on that fact.[32] The issue is often identified in rather general terms, for example by stating that the witness will testify to the question 'whether or not the parties discussed a limitation of liability in their negotiations and orally agreed on a liability cap'. Within this framework, any questions the judge or the parties' counsels might ask are permitted. If the questions reveal new details and facts not mentioned in the parties' written submissions, a party may reserve the right to comment on this new fact in a follow-up submission.

Furthermore, once the witness is testifying, the judge has the power to define the admissible scope of testimony. He or she can expand the scope of the evidentiary order in the oral hearing, even without an explicit modification of the initial evidentiary

25 Civil Procedure Rule 32.11 states that witness 'may be cross-examined on his witness statement whether or not the statement or any part of it was referred to during the witness's evidence in chief.' However, the rule is understood to allow only questions relating to the content of the witness statement, cp. White Book 2018, Civil Procedure Rule 32.11.

26 The Federal Rules of Evidence can be found under <https://www.law.cornell.edu/rules/fre/rule_611> accessed 2 May 2020.

27 The Mississippi Rules of Evidence can be found under <https://courts.ms.gov/research/rules/msrulesofcourt/Restyled%20Rules%20of%20Evidence.pdf> accessed 2 May 2020.

28 For further examples, see Ragner Harbst, *A Counsel's Guide to Examining and Preparing Witnesses in International Arbitration* (Wolters Kluwer 2015) 108.

29 ibid.

30 An English version of the German Code of Civil Procedure can be found under <https://www.gesetze-im-internet.de/englisch_zpo/> accessed 2 May 2020.

31 s 373 German Code of Civil Procedure.

32 s 359 German Code of Civil Procedure.

order.[33] This broad discretion is quite surprising when compared to the fact that a German judge cannot call a witness on his or her own initiative. The formal limit to this power is that the judge must not take over a party's responsibility to plead and prove its case, that is to say, the judge must not act overly inquisitorial.[34] While this is the formal rule, a judge's right to ask questions is in practice never challenged, and a question is never found inadmissible.

The bottom line is that in German courts, it is common practice for the judge to ask the witness any question he or she wants. And counsels are rarely stopped from asking questions, even if those are not directly related to the topic identified in the evidentiary order. If new information or facts are revealed by such interrogations, the party's right to be heard mandates that the party can comment on these new facts.[35]

3.3 Conclusion

Comparing these legal analyses produces a confusing potpourri of results. While direct testimony appears to be more or less restricted to what a party initially offered as evidence, this rule is not applied strictly and remains subject to judge-made exceptions. Further, when it comes to cross-examination, the majority of jurisdictions appear to allow the questioning of witnesses on new topics, following some kind of 'the door is wide open' approach. Judges seem free to ask the witness any question they want.

4. ANSWER: FIVE RULES—CLEAR-CUT AND TO THE POINT

Ultimately, the arbitration practitioner is faced with the result that the expansion of witness testimony is not dealt with in any set of rules relevant to arbitral proceedings. Neither case law nor soft law or a comparison of legal analyses provides coherent guidance. Despite its practical relevance, the issue appears to live in a judicial no man's land.

Hence, one is tempted to assume that an arbitral tribunal can decide as it pleases. To phrase this more politely, the question refers to the omnipotent fallback position in arbitration law, namely the arbitral tribunal's discretion in deciding procedural issues 'taking into account all relevant circumstances'. The substance remains the same. Such an 'it depends' approach, backed by a 'let us look at the present case to ensure that justice is done' reasoning, sounds both flexible and reasonable. Yet, it also sacrifices foreseeability, gives room for arbitrary decisions and favors the worst behaving/most adventurous counsel. Without clear rules and on the backdrop of the prevailing 'due process paranoia',[36] most arbitral tribunals will ultimately grant the expansion of witness testimony. Arbitrators fear that rejecting a testimony as inadmissible because 'out-of-scope' would expose the final award to the risk of an obvious challenge, namely that the party offering the expanded and now rejected witness testimony was deprived of its right to be heard. The risk-free, but also cowardly

33 Reinhard Greger,in Zöller, *ZPO* (33rd edn, Dr. Otto Schmidt-Publishing House 2020) s 369, fn 5.

34 ibid.

35 s Art. 279, para 3 German Code of Civil Procedure therefore requires that the court grants the parties the right to discuss the results of an evidentiary hearing.

