Arbitrator Questioning: Sphinx or Skeptic?

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Editor's Note

The authors have undertaken a timely and thoughtful investigation of the often challenging question of what constitutes appropriate intervention by an arbitrator in the arbitration process and, specifically, intervention in such critical tactical areas as issue setting, witness identification and the scope of witness questioning.

In tackling this issue, the authors have provided an extensive contextual assessment of the scope of decision maker intervention in other proceedings and countries including judicial and quasi-judicial proceedings both in common law and civil law jurisdictions. Their paper also concisely sets out the applicable rules and guidelines that would typically govern the arbitration process and evidence taking, correctly noting that these usually allow for quite extensive intervention in support of the arbitrator's role in controlling the conduct of the proceeding generally. Their paper also provides an interesting insight into the more inquisitorial process embraced in European jurisdictions which really bear no resemblance to the North American practice.

While noting that the issue of appropriate intervention is not without debate, the authors sensibly advocate in favour of an active yet measured role. They understandably stop short of advocating in favour of an arbitrator introducing new legal issues or witnesses or areas of questioning not otherwise agreed to by the participants to the arbitration, thus recognizing that ultimately choices with respect to these matters most properly rest with the parties themselves.

However, a proactive role is endorsed where it is undertaken in a manner that is free of bias and where such intervention by an arbitrator is consistent with other established judicial principals including the right of a decision maker to ask questions of witnesses which served to clarify the record; ensure that the arbitration process is conducted in an efficient and orderly manner; and is free from irrelevancy and witness harassment.

Whether faced with the dilemma of an over reaching decision maker in the context of an arbitration or in the context of other judicial or quasi-judicial proceedings, this paper provides an excellent articulation of the

applicable principals and provides a user friendly template for assessing when objection by counsel is warranted.

1. INTRODUCTION

Arbitrators are often nominated in construction arbitrations because of perceived subject matter expertise. This allows counsel to 'forget the wind up and make the pitch' in presenting technically challenging elements of their cases. This same level of subject matter expertise, however, allows arbitrators to formulate searching questions of both fact and expert witnesses. In complex construction arbitrations, arbitrator questioning usually occurs quite naturally during the course of an evidentiary hearing, without incident. Are there limits to tribunal questioning in complex construction arbitrations? We examine this question by examining a mature body of law that has developed on the issue of judicial questioning, and then turn to the less evolved area of arbitrator questioning.

2. JUDICIAL QUESTIONING

In this section we contrast the roles of common law and civil law judges when it comes to questioning witnesses. Two classic cases are commonly cited on this issue. The first is *Yuill v. Yuill*,[1] in which Lord Greene M.R. held that:

> It is, of course, always proper for a judge — and it is his duty — to put questions with a view to elucidating an obscure answer or when he thinks that the witness has misunderstood a question put to him by counsel. If there are matters which the judge considers have not been sufficiently cleared up or questions which he himself thinks ought to have been put, he can, of course, take steps to see that the deficiency is made good. It is, I think, generally more convenient to do this when counsel has finished his questions or is passing to a new subject. It must always be borne in mind that the judge does not know what is in counsel's brief and has not the same facilities as counsel for an effective examination-in-chief or cross-examination.
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> In cross-examination, for instance, experienced counsel will see just as clearly as the judge that, for example, a particular

[1] [1945] 1 All E.R. 183 (C.A.).

> question will be a crucial one. But it is for counsel to decide at what stage he will put the question, and the whole strength of the cross-examination may be destroyed if the judge, in his desire to get to what seems to him to be the crucial point, himself intervenes and prematurely puts the question himself.

The second classic case is *Jones v. National Coal Board.*[2] In *Jones*, the judge had taken the examination of the witness out of the hands of leading counsel for part of one day and from his junior counsel the next morning. During the cross-examination, the judge intervened on several occasions to protect the witness from what he thought was a misleading question, and to bring out points in favour of the witness's point of view. When the judge became impatient with the course the cross-examination was taking, he took over and brought it to a quick close. Lord Denning held as follows:

> No one can doubt that the judge, in intervening as he did, was actuated by the best motives. He was anxious to understand the details of this complicated case, and asked questions to get them clear in his mind. He was anxious that the witnesses should not be harassed unduly in cross-examination, and intervened to protect them when he thought necessary. He was anxious to investigate all the various criticisms that had been made against the board and to see whether they were well founded or not. Hence he took them up himself with the witnesses from time to time. He was anxious that the case should not be dragged on too long, and intimated clearly when he thought that a point had been sufficiently explored. All those are worthy motives on which judges daily intervene in the conduct of cases and have done for centuries.
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> Nevertheless, we are quite clear that the interventions, taken together, were far more than they should have been. In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England, however, a judge is not a mere umpire to answer the question "How's that?" His object above all is to find out the truth, and to do justice according to law...

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[2] [1957] 2 All E.R. 155 (C.A.).

Canadian case law of the same vintage is to the same effect. In *Boran v. Wenger*,[3] Riddell, J.A., speaking for the same court, said:

> We think that it is the right of a litigant to have his case submitted to the trial tribunal as his counsel thinks advisable and in the interests of his client — being governed, of course, by the rules governing trial which are well-established and recognized; the trial judge has no right to take the case into his own hands, and out of the hands of counsel.
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> We do not for a moment suggest that the trial judge has not the right — it may often be the duty — to obtain from the witnesses evidence in addition to that brought out by counsel — but this is adjectival, to clear up, to add to, what counsel has brought out.

