Witness Statements and Memorials: Reforms to Serve Parties, Arbitrators, and Arbitrations*

*By Doug Jones** and Robert Turnbull****

I. Introduction

The witness stands at the center of an international commercial arbitration. Parties rely on witnesses to win cases for them. It is a rare case that can be won without a witness. A witness can tell the arbitral tribunal a story which explains why the party calling the witness should prevail. In a field of commercial disputes in which large corporations are preponderant, a witness can give a human face to the arbitrating party, allowing the arbitral tribunal to understand better the motivations behind the actions which are the subject of the arbitration. Yet, the witness statement—the principal vehicle for providing a witness's evidence to a tribunal—is not serving its purpose. In many international commercial arbitrations, the witness statement is a creature of intense drafting by lawyers, thereby transmogrifying it from a written record of what a witness would have said orally in evidence, into an additional form of legal submission and commentary on matters outside the witness's own knowledge. In this form, a witness statement does not assist the tribunal, or the party which is relying on it to win the case. At best it distracts the tribunal from the important evidence; at worst it harms the party's case, causing the party to lose.

In this article, we consider the principal purposes of a witness

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**Doug Jones is a leading international commercial arbitrator, an International Judge of the Singapore International Commercial Court, and a Fellow of the American College of Construction Lawyers. He can be contacted at dougjones@dougjones.info.

***Robert Turnbull is a Barrister and a qualified lawyer in Australia, England, and Wales. He has acted for owners and builders in construction and infrastructure disputes, both domestic and international. He has worked on arbitrations seated in London, New York, Singapore, Hong Kong, Dubai, Reykjavik, and Brisbane. Robert maintains chambers at 8 Wentworth Chambers, Sydney, and can be contacted at turnbull@8wentworth.com.au.

statement in international arbitral proceedings. We also propose some solutions to return witness statements to those purposes. As part of those proposals, we also suggest moving towards a memorial approach to the preparation and presentation of cases (which entails more detailed, pre-hearing submissions to the tribunal), rather than a common law pleading-based approach. This will assist lawyers to deploy contemporaneous documents and witness statements in a complementary fashion to assist the tribunal.

A draft procedural order is provided as an appendix to the article. It can be proposed by parties, or employed by tribunals, for arbitrations of almost any size, subject matter, jurisdiction, seat or institutional rules. The proposals in this article have already been deployed in arbitrations which are presently on foot. The experience to date shows that they are working to achieve their objective.

The reforms proposed in this article draw on procedures introduced in the Business and Property Courts of England and Wales in 2021.[1] They have, however, been moulded to the more dynamic and varied nature of disputes resolved through international commercial arbitration. Further context relating to the proposals in this article has been published elsewhere, and readers are encouraged to consider those writings in parallel with this article.[2]

II. What are Witness Statements?

A witness, or more particularly a lay witness, is any person who gives evidence to a tribunal about what the witness has seen, heard, touched, or otherwise perceived. Such a witness gives evidence about facts. Generally, such a person cannot and should not venture evidence of an opinion;[3] that is the province of experts. Leading arbitration rules are premised on such a distinction.[4] Witnesses generally give evidence-in-chief, which is evidence relevant to the issues in dispute. A witness is then usually cross-examined by the opposing party about that evidence-in-chief, and about other matters relevant to the issues in dispute.

Consistent with the position in the common law courts (although not in courts of equity), it was formerly the case that in

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[1] *Civil Procedure Rules 1998* (U.K.), Practice Direction 57AC.

[2] DS Jones & RD Turnbull, *Memorials and Witness Statements: The Need for Reform*, 88 Arbitration: Int'l J of Arb., Mediation & Disp. Mgmt. 399 (2002).

[3] *E.g. Civil Evidence Act 1972* (U.K.), § 3; *Evidence Act 1995* (Cth.), § 76(1); *Evidence Act 1893* (Sing.), §§ 5 and 47.

[4] IBA Rules on the Taking of Evidence in International Arbitration 2020, art. 4 and 5; London Court of International Arbitration Arbitration Rules 2020, art. 20.1.

international commercial arbitrations evidence-in-chief was given orally. That practice has slowly eroded in international arbitrations such that it is rare for a witness to give evidence-in-chief orally. It is almost always given by witness statement. Similar changes have occurred in domestic courts in common law jurisdictions.[5]

The witness statement is now the normative way by which evidence-in-chief is given. This is recognised in both institutional rules and guidelines.[6] It is not realistic to contemplate that there will be any wholesale return to *viva voce* evidence-in-chief. Given that procedural reality, we turn to the issues we have identified with many witness statements as they are prepared today in international commercial arbitration.

III. What is holding back Witness Statements?

There are four aspects of witness statements which render them less than helpful to the tribunal and the parties relying on them.[7]

First, witness statements often do not reflect the witness's own words. In principle, a witness statement should reflect the evidence a witness would give orally if questioned during examination-in-chief. Unfortunately, in practice, witness statements are too frequently drafted in lawyers' own words.[8] This reduces their reliability; the tribunal is less likely to rely on evidence which has not been prepared in the witness's own words. This cannot be expected to be to the advantage of the party calling the witness, let alone the personal credibility of the witness.

