DEVELOPING BEST PRACTICE IN INTERNATIONAL ARBITRATION: WITNESS STATEMENTS

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CONTENTS

1 INTRODUCTION

Witness statements, as opposed to oral evidence in chief, have become a common feature of international arbitration. The use of witness statements in the evidentiary process is a product of hybridisation, where elements of common law and civil law procedure are drawn upon to guide how international arbitration should be conducted. However, there are significant questions to be asked as to whether the present practice is delivering the best outcome and contributing to celerity and efficiency of arbitral processes.

This paper considers the current standard model of how witness statements are used in international arbitration. It suggests flaws with this model and proposes some recommendations for how the model could be reformed. The overriding consideration is how to harness witness statements as a tool for promoting greater efficiency during the hearing stage of an international arbitration.

2 HISTORY & DEVELOPMENT OF WITNESS STATEMENTS

The differences between some common law and civil law legal systems are very pronounced with respect to procedures for taking of evidence. The development of a standard model in international arbitration has involved borrowing from both common law and civil law procedures. With respect to witness statements, the model employed

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in international arbitration is now heavily influenced by modern English commercial civil procedure, with some continental influences.

2.1 COMMONLAW LEGAL SYSTEMS

Historically, common law courts in England have required witness testimony to be given in person. Face-to-face testimony however has roots that reach further than medieval English courts. In early Roman law, witnesses were required to testify personally before the *iudex*, who was the private citizen selected to be the fact finder.[1] This allowed the fact finder to assess the demeanour of the witness and determine the credibility of his or her evidence against evidence given orally by other witnesses. The common law courts followed the same reasoning, preferring face-to-face testimony as a better way by which credibility could be ascertained. Blackstone noted that open in-court testimony was "much more conducive to the clearing up of truth than the private and secret examinations taken down in writing" as oral testimony meant "an opportunity of observing the quality, age, education, understanding, behaviour and inclinations of the witness"[2]. Although English chancery courts rarely conducted in-person testimony and relied primarily upon written testimony recorded in reports of ministerial officers, common law civil procedure eventually prevailed. After the passing of the English *Judicature Acts 1873*, the administration of the common law and chancery courts were combined and common law procedure prevailed. In 1875, the chancery courts also adopted public, in-court and face-to-face testimony.

In addition to historical entrenchment of oral testimony in the common law tradition, part of the common law's preference for orality and demeanour evidence stems from the adversarial model of the common law legal system.[3] Face-to-face testimony, with its opportunity for the opponent's counsel to cross-examine the witness, allows both the evidence and the credibility of the witness to be challenged in an adversarial setting. The right of confrontation is therefore an important part of common law litigation.

The preference for oral testimony explains the late introduction of witness statements into common law procedure. In England, it was not until 1831 that Parliament changed the laws of procedure so as to allow witnesses who were unable to attend trial in person to given testimony in written depositions.[4] However, even before written statements were introduced into curial procedure, it was already accepted practice for counsel to carefully interview the witness before the evidential hearing. While 'coaching' was not permitted, the adversarial nature of litigation meant that interviewing the witness was an important part of trial preparation. This is evident from the United Kingdom 'Guide to the Professional Conduct of Solicitors' which

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1 Herzog, P., *Civil Procedure in France*, 1968, Martinus Nijhoff, The Hague, at p. 39.

2 Blackstone, W., *Commentaries on the Laws of England*, Volume 4, Oxford, 1765-1769, at pp. 372-373.

3 Wolf, J. A. and Preteroti, K. M., "Written Witness Statements: A Practical Bridge of the Cultural Divide" (2007) 62 (2) *Dispute Resolution Journal.*

4 Holdsworth, W., *A History of English Law*, Volume XI, 1922-1972, Sweet and Maxwell, London, at pp. 522-523.

states that it is permissible for a lawyer to assist in the preparation of the witness statement, although that assistance cannot amount to tampering with the witness's evidence.

2.2 *CIVIL LAW LEGAL SYSTEMS*

Unlike the common law tradition, civil law courts preferred documentary evidence to witness evidence. Historically, continental courts were influenced by the secretive procedures of canon law. Witnesses were not frequently called to give evidence. Documents were considered to be more reliable than witnesses and it was also considered that questioning witnesses in a confrontational setting did not add anything to the documents already before the fact-finder.[5] Not much emphasis was placed on demeanour evidence, that is, ascertaining the credibility of the evidence through observing the demeanour of the witness.

