Memorials and witness statements: The need for reform[1]

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Introduction

Witness statements are a core feature of international commercial arbitral practice. They are not going away any time soon. Over the last few decades, witness statements have moved from a place on the periphery of international arbitral practice – principally used by common law practitioners informed by their own domestic court procedure – to become an indispensable arrow in the quiver of documents used by parties and their legal representatives to win their cases. Or are they indispensable? More recent practice suggests that, in their current form, they might not be. Witness statements have been transmogrified from a short and curt recitation of a factual witness' memory of the events the subject of an arbitration, into a vehicle for the making of legal submissions, commenting on documents (even documents the witness had never seen before the arbitral proceedings commenced) and speculating on all manner of things, including the conduct of other parties.

In order to promote arbitral efficiency, reduce costs, and enable the tribunal and parties to focus on the real issues in dispute, this trend needs to be addressed. Witness statements should return to something closer to their original purpose, namely giving the tribunal an account of what the particular witness heard, saw or thought at the time of the events the subject of the arbitration. In this effort, international arbitration practitioners have something to learn from commercial litigation, in particular reforms to

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witness statement procedure recently introduced in the Business and Property Courts of England and Wales.[3] Those reforms seek to streamline the content and purpose of witness statements, so that they give the judge what is needed – no more and no less – to decide the factual issues in dispute. While we do not propose that everything being done in England be adopted as part of international arbitral practice, we propose some measured changes which are aimed at increasing arbitral efficiency, reducing costs, and allowing everyone involved to focus on the real factual issues in dispute. These are set out in a proposed procedural order appearing as an Appendix to this paper.

In parallel, we propose that changes to the practice of preparing witness statements occur in the wider context of a broader move towards the memorial approach to the presentation of cases. By taking reformed witness statements and a greater adoption of memorials hand in hand, arbitration practitioners can save their clients costs, spend less time preparing cases, and present their cases more convincingly to tribunals.

What is a witness statement?

The question, "What is a witness statement?" might be considered normative. Indeed, the arguments contained in this article might be cited as proof that there is no fixed content to the definition of 'witness statement'. Nevertheless, for the purposes of this paper it is useful to venture a definition.

Before doing so, it is necessary to define a 'witness'. A witness is a person who gives evidence to an arbitral tribunal to assist the tribunal in finding facts necessary to render an award to dispose of the controversy before it. Conceivably, any person may be a witness,[4] although witnesses are usually drawn from employees or directors of the parties. Typically, a distinction is drawn between witnesses of fact and expert witnesses. In the common law tradition, this distinction depends on the rule against opinion evidence, namely that evidence of an opinion is not admissible, unless it is given by someone qualified by experience or training to give that opinion.[5] Such a person is referred to as an expert witness. Lay witnesses, on the other hand, classically give evidence about what they have perceived, whether by sight, hearing, or touch. A lay

[3] *Civil Procedure Rules 1998* (Eng), Practice Direction 57AC.

[4] IBA Rules on the Taking of Evidence in International Arbitration (2020), article 4(2).

[5] E.g. *Civil Evidence Act 1972* (UK), section 3; *Evidence Act 1995* (NSW), sections 76(1), 79.

witness' evidence may go beyond this, to describe events or circumstances based on what they have been told by others. For example, a chief financial officer might give evidence about the pattern of share ownership of a company, based on information provided to her by the company's registrar (which may be a third party). The balance of this article is concerned with lay witnesses (hereinafter, "**witness**").

A witness statement is the document through which a witness gives his or her evidence-in-chief about the factual issues in dispute in an arbitration. The witness statement should include some promise (whether an oath or similar) by the witness that the evidence is true. Depending on the procedure adopted in an arbitration, the party which did not call the witness may cross-examine the witness. That cross-examination need not be confined to the matters set out in the witness statement; other issues in the arbitration which are not addressed in the witness statement may be the subject of questions to the witness during cross-examination. If cross-examination occurs, the party calling the witness may re-examine the witness.

However, in some cases, cross-examination will not occur, and the whole evidence of that witness will be contained in the witness statement together with any responsive witness statement – no more and no less.