Two decades later, in *Majcenic v. Natale*,[4] the Ontario Court of Appeal held as follows:

> I turn now to a consideration of the general conduct of the trial. The trial Judge on many occasions took over the examination of the various witnesses and in so doing intervened to the extent that he assumed the duty and responsibility of counsel. I can appreciate that on occasion it is not only desirable but necessary that the trial Judge question the witnesses for the purpose of clarification of the evidence and I do not consider that he is solely an umpire or arbitrator in the proceedings. There is a limit however to the intervention and when the intervention is of such a nature that it impels one to conclude that the trial Judge is directing examination or cross-examination in such a manner as to constitute possible injustice to either party, then such intervention becomes interference and is improper.
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> Questions by the trial Judge amounting to cross-examination during the examination-in-chief of a witness destroys the effectiveness of the later cross-examination by counsel and is quite likely to be prejudicial to the party whose witnesses are being so examined and creates an atmosphere which may well be prejudicial to a fair trial.
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> [Emphasis added]

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[3] [1942] O.W.N. 185 (C.A.).
[4] [1968] 1 O.R. 189 (C.A.).

Majcenic was followed in 1994 in *Griffin v. Murnaghan*.[5] In *Griffin*, the Ontario Court of Appeal ordered a new trial because "a reasonable person, sitting in the courtroom and simply observing the process, might well have gained the impression that the hearing was not impartial". In *Griffin*, the effect of the trial judge's intervention in cross-examination had been to wipe out any progress which may have been made by the defence in cross-examining.[6]

In *Golomb v. College of Physicians & Surgeons (Ontario)*,[7] the Ontario Divisional Court set aside a discipline committee's decision. The evidence of a witness for the College in that case covered about 95 pages of transcript. Direct questioning of the witness by members of the committee covered almost 30 pages of transcript. Sitting in review of the discipline committee's conduct and decision, the Ontario Divisional Court held that with very few exceptions, those questions gave the appearance of either challenging the witness on any evidence that he gave which might appear to help the appellant, or of attempting to bolster the College's case in areas where it appeared to the particular member of the Committee to be weak. The members of the Committee engaged in vigorous cross-examination of the only medical witness called by the College. In so doing, it was held, the committee deprived the appellant of a fair and impartial hearing.

In another appeal from a discipline committee, a decision was set aside where the committee engaged in a cross-examination of the lawyer accused of misconduct that lasted three times as long as the cross-examination by the Barristers' Society.[8] In terms of transcript space, the questioning by the three members of the panel spanned 75 pages, compared to 26 pages for the examination-in-chief and 27 pages for cross-examination. Importantly for the purposes of this paper, the extent of intervention was held by the Nova Scotia Court of Appeal to have amounted to a breach of the right to a fair trial and therefore a breach of natural justice.

However, short of breaching the parties' right to a fair trial, modern judges no longer need to be what Justice Lamer, writing for the Supreme Court of Canada in *R. v. Brouillard*,[9] called "Sphinx" judges, sitting and

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[5] 1994 CarswellOnt 2195 (C.A.).
[6] The test was also adopted by the Saskatchewan Court of Appeal in *Sloboda v. Sloboda*, 2007 SKCA 15.
[7] (1976), 12 O.R. (2d) 73 (Div. Ct.).
[8] *Solicitor "X" v. Barristers' Society (Nova Scotia)*, 1998 NSCA 170.
[9] [1985] 1 S.C.R. 39 (S.C.C.).

observing silently while the proceedings unfold before them. As Justice Lamer so succinctly put it:

> We now not only accept that a judge may intervene in the adversarial debate, but also believe that it is sometimes essential for him to do so for justice in fact to be done. Thus a judge may and sometimes must ask witnesses questions, interrupt them in their testimony and if necessary call them to order.
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> [Emphasis added]

Brouillard was a criminal case. The trial judge asked one key witness 60 questions, almost as many as the Crown, and interrupted her more than 10 times as she gave her testimony. During the accused's own testimony, the trial judge interrupted defence counsel almost 20 times and the accused over 60 times, actively cross-examining the accused and asking him twice as many questions as his own counsel. Again, importantly for the purposes of our discussion, the Supreme Court of Canada held that while the judge had a duty to intervene for justice to be done, he had to do so in such a way that justice was *seen* to be done. In *Brouillard*, the judge had crossed the line, the judgment was set aside and a new trial was ordered.

The *Brouillard* case was cited with approval by the British Columbia Court of Appeal in *R. v. Darlyn*,[10] in which Bird J.A. circumscribed the limits of judicial participation as follows:

> The nature and extent of a Judge's participation in the examination of a witness is no doubt a matter within his discretion, a discretion which must be exercised judicially. I conceive it to be the function of the Judge to keep the scales of justice in even balance between the Crown and the accused. There can be no doubt in my opinion that a Judge has not only the right, but also the duty to put questions to a witness in order to clarify an obscure answer or to resolve possible misunderstanding of any question by a witness, even to remedy an omission of counsel, by putting questions which the Judge thinks ought to have been asked in order to bring out or explain relevant matter . . .
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> [Emphasis added]

[10] [1947] 3 D.L.R. 480 (B.C. C.A.).