A practice of the medieval continental canon and lay courts was to rely primarily on written testimony recorded in the reports of ministerial officers. Witnesses would then give their depositions out of the presence of the parties and the fact finder. One explanation is that this was due to the medieval Germanic principle of collegiality: courts were composed of a panel of judges. Efficiency of resources therefore led to delegating the task of hearing testimony to one judge who would then relay it to the other members of the panel.

Such practices are less prevalent in modern civil law evidentiary procedures. Witness testimony, where relied upon, now tends to be in person and written testimony is unusual. However, where witnesses are called, civil law procedure adduces witness evidence in a manner different to that of the common law courts. In civil law courts, the witness is first nominated in a party's written submissions. Then, if the court considers necessary, the court will order that the witness attend the hearing in-person. The witness will often not have been assisted in the preparation of his or her evidence by counsel, as professional rules in many civil law jurisdictions prevent lawyers from contacting a witness before his or her testimony, or strictly limit any contact to an interview to elicit relevant information.[6] Witnesses are also not questioned by counsel and there is no cross-examination. Instead, the judge assumes an inquisitorial role and questions the witness.[7]

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5 Schwarz, F. T. and Miles, W., "Taking of Evidence in International Commercial Arbitration" in *International Comparative Legal Guide to International Arbitration*, 2003, Global Legal Group; Lew, J., and Shore, L., "International Commercial Arbitration: Harmonizing cultural Differences", (1999) 54(3) *Dispute Resolution Journal* 32.

6 Trittmann, R. and Kasolowsky, B., "Taking Evidence in Arbitration Proceedings between Common Law and Civil Law Traditions - The Development of a European Hybrid Standard for Arbitration Proceedings" (2008) 31(1) *UNSW Law Journal* 330 at p. 333; Schwarz, F. T., and Miles, W., "Taking of Evidence in International Commercial Arbitration" in *International Comparative Legal Guide to International Arbitration*, 2003, Global Legal Group.

7 Trittmann, R. and Kasolowsky, B., "Taking Evidence in Arbitration Proceedings between Common Law and Civil Law Traditions - The Development of a European Hybrid Standard for Arbitration Proceedings (2008) 31(1) *UNSW Law Journal* 330 at pp. 333-334.

3 *USE OF WITNESS STATEMENTS IN INTERNATIONAL ARBITRATION*

As a product of the factually complex nature of international arbitration, witness statements have become an integral component in the international arbitral process. The need for such statements is further exacerbated by cultural differences (legal or otherwise) and linguistic barriers between parties, counsel and, most likely, the tribunal. The importation of witness statements into the international arbitral process was intended, at least is part, to level the playing field and bridge the gap between participants in the arbitral process by allowing parties from different cultural and legal backgrounds to present evidence to arbitral tribunals in a fair manner.

An interesting description of the role that witness statements play in international commercial arbitration was provided by the Working Party that prepared the (now superseded) *International Bar Association's Rules on the Taking of Evidence* (**IBA Rules**) in that:[8]

> *'If Witness Statements are used, the evidence that a witness plans to give orally at the hearing is known in advance. The other party thus can better prepare its own examination of the witness and select the issues and witnesses it will present. The Tribunal is also in a better position to follow and put questions to these witnesses. Witness Statements may in this way reduce the length of oral hearings. For instance, they may be considered as the 'evidence in chief' ('direct evidence'), so that extensive explanation by the witness becomes superfluous and examination by the other party can start immediately. In order to save on hearing time and expenses, very often the Arbitral Tribunal and the parties can also agree that witnesses whose statement is not contested by the opposing party do not have to be present at the hearing. Of course, the drafting of a Witness Statement requires contacts between the witness and the party that is presenting him [or her]'.*

3.1 *STYLE & TYPES OF WITNESS STATEMENTS*

3.1.1 *WRITTEN STYLE OF STATEMENTS*

Witness statements are usually presented in one of two ways. The first is a summary of the witness' testimony, providing a simple portrayal of the facts and descriptions with no elaborations.[9] The second involves a heavily-detailed account of the witness' testimony that is designed to save time at a hearing as the witness merely has to affirm the statement, after which cross-examination may commence.[10]

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8 International Bar Association Working Party, "Commentary on the New IBA Rules of Evidence" (2000) 14 *Business Law International* 14.