Origins of witness statements

It used to be the case that a witness in international arbitration would give evidence orally. Initially the party calling the witness would conduct examination-in-chief, followed by cross-examination and then re-examination. In those cases, witness statements had no role to play.

This followed litigation practice. To take a domestic example, the default position in England before 1995 was that that a witness of fact would give all of his or her evidence orally at trial.[6] The same presumption applied in New South Wales before 2001.[7] In 1992 in England, witness outlines had to be exchanged before trial, and were to contain a precis of the oral evidence which a witness would give during evidence-in-chief. In

[6] *Rules of the Supreme Court 1965* (Eng), Order 38, rule 1.

[7] *Supreme Court Rules 1970* (NSW), Part 36, rule 2.

1995, it became mandatory to exchange witness statements before trial, and they stood as the witness' only evidence-in-chief.[8]

However, that was only if witness evidence was permitted at all. There had been a general reluctance – particularly on the part of civilian practitioners – to allow witness evidence in international arbitration, on the basis that the contemporaneous documentary record provided much better evidence of what occurred than any witness testimony (whether oral or written), and so an arbitral tribunal ought to base its award on the documentary record as much as possible.[9] On this basis, some international arbitral practice tended to exclude witness evidence altogether.[10]

This general reluctance no doubt had its origins in civilian domestic court practice. While recognising the dangers of generalisation, in contradistinction to the common law tradition's preference for oral evidence going back to the 12th century,[11] the civilian approach has been to decide commercial disputes based on the documents available to the parties and presented to the court, with very little, if any, witness evidence (whether oral or written). This was attended by considerable doubt about the value of evidence from witnesses who were employees of a party to a dispute.

Witness statements in arbitration today

Whatever the origins of those varying approaches, arbitral practice long ago became unmoored from the practice of domestic court litigation, and has developed a procedure of its own, albeit one which varies from case to case, and can change depending on the rules adopted, the institution (if any) administering the arbitration, the agreement of the parties, the arbitrators, and local law, amongst other matters.

As part of the development of a lingua franca of international arbitral procedure, witness evidence and therefore witness statements have become the norm in commercial arbitration. It is a rare case whether neither makes an appearance. The use of witness

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[8] *Practice Direction (Civil Litigation: Case Management)* [1995] 1 WLR 262, [3]; *Rules of the Supreme Court 1965* (Eng), Order 38, rules 2A(2) and 2A(7).

[9] UNCITRAL, 9th session, Committee of the Whole (II), 9th Meeting, 16 April 1976 (A/CN.9/9/C.2/SR.9).

[10] Pietrowski, "Evidence in International Arbitration" (2006) 22 *Arbitration International* 373, 394.

[11] Traceable to the Assize of Clarendon (1166).

statements is well recognised in both arbitral rules,[12] and the soft-law guidelines which inform much of international arbitration practice.[13]

Witness statements: Benefits

If witness evidence is to be used at all, then witness statements are intended to serve a number of important purposes which seek to achieve arbitral efficiency and reduce delays and costs.

First, they are intended to reduce the length of a hearing by avoiding oral examination-in-chief.[14] This can be particularly time-consuming because evidence-in-chief is generally led by non-leading (i.e. open) questions. Witness statements reduce costs for the parties by shortening the amount of time spent at a hearing. It assists the tribunal in preparing the award, by setting out the evidence-in-chief in a coherent narrative, rather than having to rely on a transcript which may contain questioning, the structure and content of which is not always easy to follow. It also avoids debate, and objection, about leading questions in examination-in-chief.

Secondly, it gives the parties fair and advance notice of the evidence which the other side intends to rely on at the hearing, and in making its submissions to the tribunal. This often means that the written submissions in memorials, or made immediately before the hearing commences (often called 'opening submissions'), can take account of that evidence, which means that the parties' arguments are more focussed, and useful for the tribunal in preparing for the hearing.[15]

Thirdly, witness statements give the principal actors from the parties a means by which they can set out – in their own words – their view of the story to date and the matters which are the subject of the dispute.

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[12] E.g. International Chamber of Commerce Rules of Arbitration 2021, article 25(5); London Court of International Arbitration Arbitration Rules 2020, article 20.3; UNCITRAL Arbitration Rules 2013, article 27(2), Singapore International Arbitration Centre Rules 2016, article 25.4.