Recent jurisprudence on this issue in the United Kingdom has adopted the 'sphinx' metaphor in describing this issue. In *Jemaldeen v. A-Z Law Solicitors*,[11] Munby L.J. held as follows:

> 22. Ordinary civil proceedings in this country [. . .] are adversarial not inquisitorial. The duty of the judge is to hear and determine the issues raised by the parties as set out in the pleadings. But, as Denning L.J. observed at 63 [*in Jones v. National Coal Board*], the judge
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> > "is not a mere umpire to answer the question 'How's that?' His object, above all, is to find out the truth, and to do justice according to law."
>
> 23. In pursuit of that fundamental objective, the judge is not required to sit silent as the sphinx. Appropriate intervention while a witness is giving evidence, even while the witness is being cross-examined, is not merely permissible but may be vital.
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> [. . .]
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> 24. So there is nothing objectionable, for example, in a judge intervening from time to time to make sure that he has understood what the witness is saying, to clear up points that have been left obscure, to make sure that he has correctly understood the technical detail, to see that the advocates behave themselves, to protect a witness from misleading or harassing questions, or to move the trial along at an appropriate pace by excluding irrelevancies and discouraging repetition. Indeed, it is, as Denning L.J. recognised at 65, his duty to do so.
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> 25. But there is, of course, a difficult and delicate balance to be held. The judge must not, as it is often put, descend into the arena.
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> [Emphasis added]

Complaints about improper conduct by the recorder in *Jemaldeen* were rejected. While there were numerous interruptions during the cross-examination, they were justified in light of the manner in which the cross-examination was conducted. Judicial interruptions served either to protect the witness from being interrupted before he could complete his

[11] [2013] C.P. Rep. 8 (C.A.).

answer, or to clarify an answer he had given. The following serves as an example of a proper request for clarification:

> 38. At one point during his cross-examination Mr. Hadi said that "more than 90 per cent of the work was complete".
>
> "THE RECORDER: Is it 90 per cent of the files were complete or most of the files were . . .
>
> A: Yes, 90 per cent of the files were complete, your Honour.
>
> Q: Most of the files were 90 per cent complete.
>
> A: Ninety per cent of the files were complete, your Honour."
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> This is criticised as an inappropriate intervention which caused the witness to change his answer. I do not agree. It was a perfectly proper intervention by a judge seeking to make sure that he had correctly understood the witness. The same can be said of many other interventions of which similar complaint is made.

Another complaint raised in *Jemaldeen* was that the recorder interrupted one party significantly more than the other party. That in itself, the court held, did not indicate bias, since it was not a question of the recorder giving one counsel more leeway than the other, but rather a case where the recorder legitimately felt that he had more occasion to intervene with the one counsel than the other.

The Ontario Court of Appeal held in 2015 in *Ross v. Bacchus*[12] that:

> . . . judicial interventions in the course of a trial can, by their content, nature, number or a combination of the three, result in a miscarriage of justice. The interventions considered as a whole may reveal a reasonable apprehension of bias or result in an impermissible interference with the proper role of counsel. In either event, the interventions will destroy the appearance of justice, an essential element in any trial.

In *Ross*, however, even though some of the trial judge's interventions were held to be unnecessary and may have suggested impatience with counsel, they did not actually compromise the apparent fairness of the trial.

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[12] 2015 ONCA 347.

The Supreme Court of Canada has recently identified the underlying issue as being one of impartiality and bias, holding that where judicial questioning reaches such a degree as to suggest a reasonable apprehension of bias, the questioning will be improper. In 2015 in *Yukon Francophone School Board, Education Area No. 23 v. Yukon Territory (Attorney General)*,[13] the Supreme Court of Canada stated that "impartiality is a cardinal virtue in a judge" and that "public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so". The Court held that this strong presumption of judicial impartiality is not easily displaced.[14] This would seem important for our discussion relating to privately appointed arbitrators who, by contract, are deemed by the parties to be independent and impartial. A similarly strong presumption of arbitrator impartiality (although contractually based) would seem appropriate.

The test for a reasonable apprehension of judicial bias therefore requires a finding of a real likelihood or probability of bias. A trial judge's individual comments will not be taken in isolation.[15] Allegations of judicial bias will generally not succeed unless the impugned conduct, taken in the full context of not only the trial decision but the full proceeding,[16] links a particular determination to prejudicial judicial conduct. In *Yukon Francophone School Board*, the Supreme Court of Canada stated this test as follows:

> . . . what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.[17]

The test is virtually the same in the United Kingdom. The House of Lords' wording of the test was as follows:

> The appropriate test in determining an issue of apparent bias was whether the fair-minded and informed observer, having

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[13] 2015 SCC 25.

[14] *Cojocaru (Guardian ad litem of) v. British Columbia Women's Hospital & Health Center, (sub nom. Cojocaru v. British Columbia Women's Hospital and Health Centre)* [2013] 2 S.C.R. 357 (S.C.C.).

[15] *Arsenault-Cameron v. Prince Edward Island*, [1999] 3 S.C.R. 851 (S.C.C.).

[16] Cited from *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 (S.C.C.).

[17] *Committee for Justice & Liberty v. Canada (National Energy Board)* [1978] 1 S.C.R. 369 (S.C.C.); *Yukon Francophone School Board, Education Area No. 23 v. Yukon Territory (Attorney General)*, 2015 SCC 25.

> considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased.[18]

The common law test for judicial intervention, therefore, appears to come down to three deceptively simple questions. However intrusive the judge's questioning, can it still be said that:

1. Justice was done and seen to be done?
2. The facts were fairly found?
3. The parties were able to make their cases and meet the cases made against them?

The situation of the common law judge may now be contrasted with the situation of the civil law judge.