9 Mehren, G. and Salomon, C., "Submitting Evidence in an International Arbitration: The Common Lawyer's Guid", (2003) 20(3) *Journal of International Arbitration* 287.

10 *Ibid.*

3.1.2 *FACT WITNESS STATEMENTS*

Fact witness statements are designed to uncover the precise facts a witness is able to provide, thus enabling each party to determine which witness to use, or whether to use the witness at all. This evidence covers the circumstances that led to the dispute. Such statements are usually prepared after the tribunal issues an order authorising the procedure for witnesses whom the parties intend to rely upon at the hearing.[11]

Fact witness statements are usually required to be exchanged between the parties and submitted to the tribunal as early as reasonably possible, typically as soon as it is clear to both parties what the issues are and what facts need to be proved.[12]

3.1.3 *EXPERT WITNESS STATEMENTS*

Expert witness statements, otherwise referred to as expert reports, contain an expert's opinion on an issue of the case, most likely a contentious issue on the merits, and the basis for that opinion. However, the scope and content of these reports can be limited by agreement of the parties or the arbitral tribunal by way of its terms of reference from the parties or via a procedural order.[13]

Expert witness statements may be exchanged simultaneously or consecutively.[14] This exchange enables all the experts to consider each other's opinions to determine whether there are any issues they agree upon and identify any issues that remain contentious. Moreover, this procedure "removes the unfair element of surprise or deliberate ambush at the main hearing: it allows expert witnesses to meet and exchange views before the hearing [...] and since hearing time is money, it saves both time and money by having everyone read these materials in advance of the main hearing without the need for direct testimony recited aloud"[15].

3.2 *IBA RULES ON TAKING EVIDENCE 2010*

In light of the central role witness statements play in the international arbitral process, the International Bar Association (**IBA**) has addressed such statements in the IBA Rules.

The original IBA Rules were prepared by the then Committee D (Arbitration and ADR) from the IBA's Section on Business Law, comprised predominantly of practitioners of civil law heritage. These rules were adopted by the resolution of the IBA Council on 1 June 1999 and replaced the 1983 IBA *Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration*. The IBA Rules provide a resource to parties and arbitrators enabling them

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11 See Wolf and Peteroti, *supra* fn. 3

12 Schlaepfer, A., "Witness Statements", in Levy, L. and Veeder, V., (eds) (2005) 11(12) *Arbitration and Oral Evidence* 65, at p. 67.

13 Kreindler, R., "Benefiting from Oral Testimony of Expert Witnesses: Traditional and Emerging Techniques" in Levy, L. and Veeder, V., (eds) (2005) 11(12) *Arbitration and Oral Evidence* 87 at p. 96.

14 *Ibid.*

15 Veeder, V., "The 2001 Goff Lecture", (2001) 18(4) *Arbitration International*, at pp. 431-51.

to conduct the evidentiary process involved in international arbitral proceedings in an efficient and economical manner. They provide a mechanism for the presentation of documents, witnesses of fact, expert witnesses and inspections, as well as for the conduct of evidentiary hearings. Designed to be used in conjunction with institutional or ad hoc rules and procedures governing international commercial arbitrations, the IBA Rules incorporate standards derived from different legal systems and are particularly useful when parties to a dispute are not from the same legal background. Ultimately, the discretion afforded by the IBA Rules to the arbitral tribunal reflects the flexible nature of international arbitration.

On 29 May 2010, the IBA revised and adopted new *Rules on the Taking of Evidence in International Arbitration* prepared by a sub-committee of the Arbitration Committee of the Dispute Resolution Section of IBA. The revised Rules are the product of a two-year process that included public consultation and input from the arbitration community around the globe. As one of the IBA sub-committee members noted, "both parties and arbitrators will clearly recognise the 1999 IBA Rules, and at the same time find in the revised IBA Rules additional up-to-date tools to address such new or increasing challenges as electronic document disclosure, abuse of the evidentiary process, and competing standards of legal privilege"[16]. The revised IBA Rules are largely similar to the 1999 Rules but contain some important changes, such as providing for consultation between the parties as to the means of taking evidence and in relation to the treatment of electronic documents.

While some articles reflect the compromise between civil and common law systems, some aspects of the IBA Rules have clearly been influenced by one or the other. For example and of relevance to this paper, the taking of witness evidence in international arbitration has very much followed the standard of English court proceedings. Similarly, expert evidence is taken in accordance with the common law tradition. To the contrary, document disclosure requests are based upon civil law procedures. This compromise of the two systems ensures that users of international arbitration can feel confident that their expectations will be met, and feel that the process is fair and just, regardless of their jurisdictional background.