[13] IBA Rules on the Taking of Evidence in International Arbitration (2020), article 4(2).

[14] Angoura, "Written Witness Statements in International Commercial Arbitration" [2017] *International Arbitration Law Review* 106, 107.

[15] Born, *International Commercial Arbitration* (3rd edn, 2020), 2425 §15.08[X].

Fourthly, it may encourage settlement of the dispute before the hearing, because the parties will have a better understanding of the evidence to be deployed against them. This can happen in at least two ways. The legal representatives will assess the witness statements to determine the effect they have on their respective prospects of success, and advise their clients accordingly. From the parties' point of view, it gives the principal actors an insight (which perhaps they did not have before) into how their opponents view the case and their drivers in carrying on the dispute. Those fresh perspectives – legal and personal – may incline the parties towards a settlement which might not otherwise have been possible. We do not wish to overstate the ability of witness statements to achieve a settlement where one could not be reached before; but it remains the case that there are at least some cases where they will achieve this end.

Fifthly, they allow cross-examination to be more focussed because the cross-examiner can prepare more specifically, knowing in advance what the evidence-in-chief will be, thereby being able to focus on the key points for questioning. This means that the real issues necessary for the client to prove are the subject of cross-examination.[16]

Witness statements: Drawbacks

While witness statements seek to serve these important objectives, they have taken on some features which make them less useful than they ought to be for the witness, the parties, counsel and the tribunal. In setting out these lamentable features, it should be noted that this article does not engage with the issue of the reliability, or otherwise, of human memory and the relative utility of witness evidence more generally from that perspective, which has been covered elsewhere.[17] Nor does it engage with the issue of witness preparation or proofing, which occurs at varying degrees of intensity and intervention, usually depending on the legal tradition from which the lawyers hail. The extent to which witnesses should be prepared or coached to give evidence is beyond the scope of this paper, but is an important topic in its own right.[18]

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[16] Landau QC, "Tainted Memories: Exposing the Fallacy of Witness Evidence in International Arbitration", Kaplan Lecture, 17 November 2010, 7.

[17] Landau, 13-24; International Chamber of Commerce Commission on Arbitration and ADR, *The Accuracy of Fact Witness Memory in International Arbitration* (2020). For recent judicial consideration of this issue, see *Mattingley v Bugeja* [2021] EWHC 3353 (Ch) at [25] ff.

[18] See Landau, 9-12.

In the hands of counsel, witness statements have been transmogrified from a written account of the evidence which a witness would give in his or her own words under oral questioning before a tribunal, to an unhappy amalgam of legal submission, documentary commentary and quotation, and speculation, with some direct experiential evidence included (but not always).[19] A prototypical witness statement in a contemporary international arbitration bears little resemblance to what a witness would actually say before the tribunal if giving evidence, despite this being their intended (and sole) purpose.[20] In this form, witness statements are vehicles for lawyers to make legal submissions even though they have ample opportunity to do that through: (i) pleadings, (ii) written submissions, and (iii) oral argument before the tribunal.[21]

The problems with this transmogrification are several fold.

First, and most problematically, witness statements cease to bear much resemblance to the witness' own words. They have become a creature of lawyers' minds, as they try to craft the evidence to fit the case they seek to advance for their clients, rather than providing the tribunal with facts they can use to resolve the dispute.[22]

This has the consequence that witness statements become less useful because the tribunal places less weight on them, knowing they are heavily crafted by lawyers, rather than representing the witness' own evidence in their own words. So, a great deal of effort, time and expense is devoted to creating documents which ultimately are of diminished utility to the tribunal and the parties. Indeed, in this form, witness statement may actively harm the party's case because so little weight is placed on them that ultimately the party has little, if any, witness evidence of substance telling the party's story before the tribunal.

Secondly, the propensity to quote from, and comment upon, contemporaneous documents does very little to advance a party's case. Documents generally speak for themselves, such that witness commentary on them is unlikely to assist the tribunal in

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[19] For similar criticism, see *Mansion Place Limited v Fox Industrial Services Limited* [2021] EWHC 2747 (TCC), [37].