The situation of civil law judges is substantially different. It is important to note at the outset, however, that there really is no such thing as a single, coherent civil law approach to judicial questioning. A French judge's approach, for example, would probably be more in line with that of her Canadian common law colleague than it would be with the conduct of a German inquisitorial judge which we review in some detail below.[19]

It is interesting to compare the German model as it contrasts so sharply with the common law model we have been discussing. The German model of civil law "remains deeply entrenched in an inquisitorial logic",[20] such that under the German model, it is the court rather and not the parties that guides the course of evidence, and the questioning of witnesses is generally done by the judge, with counsel consigned to merely asking follow-up questions.[21] German civil procedure is governed by the *Code of Civil Procedure* (*Zivilprozeßordnung: ZPO*) from January 30, 1877. This Code regulates the course of actions in private conflicts that do not concern administrative, social and fiscal matters, which are dealt with in special courts.[22] Civil procedure is divided into two parts, the procedure leading to a judgment (*Erkenntnisverfahren*)[23] and the enforcement of that judgment (*Vollstreckungsverfahren*).[24]The two fun-

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[18] *Porter v. Magill*, [2002] 2 A.C. 357 (U.K. H.L.).
[19] Gabrielle Kaufmann-Kohler, "Globalization of Arbitral Procedure" (2003) 36 *Vanderbilt Journal of Transnational Law* 1313 at 1331.
[20] Teresa Giovannini, "The Continental European Perspective and Practice of Advocacy", in Doak Bishop, Edward Kehoe, eds., *The Art of Advocacy in International Arbitration* (New York: Juris, 2010) 499 at 500.
[21] Markus Wirth, "Ihr Zeuge, Herr Rechtsanwalt! Weshalb Civil Law Schiedsrichter Common-Law —Verfahrensrecht Anwenden?"(2003) 1:1 SchiedsVZ 9.
[22] §13 of the Courts Jurisdiction and Organization Code (*Gerichtsverfassungsgesetz — GVG*).
[23] §§ 1 to 703ZPO.

damental principles that lead to judgment are "party disposition" (*Dispositionsmaxime*) and "party presentation" (*Verhandlungsmaxime*"), against which is counterbalanced "judicial investigation"(*Untersuchungsmaxime*). While party presentation affirms that it is up to the parties to present facts and evidence to the court,[25] and party disposition affirms that it is the parties who initiate and end proceedings and determine the subject of the proceedings,[26] judicial investigation in §139 ZPO has been called the *Magna Carta* of German civil procedure.[27] It essentially enacts as law the philosophy that so offended Lord Denning in *Jones v. National Coal Board.* Under §139 ZPO, the judge has the right, indeed the duty to intervene from the outset to demand disclosure of all relevant facts, to direct the parties' pleadings, to ask them to supplement their pleadings as and when necessary, and take an active, leading and dominant role in the trial itself:

> Direction in substance of the course of proceedings
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> (1) To the extent required, the court is to discuss with the parties the circumstances and facts as well as the relationship of the parties to the dispute, both in terms of the factual aspects of the matter and of its legal ramifications, and it is to ask questions. The court is to work towards ensuring that the parties to the dispute make declarations in due time and completely, regarding all significant facts, and in particular is to ensure that the parties amend by further information those facts that they have asserted only incompletely, that they designate the evidence, and that they file the relevant petitions.
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> (2) The court may base its decision on an aspect that a party has recognisably overlooked or has deemed to be insignificant, provided that this does not merely concern an ancillary claim, only if it has given corresponding notice of this fact and has allowed the opportunity to address the matter. The same shall apply for any aspect that the court assesses differently than both parties do.
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> (3) The court is to draw the parties' attention to its concerns regarding any items it is to take into account ex officio.

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[24] §§ 704 to 945 ZPO.

[25] F. Baur, W. Grunsky, *Zivilprozeßrecht*, 9th ed. (Neuwied: Luchterhand, 1997) 30; A. Stadler, "The Law of Civil Procedure", in W.F. Ebke, M.W. Finkin, eds., *Introduction to German Law* (The Hague: Kluwer Law International, 1996) 357.

[26] *Ibid.*

[27] W. Zeidler, "Evaluation of the Adversary System: As Comparison, Some Remarks on the Investigatory System of Procedure" (1981) 55 *Australian Law Journal* 390.

> (4) Notice by the court as provided for by this rule is to be given at the earliest possible time, and a written record is to be prepared. The fact of such notice having been given may be proven only by the content of the files. The content of the files may be challenged exclusively by submitting proof that they have been forged.
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> (5) If it is not possible for a party to immediately make a declaration regarding a notice from the court, then the court is to determine a period, upon the party having filed a corresponding application, within which this party may supplement its declaration in a written pleading.[28]

A judge's duty under the German system is to compel full disclosure of relevant facts and documents and to direct pleadings "to discover the truth, however deeply it may be concealed, to clarify the case, and to lead the parties towards a full and effective exposition of their respective legal positions."[29] What this means in practice is often less than certain. It is generally agreed that §139 ZPO requires the judge to demand that unclear or incomplete statements of claim be clarified or corrected;[30] and to intervene if a party has not presented all facts through oversight, inadvertence or mistake.[31] If, for example, a plaintiff in a proceeding governed by §139 ZPO claims damages for failure of a piece of mechanical equipment, but fails to claim that the supplier has actually guaranteed the equipment to be free from defects, the trial judge will order the plaintiff to make such a claim or, if such a claim cannot be made, dismiss the action.[32]

Under the German inquisitorial system it is the court and not counsel that "opens" the case by introducing and outlining the facts and legal issues at stake, and the scope of the inquiry that will be undertaken. Potential witnesses are identified by the parties, §373 ZPO, but may be summoned by the court *ex officio*.[33] Neither the parties themselves nor their counsel are permitted to contact witnesses prior to trial. According to the Rules issued by the German Bar Association, the "questioning of witnesses out of court is advisable only when special circumstances

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[28] §139 ZPO.
[29] E.J. Cohn, *Manual of German Law*, v.I, 2 (London: The British Institute of International and Comparative Law, 1968-71), cited in W. Zeidler, *supra* note 27 at 394.
[30] V. Hermisson, "Richterlicher Hinweis auf Einrede—und Gestaltungsmöglichkeiten" (1985) 43 *Neue Juristische Wochenschrift* 2558.
[31] A. Stadler, *supra* note 25 at 364.
[32] F. Baur, W. Grunsky, *supra* note 25 at 32.
[33] ZPO §273 II No. 4.

justify it. . . [and then] even the appearance of attempting to influence the witnesses must be avoided."[34] In Germany any judge would be very reluctant to rely on a witness who had discussed the case with counsel before the trial.[35] The court and not counsel requests the witnesses' personal data before asking them to tell the court what they know about the case. The order of witnesses is determined by the court and there is no prohibition on the recall of witnesses and no concept equivalent to the "splitting" of a case. It is counsel who are the 'sphinxes' during the trial, not the court.