36 Klaus-Peter Berger and Ole Jensen, (2026) 32 (3) Arb. Int'l 415. Forthcoming.

compromise is to admit the expanded witness testimony while giving the opposing party the right to react by offering counter-evidence, if needed in an additional hearing.

Such approach disregards the fact that the opposing party is entitled to an efficient proceeding. Flexibility in arbitration is important but it must not sacrifice efficiency, foreseeability and equal treatment of the parties.[37] It is therefore submitted that tougher and clear-cut rules are needed to deal with 'out-of-scope' testimony. Here are five proposals:

4.1 Rule No. 1: no new facts in direct testimony

Rule No. 1: 'It is inadmissible for a counsel in direct testimony to ask questions inviting the witness to comment on topics not covered by the written witness statement.'

This rule can be described as common ground since it is advocated by the IBA Rules' principle that a party must know in advance the evidence on which the other party relies on. It is compounded by the fact that requiring a witness statement to contain 'a full and detailed description of the facts' (Article 4 (5) (b) IBA Rules) becomes meaningless if the scope of testimony can be expanded during direct testimony. Moreover, both the common and civil law jurisdictions favor the approach that pleaded witness testimony cannot be expanded. While common law identifies written witness statements as evidence in chief, civil law requires parties to present witnesses for a clearly identified topic which the court then confirms to be relevant by calling the witness in an evidentiary order. Both concepts preclude that a witness is exploited to launch a surprise attack by introducing new facts in the evidentiary hearing.

Rule No. 1 'no new facts in direct testimony' is backed by numerous other reasons. First, the introduction of new facts would violate the opposing party's right to be heard. That party – in ignorance of the expanded content of the witness testimony – could not adequately prepare for cross-examination. Secondly, such expansion violates the principle of equal treatment since the other party has allowed its opponent to prepare for cross-examination by observing the unwritten rules, i.e. by clearly indicating and disclosing the scope and content of witness testimony beforehand. Third, the expansion of witness testimony renders proceedings inefficient because an additional hearing is unavoidable if the other party insists on its right to offer counter-evidence in reply to the newly introduced testimony. Fourth, there is no compelling reason for admitting the expanded testimony. Either the sudden expansion is an intentional, prearranged surprise attack, or the party did not invest sufficient diligence in finding out beforehand what 'its' witness knows and can testify to. In both instances, the fault lies with the party offering the witness and excluding the new witness testimony is the adequate consequence.

37 The duty of the arbitral tribunal (and the parties) to conduct proceedings in an efficient manner, thereby acting fairly and ensuring the parties' right to present their case is explicitly stipulated, eg in art. 22 (1), (4) ICC-Rules. For further details, see Baumann and Pfitzner (n 7) 16.577ff.

4.2 Rule No. 2: 'New facts in cross-examination only with leave of tribunal'

Rule No. 2: 'A party may cross-examine a witness on topics not covered by the witness statement only with the leave of the arbitral tribunal, to be granted due to special circumstances.'

The solution to this scenario is more difficult: The IBA Rules do not suggest a solution. Nor is the situation unambiguously clear under the common or civil law systems. In the common law system, some jurisdictions adopt the 'open approach', allowing out-of-scope questions in cross-examination, while others do not. In the civil law system, the permissible scope is determined by the court's evidentiary order, but that amounts to pure theory since court practice shows that judges rarely limit opposing counsel's right to ask questions.

A wider, more principled analysis does not lead to a clearer result. True, addressing new facts in cross-examination basically turns an opposing witness into a witness of the cross-examiner. That is hardly the idea behind cross-examination. In theory, the cross-examiner could have offered the witness himself. And if the witness was unwilling to testify, local state courts could have assisted in forcing a witness to testify.[38] That is theory. In practice, a party's access to witnesses is severely restricted if those witnesses are somehow associated with the opposing party (eg employees or consultants of the opposing party). It is, therefore, not the cross-examiner's fault or carelessness that the witness was not called to testify to the new fact at an earlier stage. By interrogating the witness, the cross-examiner is hardly launching a surprise attack; more likely, he embarks on a fishing expedition not knowing what the witness is going to answer. Accordingly, no unfair procedural advantage is sought. On the other hand, one might well ask whether the party who offered the witness in the first place has a legitimate interest in narrowing that witness's testimony down to predefined areas. This train of thought culminates in one question: assuming the witness is telling the truth (as it is always to be assumed), isn't the truth important enough to set aside notions of procedural efficiency?