[20] Veeder, "Introduction" in Levy & Veeder (eds) *Arbitration and Oral Evidence* (2004), 7-9; Sanders, *Quo* Vadis *Arbitration?* (1999), 262; Landau QC, 5.

[21] Hirsch and Reece, "Witnesses in International Arbitration" (2017) 4 *International Business Law Journal* 315, 324; Hunter, "The procedural powers of arbitrators under the English 1996 Act" (1997) 13 *Arbitration International* 345, 353.

[22] HM Courts and Tribunals Service, *Factual Witness Evidence in Trials before the Business & Property Courts: Implementation Report of the Witness Evidence Working Group* (July 2020), [10].

understanding what the documents say. The tribunal can, as well as any witness or lawyer, read and interpret the contemporaneous documents. Doubtless, a party's legal representatives can be expected to be able to advance the interpretation of a document most favourable to that party via oral and written submissions. It is not common, but is sometimes the case, that a witness' commentary on those documents – whether in the words of the lawyer or of the witness – is going to lend further weight to the party's preferred interpretation of a document.

Thirdly, the difficulties outlined above are compounded when a witness comments on a document which they saw for the first time when it was shown to them in preparing their witnesses statement, some months or years after the arbitration commenced, and certainly well after the date the document came into existence. The commentary of a witness on an email which they never received, or a document which they did not see before the dispute arose, is unlikely to have any probative value – let alone relevance – in helping the tribunal or the parties understand what the document means or in resolving any dispute about the effect of the document.[23]

Fourthly, witness statements have become another vehicle for legal submission.[24] Arbitral procedure contains existing, and sufficient, opportunities for legal representatives to advance legal submissions. Depending on the procedure adopted, these include pleadings, opening written submissions, oral submissions at the beginning, during and at the end of a hearing, and post-hearing written submissions. It is hardly necessary to make those same submissions by putting words into a lay witness' mouth,[25] thereby showing the tribunal that the witness clearly did not prepare their own statement, introducing unnecessary wasted time and costs, and, most importantly, diminishing the value and credibility of the witness' evidence overall.

These deficiencies – largely the fault of lawyers – have not only rendered the witness statement a document of limited utility in deciding international commercial disputes. They have actively hampered the arbitral process, and inhibited the efficient disposition of cases submitted to tribunals. That is because they are another document which needs to be drafted, read and digested by lawyers on all sides, and responses prepared, with

[23] See *JD Wetherspoon plc v Harris* [2013] 1 WLR 3296, 3304 [39].

[24] Hunter "The Procedural Powers of Arbitrators under the English 1996 Act" (1997) 13 *Arbitration International* 345, 353.

[25] See *JD Wetherspoon plc v Harris* [2013] 1 WLR 3296, 3304 [39].

all of it to be considered by the tribunal. The tribunal then has to spend time assessing the witness' evidence, and dealing with it in the award. All of this introduces significant and unnecessary wastage of time and cost, making the arbitral process slower and more expensive than it needs to be.

But there is another way. Witness statements can be prepared so that they serve, rather than hinder, the resolution of arbitral disputes.

Proper purposes of witness statements

In contrast to what they have become, witness statements should return to their roots, namely as the evidence-in-chief a witness would give, in the witness' own words. With this in mind, we suggest that witness statements have four principal purposes in international arbitration.

First, a witness statement should be an account of the witness' recollection of events, as the witness remembers them. As much as possible, they should be written in the witness' own words, acknowledging that lawyers will assist in the preparation of the statement.

Second, as a whole, the witness statements should fill the gaps in the factual evidence left by the documents. In modern disputes, much of the evidence will be documentary, and that documentary evidence will cover a significant number of the facts in dispute. This itself can become a burden, because of the volume of documentary evidence. But it is often the case that the facts in issue will need to be the subject of witness evidence. That may be because additional commentary is required, to supplement what a document says because the document does not convey the whole story. It may be because there is no document addressing a particular issue, so witness evidence is needed to resolve that issue. It may be because part of the case revolves around a conversation which was not the subject of documentary record. It may be because an issue in dispute is a person's state of mind or understanding of certain subject matter. For example, in a claim alleging loss based on a misrepresentation, the way in which a representation was understood by the representee may be relevant to determine whether the representation conveyed the meaning alleged, and whether that representation was misleading or not. That will often require the witness evidence of both the representor and representee to resolve the issue in dispute, along with other relevant evidence. In short, witness statements should contain what a witness perceived, no more, no less.