The role of counsel under an inquisitorial system is much reduced and has been said to amount to that of a "listener" who only intervenes if the judge somehow leaves the established guidelines.[36] Counsel in Germany generally remain mostly inactive when it comes to questioning witnesses.[37] Any requests by counsel for clarification of the evidence being given by a witness is directed toward the bench and then by the bench to the witness.[38] In fact, questioning of a witness by the parties or their counsel under an inquisitorial system can be regarded as indirect criticism of the court.[39] There is no inherent right to cross examine witnesses in the German system.[40] While all this may sound alarming to common law counsel, it is important to keep in mind German courts, unlike their common law counterparts, tend to view witness testimony with serious reservations as to its probative value in any event:

> Few differences between common law and civil law procedure are as striking as the attitudes toward the testimony of witnesses. In civil law systems, the judge is expected to have read the dossiers of documents submitted by each party in advance of the hearing. The dossiers may include the written statements of witnesses, or witnesses may appear at the hearing to give an unprompted narrative and to be questioned by the judge. The role of the lawyers for the parties is generally limited to suggesting to the judge questions that should be

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[34] John H. Langbein, "The German Advantage in Civil Procedure" (1985) *University of Chicago Law Review*, online: < http://www.law.harvard.edu/publications/evidenceiii/articles/langbein.htm > .
[35] N. Horn, H. Kötz, H.G. Leser, *German Private and Commercial Law: An Introduction* (Oxford: Clarendon Press, 1982) 46.
[36] See, for example, Wolf-Dieter Treuer, Katrin-Elena Schönberg, Thomas A. Treuer, *Leitfaden zur Zeugenvernehmung: Vom Beweisantrag bis zur Bewertung der Zeugenaussage* (München: C.H. Beck, 2011) at 84.
[37] Ralph Oliver Graef, "Die Vorbereitung und Durchführung des Haupttermins im deutschen und englischen Zivilprozß " (1996) 95 *ZVglRWiss* 92 at 106.
[38] §396 II ZPO, § 397 I.
[39] W. Zeidler, *supra* note 27 at 393.
[40] F. Baur, W. Grunsky, *supra* note 25 at 188; A. Stadler, *supra* note 25 at 366.

> asked. The idea of a witness being presented by the lawyer for a party in the question-and-answer format of common law direct examination is vaguely distasteful to civil lawyers. And the idea of a witness being required to agree or disagree with statements by a lawyer in the format the common law calls cross-examination is positively repugnant to them.
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> [. . .]
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> The common law tends to be sceptical that the sun has risen unless a witness can be found to testify under oath that he saw it do so. The civil law believes that the best evidence comes from documents. While witness testimony can be crucial in a civil law case, the civil law generally gives far less weight to live testimony than the common law, and treats the testimony of witnesses affiliated with or employed by a party with considerable scepticism.[41]

3. ARBITRATOR QUESTIONING

International arbitral rules give the tribunal virtually complete control over the procedure governing the arbitration, including the examination of witnesses, but without guidelines as to how that control might or ought to be exercised. The *IBA Rules on the Taking of Evidence in International Arbitration* (the "*IBA Rules*") are among the most prevalent evidentiary rules used in international commercial arbitration today. In fact, a senior arbitrator has stated that "in the last few years, I cannot remember a single case where these rules were not used as guidelines, and I am now talking about cases in jurisdictions all literally all over the world".[42]

Article 8(3)(g) of the *IBA Rules* provides that "with respect to oral testimony at an Evidentiary Hearing, the Arbitral Tribunal may ask questions to a witness at any time." The *Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration* clarifies this rule as follows:

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[41] Siegfried H. Elsing, John M. Townsend, "Bridging the Common Law — Civil Law Divide in Arbitration" (2002) 18:1 *Arbitration International* 59 at 62.

[42] Pierre A. Karrer, "The Civil Law and Common Law Divide: An International Arbitrator Tells it Like He Sees it" (February/April 2008) *Dispute Resolution Journal* 72 at 74.

> Order of Witnesses
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> Articles 8.3 (a), (b) and (c) set out the basic order of witnesses followed in many cases: claimant's witnesses, followed by respondent's witnesses, and experts. For each witness, testimony is first presented by the party offering that witness, followed by examination by the opposing party and then an opportunity for re-examination by the presenting party. Usually, any re-examination is limited to new matters raised in the previous oral testimony. Many arbitral tribunals ask their questions only towards the end, except for questions designed to help the process along or to make a witness feel comfortable. However, arbitral tribunals, particularly in more complex cases, are increasingly adapting these procedures to provide for better examination of the issues in dispute. Article 8.3(g) confirms the arbitral tribunal's ability to pose questions at any time. Arbitral tribunals often hear oral argument by counsel for the parties, which may be a part of, or may be separate from, the evidentiary hearing. Therefore, Article 8.3(f) confirms the discretion of arbitral tribunals to vary this order of proceeding in the manner best suited for the circumstances of that case. For example, the provision allows the arrangement of testimony by particular issues or that witnesses be questioned at the same time and in confrontation with each other about particular issues (witness conferencing). Such techniques may enable arbitral tribunals better to understand the contradictions in testimony and to be able to determine the weight and credibility to be given to the testimony. Ultimately, the IBA Rules of Evidence leave it to the arbitral tribunal and the parties to determine how best to proceed.
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> [Emphasis added]