The 1999 IBA Rules heralded a shift from the 1983 Guidelines in that the prescribed procedure provided for in the 1983 Guidelines was significantly reformed. The 1983 Guidelines required the simultaneous submission of witness statements to the arbitral tribunal, which would subsequently provide them to the other parties.[17] The 1999 revision to the IBA Rules increased the flexibility of this procedure, no longer requiring the simultaneous submission of witness statements, but allowing the tribunal

16 Kreindler, R., quoted in "IBA announces approval of revised evidence rules" (2010) *International Bar Association.*, available at: <http://www.ibanet.org>.

17 Bühler, M. and Dorgan, C., "Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbitration - Novel or Tested Standards?" (2000) 17(1) *Journal of International Arbitration* 3; 1983 Rules Arts. 5(1) and 5(3).

to determine the specifics of the procedure by which witness statements will be exchanged, including whether this will be done simultaneously or consecutively.[18]

Under the newly revised 2010 IBA Rules, Art. 4(5) contains a list of the required elements of a witness statement, including:[19]

(a) the full name and address of the witness, a statement regarding his or her present and past relationship (if any) with any of the Parties, and a description of his or her background, qualifications, training and experience, if such a description may be relevant to the dispute or to the contents of the statement;

(b) a full and detailed description of the facts, and the source of the witness's information as to those facts, sufficient to serve as that witness's evidence in the matter in dispute. Documents on which the witness relies that have not already been submitted shall be provided;

(c) a statement as to the language in which the Witness Statement was originally prepared and the language in which the witness anticipates giving testimony at the Evidentiary Hearing;

(d) an affirmation of the truth of the Witness Statement; and

(e) the signature of the witness and its date and place.

The 2010 revisions to the IBA Rules have not substantially changed how witness statements are dealt with. However the new Art. 8(1) provides that any witness must appear at the evidentiary hearing should the requesting party inform the arbitral tribunal (within the time ordered by the tribunal) of the request. Further, the 2010 revisions provide explicitly that the witnesses shall appear in person unless the tribunal authorises the use of videoconferencing or a similar technology.[20] If a witness whose appearance has been requested pursuant to Art. 8(1) fails without a valid reason to appear for testimony at an evidentiary hearing, the tribunal shall disregard any witness statement related to that evidentiary hearing by that witness unless, in exceptional circumstances, the tribunal decides otherwise.[21]

It is worthy of note that the 2010 revisions to the IBA Rules encourage tribunals to consider the economy of procedure in making procedural decisions. This is evidenced in two sections, namely the requirement in Art. 2(1) that the tribunal and the parties meet "with a view to agreeing on an *efficient, economical and fair* process for the taking of evidence" (emphasis added) and Art. 9(2)(g) which provides that considerations of 'procedural economy, proportionality, fairness or equality of the parties' are valid reasons for the tribunal's exclusion of evidence. As such, tribunals should take the initiative to work with the parties to reach an agreed upon time and

18 IBA Rules Art. 4(4).
19 IBA Rules Art. 4(5).
20 IBA Rules Art. 8(1).
21 IBA Rules Art. 4(7).

The process is further troubled by counsels', particularly those with a common law background, predisposition to get heavily involved in the drafting process of the witness statements. Without any clear and mandatory ethical guidelines in the international arbitration process, the extensive preparation and proofing of witnesses means that witness statements are now a vehicle of advocacy, not of evidence. Moreover, counsels' intimate involvement with the drafting of witness statements undoubtedly diminishes the statements' probative value and increases the need for oral cross-examination. Particularly where it is blatantly obvious on the face of the document that the witness would not, or possible could not due to linguistic barriers for example, have drafted their statement as it appears on their own or without intensive aid from counsel.

On the other hand, witness statements are championed on the basis that they are designed to reduce hearing time. The arguments in favour of witness statements are that they reduce what would be hours of hearing time into written pages, and that because lawyers can assist with drafting and preparation, the statements do not contain the 'human stumbling and groping' that is sometimes a feature of direct testimony.[30] While this may be the case, the efficacy of a witness statement depends on how they are used in the context of the evidentiary hearing. This is another area where the standard model is flawed.