Third, a witness statement can be a useful vehicle for a party to tell their side of the story. A party will often choose a relatively senior employee or director to give an account to the tribunal of how that party sees the circumstances which are the subject matter of the dispute, and what went wrong to cause the parties to be in an arbitration. This will help set the scene for the tribunal, and understand why the parties think they have ended up in a dispute. This purpose should not, however, be taken too far. A witness statement of this type should not become a vehicle to repeat legal submissions, or craft the story in the way the lawyers think it would be best presented. Rather, as much as possible, it should represent the witness' own words so that the witness can explain – on behalf of the party – their view of the factual background and the resulting dispute.

Fourth, witness statements from lay witnesses can provide an important foundation for expert witnesses to form their opinions and prepare their reports. Without an understanding of the factual background as understood by each party's witnesses, the experts can experience difficulty in providing an opinion which actually assists the tribunal to resolve a dispute. Without the factual foundations, their opinions may be so general or unspecific as to be unhelpful. Say there is a dispute as to whether the sum to refurbish an office amounts to a contingent liability. The dispute turns on when the liability will need to be incurred. The tenant might say that, in its long experience of renting offices for its business, offices need to be refurbished every five years. The landlord might say that, in its long experience of owning and leasing offices, a refurbishment is indeed needed every five years, but that in this particular case, because the previous refurbishment was done to such a high standard, and with additional cost being incurred, it will last for eight years without a refurbishment. An accountancy expert asked to opine on whether there is a contingent liability for refurbishment will need to know, inter alia, the timeframe for refurbishment. Without that knowledge, any opinion the accountant gives risks being so general as to be meaningless, whereas if he is aware of the competing timelines put forward by the parties' lay witnesses, he will have a surer grounding on which to provide an opinion.

We suggest that those are the four principal purposes of witness statements. Now we return to the practical steps needed to achieve them.

Proposed changes – memorial approach

The vices which afflict the modern witness statement cannot be addressed by reforming this document on its own. A wider approach to procedure needs to be embraced. The

problems identified with witness statements above are: (i) over-lawyering, (ii) extensive commentary and quotation from documents, (iii) legal submissions, and (iv) speculation. These problems can be addressed by adopting a memorial approach, rather than the more traditional common law pleading approach.

Broadly, there are two principal approaches to the preparation of material for a final hearing in international arbitration: the memorial approach and the pleading approach.[26] These are not so much polar opposites as points on a spectrum. The flexibility of international arbitration allows the tribunal and parties to craft a procedure somewhere along the spectrum which best serves to resolve the specific dispute between them efficiently and justly. Whether that flexibility is suitably employed, or employed at all, is another challenge.

Stated generally, the memorial approach arises from the civil law tradition where all documentary evidence, witness evidence and legal submissions are presented to the tribunal and opponents in one submission. The pleading approach derives from the common law tradition[27] where the parties set out their factual position in written pleadings, followed sequentially by discovery/disclosure, witness statements, expert reports (if any), and finally written opening submissions or skeleton arguments before the oral hearing.

This article does not seek to debate the merits and demerits of either a pleading or a memorial approach; that debate has been addressed elsewhere.[28] However we do contend that a memorial approach will often assist parties in achieving efficiency in the presentation of their cases and will assist the arbitral tribunal in reviewing the documentary record in preparation for a hearing, as compared with the pleadings

[26] Born, 2422, §15.08 [V].

[27] At least since 1875, when the Judicature Acts 1873-1875 abolished the forms of action in England, and introduced factual pleadings: *Supreme Court of Judicature Act 1873* (36 & 37 Vict, c. 66) and *Supreme Court of Judicature Act 1875* (38 & 39 Vict, c. 77).