The *2014 Rules of the London Court of International Arbitration* specifically provide for the tribunal's right to question witnesses:

> 19.2 The Arbitral Tribunal shall organise the conduct of any hearing in advance, in consultation with the parties. The Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing, including its date, form, content, procedure, time-limits and geographical place. As to form, a hearing may take place by

> video or telephone conference or in person (or a combination of all three). As to content, the Arbitral Tribunal may require the parties to address a list of specific questions or issues arising from the parties' dispute.
>
> 20.8 Any witness who gives oral testimony at a hearing before the Arbitral Tribunal may be questioned by each of the parties under the control of the Arbitral Tribunal. The Arbitral Tribunal may put questions at any stage of such testimony.
>
> [Emphasis added]

The *Arbitration Rules of the Chartered Institute of Arbitrators* provide that "witnesses, including expert witnesses, may be heard under the conditions and examined in the manner set by the arbitral tribunal".[43] Rule 28.2 of the UNCITRAL rules is identical.

Although it is difficult to locate any example of this broad grant of procedural jurisdiction being exercised, Canon IV.E of the *AAA Code of Ethics of Commercial Arbitrators* states that:

> When the arbitrator determines that more information than has been presented by the parties is required to decide the case, it is not improper for the arbitrator to ask questions, call witnesses, and request documents or other evidence, including expert testimony.

Even prominent rules that do *not* expressly address questioning of witnesses by arbitrators contain provisions that leave little doubt as to their ability to do so. Rule 25 of the *ICC Rules of Arbitration* may serve as an example:

> (3) The arbitral tribunal may decide to hear witnesses, experts appointed by the parties or any other person, in the presence of the parties, or in their absence provided they have been duly summoned.
>
> (4) The arbitral tribunal, after having consulted the parties, may appoint one or more experts, define their terms of reference and receive their reports. At the request of a party, the parties shall be given the opportunity to question at a hearing any such expert.
>
> (5) At any time during the proceedings, the arbitral tribunal may summon any party to provide additional evidence.

[43] *Arbitration Rules of the Chartered Institute of Arbitrators*, Rule 28.2.

It has been observed authoritatively, however, that generally arbitrators limit their questions to witnesses to those they consider necessary to clarify testimony or to obtain information they consider necessary to make a ruling:

> It would be unusual for arbitrators to adopt a long line of questioning with the objective of attacking the credibility of a witness. However, there may be cases where specific questions are designed to test credibility when a case turns on whether or not the testimony of a witness is reliable.[44]

In this regard, the College of Commercial Arbitrators has issued the following guidelines to arbitrators:

> Questioning Witnesses
>
> Arbitrators should carefully consider when and to what extent they become involved in the questioning of witnesses.
>
> Arbitrators have varying views on the propriety of questioning of witnesses. Some prefer to ask questions of witnesses or counsel wherever they arise in the hearing, taking care not to become too intrusive or adversarial or to usurp the role of counsel. Other arbitrators prefer to allow counsel to fully develop the evidence and to refrain from asking clarifying questions until examination and cross-examination have been concluded (except in cases in which arbitrators may be taking the lead in questioning expert witnesses or other witnesses appearing as a panel).
>
> If an arbitrator perceives that questioning by counsel leaves a significant gap in evidence, there is an issue whether the arbitrator should seek to close that gap. In this regard, some arbitrators believe it is entirely appropriate, and consistent with institutional rules and applicable law, to attempt to fill such evidentiary gaps by propounding neutral questions that are designed simply to assist the arbitrator in arriving at the truth and achieving a full understanding of the relevant facts. Other arbitrators generally consider it a breach of neutrality to call attention to gaps in evidence or to ask for more evidence. This view sometimes is based on the belief that counsel may have a strategic reason for not pursuing a line of inquiry or not

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[44] N. Blackaby, C. Partasides, *Redfern and Hunter on International Arbitration*, 5th ed. (Oxford: Oxford University Press, 2009) at 6.206.

> cross-examining on a particular point and that it is not the arbitrator's role to assist counsel in completing the evidence. At a minimum, however, most arbitrators will ask questions necessary to assess evidence already presented, for example, to ask foundation questions after a witness has testified to an important fact without a foundation having been established. In that instance, the arbitrator is not necessarily filling a gap but instead is seeking to determine the weight of evidence already offered. This approach differs from asking, "Counsel, you indicated you only have one or two more questions before concluding, but we note you have not yet said anything about the amount of monetary damages you believe might be appropriate in this case." Although there is an understandable reluctance of arbitrators to see a party lose as a result of its counsel's failure to adequately produce evidence, the point can be reached at which a question propounded by the arbitrator might be viewed by opposing counsel as a biased hint to produce such evidence.[45]
>
> [Emphasis added]

In *Lummus Global Amazonas S.A. v. Aguaytia Energy del Peru S.R. Ltda.*, a party to an ICC arbitration attempted to have the award set aside on the basis, among other things, of allegedly inappropriate questioning of witnesses by the tribunal.[46] A District Court in Texas held that the tribunal's questioning had been aimed at assisting the panel in understanding the issues and was appropriate to reaching an efficient and fair resolution of those issues:

> In *Fort Hill Builders, Inc. v. Nat'l Grange Mut. Ins. Co.*, 866 F.2d 11 (1st Cir.1989), the court held that an arbitrator's "alleged interruptions and interjections of comments or explanations favorable to [one party] or hostile to [the other party] to the point where [that party's] lawyer felt he was facing an adversary" were insufficient to show evident partiality. *Id.* at 13. The plaintiff argued that the arbitrator's comments were "so strong and frequent that they must have influenced the other arbitrators." *Id.* The court emphasized that the plaintiff did not argue that he "lacked an opportunity to oppose or correct [the arbitrator's] statements or to argue his own views."