In order to reap the benefits to efficiency that reducing oral testimony to writing provides, the detailed written statements must be allowed to speak for themselves since they already contain a comprehensive account of the relevant factual or expert information. However, as Toby Landau points out, this is not what happens in practice.[31] Instead, oral testimony in practice involves examination-in-chief where the witness frequently reads out the written statement. This process is repetitive and means that the use of witness statements does not at all reduce the duration of the hearing. This process of building up witness testimony in examination-in-chief also has as its corollary an extensive cross-examination by counsel for the other side. Unless reigned in by the tribunal, the oral hearing may simply stretch on. This is also compounded by the phenomenon of 'trial by transcript' noted above, where the aim of counsel is to simply get a particular sound byte recorded in the transcript, so that they can refer to it in their submissions to the tribunal.

One of the contributing reasons to the flawed use of witness statements in international arbitration is the structural context in which such practice takes place. The standard model is in essence a hybrid model of common and civil law curial procedure. However, those procedures take place within a framework structured by domestic professional codes of ethics that govern the interaction between lawyers and witnesses and a professional judiciary who wield powers of contempt. Except where the particular arbitrator or arbitral tribunal takes a proactive approach to managing the

30 See Wolf and Preteroti, *supra* fn 3.

31 See Landau, *supra* fn 27.

evidentiary process, there is no inbuilt mechanism that prevents the abuse of witness statements.

Finally, at a level of further abstraction, there is also another flaw with the standard model. This flaw is the way in which the model has 'blinkered' practice in international arbitration, by creating a standard procedure and therefore inhibiting the procedural flexibility of the arbitral process. Unlike domestic courts, international arbitration has no mandatory rules of evidence. While the IBA Rules provide some guidance in this area, they are not binding upon the parties. Therefore, each arbitration procedure can, in theory, be drawn on a blank sheet of paper. By solidifying a standard model, witness statements are used without considering whether witness evidence serves any utility for the particular dispute, and if so, how witness evidence should be adduced. For instance, should cross-examination be allowed or should it be dispensed with? For that matter, is oral testimony necessary in the particular case?

These questions are validly asked in light of research in the operation of the human memory. Studies from the 1970s have demonstrated that human memories can be manipulated by suggestion.[32] Experiments by psychologists indicate that when asked to recall a particular object, the memory recalled in certain circumstances will be a compromised memory formed from the original perception and the additional information contained in the question. The question put to the witness who is being asked to recall an event is therefore critical. These results of recent psychological experiments into human memory trigger questions regarding the way in which witness examination is conducted. The current model does not adequately take into account the constructive nature of memory. The preparation, proofing and lawyer involvement in the process leading up to an oral hearing adds to the artificiality of the witness examination process in recalling memory.

If full weight is given to these psychological findings, then the extent to which witness evidence is used and the way in which it is used must be questioned. Even if this research is set aside, the flaws with the standard model are still significant. The current ways in which witness statements are used in international arbitration are procedurally inefficient and ineffective at persuading the tribunal. The way in which the standard model operates must be reconsidered.

4.3 *TIME & COST IMPLICATIONS*

Not only is the standard model's approach for preparing witness statements time consuming, the expense incurred in drafting witness statements, particularly with counsels' profound involvement in the process, represents a substantial part of the cost for preparation of a case. Similarly, the additional time spent deconstructing witness statements during cross-examination to discredit a witness' written testimony

[32] See for example, Loftus, G. R. and Loftus, E. F., *Human Memory: The Processing of Information*, 1976, Erlbaum Associates, Hillsdale, New Jersey; Bourne, L. E., Dominowski, R. L. and Loftus, E. F., *Cognitive Processes*, 1979, Prentice-Hall, Englewood Cliffs, New Jersey; Loftus, E. F., *Eyewitness Testimony*, 1979, Harvard University Press, Cambridge, MA.

significantly lengthens evidentiary hearings and adds further to the largest component of costs incurred in arbitral proceedings - counsel's fees.[33]

5 RECOMMENDED GUIDELINES

As noted above, the IBA Rules and some institutional arbitration rules address some aspects about how witness statements should be used in international arbitration. However, the approach taken is not prescriptive and does not address the significant flaws in current practice. In order to reign in over-zealous counsel and to avoid practices that lead to escalating costs of arbitration, a more proactive approach needs to be taken by the arbitral tribunal with respect to controlling the use of witness statements.