[28] Shah and Stewart-Ornstein, "Memorials v pleadings: How to pick the winning approach for arbitration" (2019) *Practical Law Arbitration Blog*; Bedey, "Pleadings v Memorials – what's the difference" (2014) *Lexis Nexis Dispute Resolution Blog*; ACICA Practice & Procedures Board, *ACICA Explanatory Note: Memorials or Pleadings?*, Australian Centre for International Commercial Arbitration (2020).

approach.[29] Consequently a memorial approach will make witness statements more useful to the tribunal.

We would suggest that tribunals and parties adopt an approach closer to a memorial approach where the parties are required to exchange simultaneously, or sequentially, memorials containing: lay witness statements; documents on which they rely; and any legal submissions. Those legal submissions may come close to a common law pleading in that they will set out the factual and legal matters that the party alleges in the dispute but go further by advancing legal argument by reference to cases and other legal authorities and the facts as drawn from the documents and witness statements. This should be followed by the exchanges of responsive memorials, containing the same types of documents. Whether it is necessary to have a further reply round of memorials will largely be governed by the nature of the dispute, however such a third round can often be avoided.

It is also helpful to include in a memorial a chronology (which can be cross-referenced to contemporaneous documents) and a *dramatis personae*. Ideally, the parties should co-operate to produce a consolidated single version of each of these documents, pointing out, if necessary, where there are any points of divergence between them. If these documents are kept purely factual – and not seen as yet another vehicle for the parties to argue their respective cases – they can assist the tribunal and parties to understand the factual matrix of the dispute.

It is possible to incorporate at some point in this process a procedure for document disclosure where the parties identify documents relevant to the dispute (whether helpful or adverse to their case) and disclose those to the other parties. Documents which are disclosed need not necessarily form part of a memorial or the documentary record which goes before the tribunal; it will be up to the parties to deploy disclosed documents in support of their case.

The obvious omission from the memorials is expert evidence. Given that the factual substrata need to be broadly stated before experts are able to give an opinion to assist the tribunal in resolving the dispute, we suggest that in most cases expert evidence be

[29] Cavan and Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd edition, 2013), 494.

deferred until after at least the first exchange of memorials so that the experts know the factual matters in issue and are able to provide an opinion which assists the tribunal.

The principal advantage of a memorial approach is that each of the witness statements and the legal submissions can make cross-references to the contemporaneous documents on which the parties rely. In this way it is possible to avoid witnesses quoting from the contemporaneous documentary record, thereby allowing the tribunal to review the relevant documents in the round, rather than on a selective basis as chosen by the witnesses (or the parties' lawyers). Modern software allowing hyperlinking between electronic documents, and indeed, individual paragraphs or sections of documents, has made such a cross-referencing exercise much easier (and more useful) than it formerly was. It also makes it easier for the parties and the tribunal to navigate around the documents by clicking through the hyperlinks.

If our proposal of the memorial approach is adopted, it will avoid the problem of witness statements containing extensive quotation from, and commentary on, the contemporaneous document records. Such commentary can be made in the legal submissions which the parties submit at the same time as the witness statements. It will also cause the parties to deprecate the approach of repeating their legal submissions in the witness statements because both documents will be submitted to the tribunal and to the other side at the same time.

A memorial approach also has the advantage of forcing the parties to focus on their case at an early stage and the issues which are in dispute. The risk with a pleading approach is that the parties advance factual cases, without having carried out a thorough review of the documents or obtaining proofs of evidence from witnesses. Therefore, the case as stated in the pleadings risks being modified to suit the contemporaneous documents once reviewed, or the witness statements, once prepared. It will also force the parties to make their case based on their own contemporaneous documents they hold, rather than holding out hope that their case can be advanced through the disclosure of documents held by the other side.

One potential downside of a memorial approach is the possibility that a witness statement will engage with matters of fact which are not contested. With a memorial approach, the factual issues in dispute are not clear until the respondent files its first memorial. Therefore, the claimant's witnesses are at risk of preparing long statements to support allegations made in the legal submissions, only to find that some of those

allegations are accepted by the respondent, rendering the claimant's witness statements unnecessarily long. In our view, that risk is tempered by the fact that if our proposals for the reform of witness statements are adopted, the claimant will rely on the contemporaneous documents to prove factual issues, rather than through witness statements.