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[45] James M. Gaitis, ed., *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration*, 3rd ed. (New York: Juris, 2014) at 209.
[46] 256 F.Supp.2d 594 (S.D. Tex., 2002).

> *Id.* The court held that the complaint should have been raised at the proceeding itself. *Id.* at 13. The court did not rely only on waiver, but also rested on the fact that the arbitrators' decision was unanimous, stating "[t]hat the other panel members were ultimately persuaded by [the arbitrator's] reasoning rather than [the plaintiff's counsel] does not constitute bias." *Id.*
>
> In the present case, as in *Fort Hill Builders,* LGA did not raise any complaint during the hearings as to Jaffe's interruptions, questions, or comments. Instead, LGA waited until it received the adverse draft interim award. (Docket Entry No. 21, Ex. 14, p. 1). LGA should have objected earlier had it felt prejudiced during the proceeding itself. LGA's failure to do so is not, however, the sole basis for this court's rejection of this argument as grounds to vacate the award. As in *Fort Hill Builders,* LGA has not alleged any wrongdoing by the other two members of the panel. *See Fort Hill Builders,*866 F.2d at 14. LGA has not shown that it lacked the opportunity to respond to Jaffe's comments and questions. A review of the transcript reveals that each of the panel members asked questions of the witnesses, often vigorously. The hearings involved highly technical and detailed subjects, about which the arbitrators had acknowledged substantive expertise and experience, as well as experience as arbitrators. There were a number of sharp disputes and disagreements. The transcript shows that a number of participants interrupted, questioned, and commented. The record does not support LGA's characterization of Jaffe's behavior as improper or as prejudicial.

Questioning of witnesses by a tribunal with acknowledged substantive expertise, even if pursued extensively and vigorously, does not appear to violate the principles of equal treatment and fairness[47] as long as the questions are reasonably based on the facts, are aimed at uncovering or clarifying the witness's evidence and are not intended to intimidate or harass the witness. In these circumstances, it appears that even aggressive questioning will not give rise to an apprehension of bias.[48]

The limits beyond which an arbitrator must not go in questioning witnesses appear to be those circumscribed by a reasonable apprehension of

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[47] Nathan D. O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (London & New York: Routledge, 2013) at 8.66.
[48] *Ibid.* at 8.67.

bias. It universally understood that it is a fundamental principle in arbitration that arbitrators must be impartial,[49] and that that impartiality must be maintained throughout the arbitral process.[50] In *MDG Computers Canada Inc. v. MDG Kingston Inc.*,[51] the Ontario Superior Court of Justice summarized the law on arbitrator's bias as follows:

> 14 The test for determining whether a reasonable apprehension of bias exists in an arbitrator is whether an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that the arbitrator is seized with an attitude or predilection for bias, whereby the arbitrator must be taken to have prejudged the matter: *Simcoe Condominium Corp. No. 78 v. Simcoe Condominium Corp. Nos. 50, 52, 53, 56, 59, 63 & 64*, 2006 CarswellOnt 909 (Ont. S.C.J.); *Szilard v. Szasz* (1954), [1955] S.C.R. 3 (S.C.C.).
>
> 15 This standard or test is objective and no actual or intended bias need be established. As stated by the Supreme Court of Canada in *Szilard v. Szasz*, *supra*, at pp. 6-7:
>
> > It is the probability or the reasoned suspicion of biased appraisal and judgment, unintended though it may be, that defeats the adjudication at its threshold. Each party [to an arbitration], acting reasonably, is entitled to a sustained confidence in the independence of mind of those who are to sit in judgment on him and his affairs.
> >
> > Especially so is this the case where he has agreed to the person selected.
>
> 16 Apprehension of bias must be based on substantial grounds. The courts will not entertain "mere suspicion" or take into account the subjective views of the parties in making such determination. *Simcoe Condominium Corp. No. 78 v. Simcoe Condominium Corp. Nos. 50, 52, 53, 56, 59, 63 & 64*, *supra*.

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[49] N. Blackaby, C. Partasides, *Redfern and Hunter on International Arbitration*, 5th ed. (Oxford: Oxford University Press, 2009) at 4.72.
[50] *Ibid.* at 4.79.
[51] 2013 ONSC 5436 (S.C.J.).

We seem to be back where we were with common law judicial questioning, therefore, answering the following three questions objectively:

1. Was justice done and seen to be done?
2. Were the facts fairly found?
3. Were the parties able to make their cases and meet the cases made against them?

4. IS IT SAFER FOR AN ARBITRAL TRIBUNAL TO LEAVE RELEVANT QUESTIONS UNASKED?

One would hope the answer to such a question would be a resounding "no". Across systems of private law, it seems that provided the questioning does not give rise to the appearance of one-sidedness or unfairness, permissible areas of questioning for an arbitrator include the following:

1. Ensuring that the arbitrator has understood what the witness is saying.
2. Clearing up points that have been left obscure.
3. Ensuring that the arbitrator has correctly understood technical detail.
4. Maintaining an orderly, professional approach by counsel.
5. Protecting witnesses from misleading or harassing questions.
6. Moving the arbitration along at an appropriate pace.
7. Excluding patent irrelevancies and discouraging repetition.