5.1 WHAT SHOULD BE THE ROLE OF THE WITNESS STATEMENTS

Part of the problem with current practice is that the role of witness statements has been distorted. It must always be kept in mind that witness statements are most effective where they are written and concise statements that aid the tribunal when taking witness evidence rather than replacing or repeating the same information to be given during the oral hearing. This is particularly the case for statements by witnesses of fact, where the evidence is often less complex than expert evidence and therefore can be given with the same degree of clarity during the oral hearing. That is not to say that statements by witnesses of fact are always superfluous. Sometimes witness evidence is essential. Where it is not, it can still add colour and context to the dispute. Reducing the evidence into a statement can streamline the account of the evidence and give direction to the oral hearing. The following are some guidelines with respect to statements given by witnesses of fact.

5.1.1 STATEMENT OF FACTS

Where given by a witness of fact, a witness statement should restrict itself to matters of fact alone, rather than being an extension of the party's submissions. Although the statement tendered by one party will usually support that side, it should not be considered to be a further instrument to advocate to the tribunal. They will be better received by the tribunal and accorded a higher probative value where they assist the tribunal in its role as fact-finder. Therefore, witness statements are more convincing and persuasive where they are drafted in a concise fashion, without too many rhetorical frills or excessive partiality tailored to further the party's claims.

5.1.2 STATEMENT OF FACTS

As a general rule, the role of counsel in drafting a witness statement should be limited, but not necessarily excluded. There are valid arguments in favour of some degree of involvement by lawyers in the preparation of the witness statement. A lawyer is in a

[33] Queen Mary University of London and PriceWaterhouseCoopers, *International Arbitration: Corporate Attitudes and Practices, 2006*, at p. 20, available at: <http://www.arbitrationonline.org/docs/IAstudy_2006.pdf>.

better position to ascertain relevant and irrelevant information. Further, law witnesses will vary in terms of linguistic and educational backgrounds. Lawyers are therefore better placed to structure the evidence logically, and ensure a consistent level of comprehension and coherence and that the statements adhere to basic standards of grammar and spelling. Further, there are other instances where lawyer involvement may be useful. For example, Hwang and Chin suggest that witness statements that touch upon the same issue can cross-reference each other, to reduce repetition.[34] This is a task which should be carried out by lawyers in the process of reviewing witness statements.

However, it is suggested that the role should not go beyond tidying up the presentation of witness evidence. The statement must be that of the witness and not the lawyer. To that extent, the witness should be intimately involved in a dialogue during which the raw evidence is elicited. The lawyer must be careful where drafting, or assisting with drafting, the statement that none of the lawyers contributions alter or add to the substance of the statement in anyway. It cannot be stressed enough that the evidence attested to in the statement should not be embellished by an overzealous lawyer, nor should the lawyer in the process of eliciting information from the witness suggest any facts that the witness should include. The language selected should reflect the language used by the witness, as long as comprehension is not also sacrificed. A witness statement which is rendered in the witness's own words has more credibility. Elegant legalese should therefore be avoided.

5.1.3 DOCUMENTS

There is no need for witness statements to be the means for proving documents. Lawyers from jurisdictions with domestic rules of evidence that require documentary evidence to be proved by witness statements tend to use witness statements in international arbitration to introduce and prove documents. This practice tends to lengthen what would otherwise be a mere reference to documents which are provided and proved separately.

5.2 PROACTIVE CASE MANAGEMENT

It is generally accepted that tribunals bear a duty to ensure that the arbitral process is conducted as expeditiously and efficiently as possible, whilst carrying out its duties impartially to ensure a fair process and to guarantee the equal treatment of parties. As such, a tribunal in accepting its tasks undertakes to fulfil them with due diligence and to the best of its ability.[35] This tribunal's duty to act with due diligence is akin to its duty to act with due care, which is a fundamental principle as "justice delayed is

[34] See Hwang & Chin, *supra* fn 29, p. 657.

[35] Fouchard, P., "Relationship between the Arbitrator and the Parties and the Arbitral Institution", in ICC Special Supplement, (1995) *The Status of the Arbitrator*.

practices. However, the harsh reality has been that the standard model for use of witness statements is deeply flawed.

A solution, and possibly the only one in the absence of any applicable rules or guidelines directly on point, is for arbitral tribunals to take on a far more proactive case management role at the outset in the arbitral process. By doing so the international arbitration community may break through the standard model's troubled mould and move toward an arbitral procedure more reflective of its quintessential characteristics: efficiency, celerity and affordability.