A proposed solution

Drawing on some of the reforms implemented in the Business and Property Courts in England, we propose that limits and guidelines be imposed on the preparation of witness statements. Not all of the English proposals should be adopted; some are cumbersome, and of themselves introduce unnecessary cost and time in the preparation of witness evidence. It is not, however, the purpose of this note to critique the approach the judiciary has taken in England and Wales towards the laudable objective of confining witness statements to their proper purpose. Rather, in line with the English changes, we propose the following principles be applied in the preparation of witness statements, and be reflected in procedural orders:

(i) subject to providing background context, the witness statement must only contain matters relevant to the issues in dispute of which the witness has personal knowledge;

(ii) the witness statement must not contain any supposition, speculation, conjecture, or commentary on another person's knowledge;

(iii) the witness statement must not contain argument;

(iv) there should not be a recitation of the documentary record, or quotations from contemporaneous documents;

(v) witnesses should only refer to documents which they received or were aware of before the dispute arose, and only if it is necessary to refer to the document; and

(vi) the witness statement should identify where documents have been used to refresh the witness' memory (whether those documents have been referred to or not in the witness statement).

By adopting both a memorial approach and the principles above, the tribunal and parties will go a long way towards reducing the unnecessary time and cost, as well as the inefficiency, presently attending the preparation of witness evidence, and presenting the case to the tribunal.

The Appendix to this paper contains a portion of a draft procedural order, which can be used in regulating the preparation of witness evidence.

Conclusion

Tribunals want to hear from factual witnesses. They shape the tribunal's understanding of the contours of the dispute, while helping the tribunal discharge their principal duty: delivering an enforceable, fair award deciding the dispute and doing justice between the parties. Parties want witness evidence to go before tribunals. Witnesses serve to put a human face on what are often technical or commercial disputes, as well as telling a party's story to the tribunal. But the principal vehicle for this – the witness statement – is not serving these objectives. It has become a product of lawyers' eager drafting, seeking to advance, at every opportunity, the parties' case as the lawyers perceive it best presented. Witness statements, as commonly deployed in international commercial arbitration, do not help the tribunal, the parties, the lawyers or the witnesses themselves contribute to the resolution of a commercial dispute, which, after all, is the principal endeavour on which everyone embarks when participating in an arbitration.

Efficient dispute resolution by arbitration can be served by having witness statements return to their proper purpose. If all participants focus on preparing witness statements which tell the witness' story as they perceive it, without formulaic and artificial recitation of documents or incantation of legal arguments they are not qualified to advance, then they can help tribunals decide disputes more efficiently, and with less cost for all involved. If this is done in the context of a memorial approach so much the better, because, in that way, all of the relevant material will be put before the tribunal at the same time, in a coordinated fashion, allowing the tribunal and the parties to understand better the factual scenarios, the legal arguments, and the documentary evidence presented by each side.

APPENDIX – DRAFT PROCEDURAL ORDER DEALING WITH WITNESSES

1. Exchanges of Parties' Cases

1.1 The Claimant is to submit its Statement of Claim on [date].

1.2 The Respondent is to submit its Statement of Defence and Counterclaim on [insert date]. The Statement of Defence and Counterclaim and accompanying evidence should be responsive to the Statement of Claim.

1.3 The Claimant is to submit its Reply and Defence to Counterclaim, if any, on [insert date]. The Reply and Defence to Counterclaim and accompanying evidence should be responsive to the Statement of Defence and Counterclaim.

1.4 The Respondent is to submit its Rejoinder and Reply to Counterclaim, if any, on [insert date]. The Rejoinder and Reply to Counterclaim and accompanying evidence should be responsive to the Reply and Defence to Counterclaim.

1.5 The Claimant is to submit its Rejoinder to the Reply to Counterclaim, if any, on [insert date]. The Rejoinder to the Reply to Counterclaim and accompanying evidence should be responsive to the Rejoinder and Reply to Counterclaim.

1.6 Each of the pleadings referred to in the immediately preceding paragraphs are to be accompanied by the documents sought to be relied upon by the party submitting the pleading, legal arguments advanced by the party, factual and legal exhibits, and factual witness statements (excluding expert reports which are to be filed in accordance with Part [insert]). Those documents and factual witness statements are to comply with the provisions contained in Part [insert references to provisions addressing factual witness statements, expert reports and the general form of documents].