'It depends' is the suitable answer. Procedural efficiency does not *per se* give way to the goal of determining the truth. The truth-finding process is always channeled by procedural rules, be that those applicable in a state court or in arbitral proceedings. And cross-examining witnesses on topics not covered by witness statements does not form part of these rules. The admittance of new evidence might significantly prolong the proceedings because the opposing party must have the right to counter the new witness evidence obtained during cross-examination. That can translate to offer counter-witnesses in a subsequent hearing. Justice is thereby delayed, and sometimes justice delayed is justice denied.

In such an ambiguous situation, it is advisable not to adopt a harsh 'once and for all' rule, but to rely on the procedural discretion of the arbitral tribunal which can consider the special circumstances of the case. The ground rule, however, remains that out-of-scope questions are not admissible in cross-examination because (i) they

38 See eg s 43 English Arbitration Act or art. 27 UNCITRAL Model Law according to which 'The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. 'For further details on the assistance of state courts in taking of evidence, see, eg Baumann and Pfitzner (n 7) 1.328ff.

contradict the typical nature and purpose of a common law-style cross-examination which is to call the witness' direct testimony into question; and (ii) they contradict the basic notion of civil law that a party bears the burden of proof for all elements beneficial for its claim/defense, entailing that such evidence must be brought forward by that party alone. Lacking access to evidence is no excuse for fishing expeditions.[39] In exceptional cases, however, that principle must give way to a discretionary decision by the arbitral tribunal.

4.3. Rule No. 3: 'The Tribunal may ask questions on new topics at any time'

Rule No. 3: 'The Tribunal can ask a witness any question at any time, regardless of whether the question relates to a topic covered in the witness statement or not.'

There is broad agreement here. Articles 4 (10) and 8 (5) IBA Rules grant the tribunal the right to call any witness, and to ask that witness any question. The same applies under Articles 2.4, 3.2 (a), 5.2, and 5.5 of the Prague Rules. The common approach is to grant arbitral tribunals extensive inquisitorial powers to establish the facts of the case. This is also directly reflected in some arbitral rules, inter alia in Article 20.8 LCIA-Rules, Article 25 (5) ICC-Rules, Article 28.2 DIS-Rules and 25 (4) Swiss Rules. Besides, this approach is also adopted in state court proceedings, as the English CPR 32.1 demonstrates.

The tribunal's unlimited right to ask questions has a price. Depending on the answer to a certain question, proceedings might be delayed significantly. The right to be heard requires to give both parties the possibility to comment on the new factual testimony, resulting sometimes in both parties offering counter-evidence which might render an additional evidentiary hearing necessary. Hence, an arbitral tribunal should exercise caution when asking questions on topics not pointed out by the parties. As a rule, it is the responsibility of the parties, and not the arbitral tribunal, to reveal the truth by offering evidence and interrogating witnesses. Asking questions that a party's counsel should have asked in the first place might expose the arbitral tribunal to accusations of bias. An arbitrator is therefore ill-advised to ask questions out of spontaneous curiosity. Instead, arbitrators should make an educated choice as to whether or not to ask questions on facts for which the witness was not initially put forward for.[40]

4.4 Rule No. 4: 'A witness may not volunteer information unsolicited'

Rule No. 4 provides: 'In his or her oral testimony, a witness may not volunteer information on issues for which he or she was not offered by a party. However, under exceptional circumstances, the arbitral tribunal may permit such testimony.'

Clearly, it is not for a witness to define the areas on which he or she testifies. This task rests with the parties and, in exceptional circumstances, with the inquisitorial power of the arbitral tribunal. A witness who testifies 'out of the blue' to issues not

39 The so-called '*Beibringungsgrundsatz*' under German procedural law, translated 'principle of providing evidence without the help of the other party or the court'.

40 An example might be a case where the arbitral tribunal suspects that the proceeding is collusively abused by both parties to camouflage a money-laundering activity.

covered by his or her witness statement may well be (ab)used by a party to launch a surprise attack. It goes without saying that such maneuver is to be forbidden. And in cases where a witness expands his or her testimony on his or her own true initiative, no legitimate interest of the parties or the arbitral system exists as such which would require continuation of such testimony. In exceptional cases, the arbitral tribunal might permit such testimony to continue; the respective interrogation would then probably be administered by questions of the arbitral tribunal and thus fall under Rule No. 3 above.