The better point of view, it would seem, is to consider it both an arbitrator's right and an arbitrator's duty to ask questions in these seven areas, particularly when the arbitrator has been chosen for subject matter expertise.

5. WHAT IF LEGITIMATE TRIBUNAL QUESTIONING RAISES NEW ISSUES?

What if a line of questioning brings to light a possible limitations defence or a notice issue? It is generally understood in common law jurisdictions that issues are either raised by the parties or not at all. The United States Supreme Court, for example, has repeatedly held that "in our adversarial system of adjudication, it is up to the parties, and not the court, to raise the affirmative defence. . . As this Court has made clear, 'the determination of what may be useful to the defence can properly and effectively be made only by an advocate'. . . More specifically, in the context of unpleaded affirmative defences, this Court has held that 'trial

courts must be cautious about raising [an affirmative defence] *sua sponte*, thereby eroding the principle of party presentation so basic to our system of adjudication."[52] Similarly in Canada, an affirmative defence not pleaded is not before the court and cannot be raised in argument,[53] nor can a court raise such a defence in a default situation.[54]

There is good reason for this. A judge cannot know the case as well as the parties, nor will a judge know a party's reasons for not asserting a limitations defence, to stick to that example. A party may prefer to have a matter settled on the merits once and for all rather that have it dismissed on a limitations ground.[55] It has therefore been argued that while *sua sponte* decision making "might be tolerable for certain perfunctory, housekeeping-type matters, with respect to more significant matters, a court's discretion in this area probably should be exercised only in the most exceptional of circumstances".[56] The same point has been made in slightly different terms by leading commentators in the area:

> A more difficult question is what objective limits there may be on the powers of arbitrators to take initiatives to obtain evidence of fact and law. One must distinguish between actions of arbitrators which will attract deterrent legal consequences and those which will not. Inasmuch as there are no such consequences, it follows that arbitrators have acted within their powers.[57]

If a court should not directly raise an issue not raised by the parties except in extraordinary circumstances, there is no reason why it should be allowed to do so by way of questioning witnesses. If a line of questioning by a tribunal does result in new issues being raised, it is submitted that the tribunal ought to give the parties an opportunity to address the issue, for example by allowing the parties to do brief redirect and re-cross examinations on any such question asked, i.e. any question that elicits a change in evidence. Of course, by then, the damage is done. Without at least providing an opportunity to address the new issue, the tribunal might run the risk of having its award set aside on a number of grounds, including *ultra petita*.[58]

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[52] *Lassiter v. City of Philadelphia, Pa.*, 134 S.Ct. 902 (2014); *Dennis v. U.S.*, 384 U.S. 855 (1966).
[53] *D.S. Park Waldheim Inc. v. Epping*, 1995 CarswellOnt 1715 (Gen. Div.).
[54] *McDiarmid Lumber Ltd. v. Letandre*, 2003 MBQB 99.
[55] B.S. Shannon, "Some Concerns About *Sua Sponte*" (2012) 73 *Ohio State Law Journal Furthermore* 28 at 35.
[56] *Ibid.*
[57] P. Landolt, "Arbitrators' Initiatives to Obtain Factual and Legal Evidence" (2012) 28:2 *Arbitration International* 173 at 190.
[58] *Ibid.* at 192.

6. WOULD PARTY-APPROVED WITNESS CONFERENCING CHANGE THIS ANALYSIS?

Witness conferencing involves the appearance of two or more witnesses together before the tribunal to give evidence and be examined in the same session. Witness conferencing is most often done in the context of expert witnesses, but has been used more recently for fact witnesses as well, although the latest edition of Redfern and Hunter still states that "where fact witnesses are concerned, it is a somewhat adventurous path for an arbitral tribunal to take".[59]

Witness conferencing, by its nature, tends to reduce the role of the lawyer. A comment on expert witness conferencing which would appear to be equally valid for fact witness conferencing describes the diminished role as follows:

> The debate takes place among the informed and specialized witnesses; it is expert knowledge v. expert knowledge and no longer the lawyer's questioning technique v. the witness' expert knowledge.[60]

That does not mean, however, that counsel assumes the role of a mere bystander:

> Moreover, counsel will not normally be excluded entirely, but will have an opportunity to direct questions to the witnesses. However, more than one of the witnesses may wish to respond to any particular question, which may generate further interventions from yet other witnesses, leading to a full blown debate. It can be a frustrating process for the common law advocate which would wish to have greater control and opportunity to pin a particular witness down on a specific point of detail.[61]

While this approach obviously changes the dynamic of witness questioning, it is submitted that it should not broaden the parameters within which tribunal members ought to stay when conducting the conference. The results of overreaching on the part of the tribunal would be no

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[59] N. Blackaby, C. Partasides, *Redfern and Hunter on International Arbitration*, 6th ed. (Oxford: Oxford University Press, 2015) at 6.180.

[60] W. Peter, "Witness Conferencing" (2002) 18 *Arbitration International* 47.

[61] A. Sinclair, "Differences in the Approach to Witness Evidence Between the Civil and Common Law Traditions", in D. Bishop and E.G. Kehoe, eds., *The Art of Advocacy in International Arbitration*, 2nd ed. (Huntington: Juris, 2010) 23 at 46.

different in a witness conference context than they would be in normal direct and cross-examination.

7. CONCLUSION

Our unsurprising conclusion is that an arbitrator chosen for subject matter expertise is better in the role of skeptic than Sphinx, providing that active skepticism does not become active advocacy. As to the "right or duty" issue, we can do no better than quote Primo Levi: more dangerous are common men, the functionaries, ready to believe and act without asking questions.