2. Factual Witness Statements

2.1 The Parties shall file and exchange any factual witness statements on or before [date].

2.2 The Parties shall file and exchange any responsive factual witness statements on or before [date].

2.3 The purpose of witness statements is to set out the matters of fact which a witness would give if they were called to give oral evidence at a hearing. In accordance with that purpose, each witness statement shall:

(i) commence with a summary of matters intended to be established by the witness;

(ii) be as concise as the case allows;

(iii) subject to providing background context, only contain matters relevant to the issues in dispute of which the witness has personal knowledge and should not contain any supposition, speculation, conjecture, or commentary on another person's knowledge;

(iv) not contain argument;

(v) not be a recitation of the documentary record and shall not contain quotations from documents (except where absolutely necessary);

(vi) subject to leave of the Tribunal, only refer to documents where the witness has seen the document before the commencement of the arbitration and it is necessary to refer to the document, for example to explain the witness' understanding of the meaning of a document at the time it was sent or received; and

(vii) identify where documents have been used to refresh the witness' memory (whether those documents have been referred to or not in the witness statement).

2.4 In terms of format, each witness statement shall:

(i) have attached a photograph of the witness, set out the name and business address of the witness, his or her relationship with any of the Parties, if any, and a description of his or her qualifications, including his or her competence to give evidence;

(ii) be signed and dated by the witness;

(iii) take the form of a declaration under oath or affirmation, to the effect that the contents are true;

(iv) be numbered discretely from other documents and properly identified as such. Witness statements submitted by the Claimant shall begin with the letters “CWS” followed by the name of the witness (i.e., CWS-Picasso, CWS-Da Vinci, etc.); witness statements submitted by the Respondent shall begin with the letters “RWS” followed by the name of the witness (i.e., RWS-Rembrandt, RWS-Rubens, etc.); and

(v) contain numbered paragraphs and page numbers.

2.5 Any person may present evidence as a witness, including a Party or a Party's officer, employee or other representative.

2.6 Factual witness testimony at the Main Evidentiary Hearing shall proceed as follows:

(i) Oral evidence at the Hearing shall be given under oath or affirmation.

(ii) There shall be an opportunity for a brief examination by the Party producing the witness, limited to confirming and if required correcting the accuracy of the contents of their written witness statement, such confirmation or correction to be provided in writing in advance.

(iii) The other Party shall have the opportunity to cross-examine the witness in the usual manner, subject to the ability of the Tribunal to direct questions to the witnesses at any time in its discretion.

(iv) The first Party may then re-examine the witness if it so wishes. Such re-examination shall be limited to matters that have arisen in the cross-examination.

(v) Under the Tribunal’s authority and at its discretion, a Party may be allowed to recall a witness if the circumstances so justify.

2.7 Witness statements from witnesses not required for cross-examination shall be admitted as documentary evidence, however the Tribunal will be entitled to attach such weight to such evidence as it considers appropriate.

2.8 Any witness who has filed a witness statement shall make themselves available to be cross-examined at the Main Evidentiary Hearing should notice requiring his or her cross-examination be given by the other Party [date]. The Party relying on such evidence shall secure that witness' presence and availability at the Main Evidentiary Hearing in advance.

2.9 In the event that a Party does not make a witness available, the requesting Party may apply for any additional ruling from the Tribunal, including a ruling that the Tribunal disregard the content of that witness' statement(s), or the drawing of an adverse inference.

2.10 The admissibility, relevance, weight and materiality of the evidence offered by a witness shall be determined by the Tribunal with the IBA Rules on the Taking of Evidence in International Commercial Arbitration 2020 ("**IBA Rules**") serving as a guideline.

2.11 A Party's decision not to call a witness for cross-examination will not be taken to mean that the Party does not contest the witness/expert's evidence.

2.12 The Tribunal may, at any time before this Arbitration is concluded, order any Party to provide, or to use its best efforts to provide, the appearance for testimony at a Main Evidentiary Hearing of any person including one whose testimony has not been offered.