4.5 Rule No. 5: 'A party must object promptly to out-of-scope testimony'

Rule No. 5 reads: 'A party must object promptly to out-of-scope testimony. Without such timely objection, a party is barred from challenging the testimony as inadmissible. If the objection is overruled, the party may reserve the right to comment on testified issues not covered by the witness' initial written witness statement or to offer additional evidence as to that new issue.'

Psychologists have shown that the human brain cannot un-ring the bell. Once a fact has been revealed or testified to, the decision-maker is unable to ignore it completely. That holds true even if the fact is declared procedurally inadmissible. The phenomenon is commonly labeled 'WYSIATI-effect' or 'What you see is all there is' effect.[41] For an efficient proceeding, it is therefore indispensable that out-of-scope testimony is brought to the attention of the arbitral tribunal promptly, at best immediately after an inadmissible question was asked and before the problematic testimony starts. In this regard, parties' counsels are the custodians of the proceedings. They know best what facts have been addressed in the witness statements and what aspects have not been covered. Hence, if they want to protest, they have to voice this protest immediately in the evidentiary hearing. This can be done by saying 'Objection. Out-of-scope questioning', followed by an explanation. It is then for the tribunal to decide whether it allows the interrogation or related testimony to proceed. If the tribunal grants permission to do so, it is clear that the fundamental procedural right to be heard requires the consequential ruling that the protesting party may comment on the new testimony and offer counter-evidence.

An objection that is not raised timely might preclude the party from objecting at a later date in the proceedings. This is so because of the well-established duty in arbitration law to object timely, see for example Article 4 or Article 13 (2) UNCITRAL Model Law.[42]

5. BOTTOM-LINE: EARLY DETERMINATION BY THE ARBITRAL TRIBUNAL

The bottom line of this article is that out-of-scope testimony is both a significant and practically relevant problem for arbitration proceedings. It is therefore deplorable that no clear-cut rules exist on how to deal with this problem. The consequence is a potpourri of on-the-spot solutions found by various arbitral tribunals. The tendency

41 Kahnemann, *Schnelles Denken, Langsames Denken*, 112ff; Risse, NJW 2018, 2848, 2850.

42 This duty to object timely is also reflected in the arbitral rules of some institutions, such as eg art 43 DIS-Rules and art 32 LCIA-Rules.

is for arbitral tribunals to accept out-of-scope testimonies, not because it is right, but for fear that an award will be attacked on grounds of a denied right to be heard if some factual evidence was declared inadmissible. Inefficient and protracted proceedings are the consequence.

This article advocates that five clear-cut rules should govern the problem of out-of-scope testimony. Those five rules are based on reasons of procedural fairness and efficiency. Out-of-scope testimony must be avoided wherever possible to ensure transparent and fair proceedings. It is the task of the arbitral tribunal to foster procedural transparency by clarifying the rules of the game early. This can be accomplished by an early procedural order setting forth the following rules:

1. A witness may not testify to issues that are not covered by the scope of his or her written witness statement (hereinafter 'out-of-scope testimony'). In direct testimony, it is inadmissible for a party to ask questions inviting the witness to comment on topics not covered by the written witness statement;
2. A party may cross-examine a witness on topics not covered by the scope of the written witness statement only with the arbitral tribunal's leave. Such leave requires special circumstances;
3. The arbitral tribunal may ask a witness any question at any time, regardless of whether the question relates to a topic covered by the scope of the written witness statement;
4. When questioned, a witness may not volunteer information on issues not covered by the scope of his or her written witness statement. Under exceptional circumstances, the arbitral tribunal may permit such testimony;
5. A party must object promptly to out-of-scope testimony. Without such timely objection, a party is barred from challenging the testimony as inadmissible. If the objection is overruled, the party may reserve the right to comment on newly testified issues not covered by the scope of the written witness statement or to offer additional evidence as to those new issues.

In some proceedings, no witness statements are filed. That is rather common in arbitration proceedings adopting a civil law approach. In such instances, out-of-scope testimony has to be defined differently, in particular by referring to the scope of the tribunal's evidentiary order or by referring to a party's formal offer to take evidence. Having said that the essence of the aforementioned rules remains identical.