Secondly, witness statements often quote from or comment upon contemporaneous documents which are otherwise in evidence before the tribunal. Such documents speak for themselves, and a witness's commentary does not usually assist a tribunal. Putting the lawyers' submissions about the effect of documents into the mouths of witnesses is no more convincing than making

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

[6]*E.g.* International Chamber of Commerce Rules of Arbitration 2021, art. 25(5); London Court of International Arbitration Arbitration Rules 2020, art. 20.3; UNCITRAL Arbitration Rules 2013, art. 27(2); Singapore International Arbitration Centre Rules 2016, art. 25.4; IBA Rules on the Taking of Evidence in International Arbitration 2020, art. 4(2).

[7]*See* similar propositions advanced by X Favre-Bulle & C Newmark, "The Use and Abuse of Factual Witnesses" in B M Cremades & P Peterson (eds.), *Rethinking the Paradigms of International Arbitration: Dossier XX* at 100 (2013).

[8]VV Veeder, "Introduction" in Levy & Veeder (eds.) *Arbitration and Oral Evidence* at 7–9 (2004).

those submissions at the appropriate time; indeed it weakens the overall credibility of the witness's evidence.

Thirdly, some witness statements comment on documents which were not seen by the witness until they were provided by the lawyers to the witness in preparing the statement.[9] It is rare indeed for a witness to be able to provide useful, let alone relevant, evidence going to a document the witness had never seen before.[10]

Fourthly, witness statements have become an additional vehicle for legal submissions.[11] This is unnecessary. At the end of an arbitration, a tribunal may have before it: written openings, a transcript of oral openings, written closing submissions, a transcript of oral closing submissions, and a slide deck which accompanied those oral closings, to say nothing of formal pleadings. It is enough for the tribunal to synthesize the arguments advanced across those opportunities to make such arguments, without having added to the submissions (which are usually repetitive) made by a witness. This merely serves as a distraction which burdens the tribunal unnecessarily.[12] Moreover, submissions from a lay witness, couched as witness testimony, are not very convincing due to the fact that they are not being made by a lawyer.

These four deficiencies introduce wasted costs, lengthen hearing times and preparation timetables, burden the tribunal with unnecessary documents, and do not serve the singular aim of each party—to win the case. Having identified those deficiencies, we turn to the principal purposes of witness statements.

IV. What should a Witness Statement Do?

A witness statement in an international commercial arbitration has four principal purposes.

First, to give all the evidence from a lay witness which is (i) relevant to the issues in dispute, and (ii) what the witness can recall from that which the witness perceived. It should be in the witness's own words as much as possible.

Secondly, and related to the first purpose, the witness statement should tell a party's side of the story. Often a senior employee or director will give evidence to the tribunal about the issues in dispute. This gives the tribunal some context in which to decide the dispute.

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[9] *See, e.g.*, Cumbria Zoo Company Ltd v. The Zoo Investment Company Ltd [2022] EWHC 3379 (Ch), ¶¶ 47–59.

[10] *See, e.g.*, JD Wetherspoon plc v. Harris [2013] 1 WLR 3296, 3304 ¶ 39.

[11] R. Hunter, "The Procedural Powers of Arbitrators under the English 1996 Act," 13 Arb, Int'l 345, 353 (1997).

[12] *See, e.g.*, JD Wetherspoon plc v. Harris [2013] 1 WLR 3296, 3304 ¶ 39.

Thirdly, witness statements supply evidence which cannot be obtained from the documents. Contemporaneous documents, while often very important, can only go so far in giving an account of the events which led to the arbitration. For example, a person's state of mind may be relevant to an issue in dispute. This may not be able to be ascertained from documents, such that witness evidence is required.

Fourthly, witness statements can form part of the factual substratum on which an expert witness can base his or her opinion. For that reason, we propose that experts' reports be served after, and separately from, witness statements, to provide the expert witnesses an opportunity to review the factual witness statements before committing themselves to their final opinions in their reports.[13]

V. How do we Improve Witness Statements?

We propose a two-pronged approach to improving the presentation of parties' cases to the tribunal. First, we suggest a greater adoption of the memorial approach to the presentation of a party's case to the tribunal, as opposed to the pleadings-based approach.[14] Secondly, we suggest the implementation of rules (likely in the form of procedural directions) to govern the preparation of witness statements.

Memorials are key to any reform, because they go a considerable way to alleviating the problems created by voluminous contemporaneous documents. Memorials are more detailed than pleadings, which are familiar to common law practitioners. Memorials involve the presentation by each party of its entire case in a consolidated document, with all supporting documents attached—witness statements, documentary evidence, legal argument, and sometimes expert reports. In requiring memorials, a tribunal orders parties to exchange at the same time: lay witness statements, documents on which each party relies, and legal submissions. Those legal submissions are likely to be a hybrid between a common law pleading and a written submission (or skeleton argument). It would also assist if the parties were to produce a joint chronology and *dramatis personae.* This approach has two advantages. First, it forces the parties to review the documentary record before committing their case to paper, thereby introducing efficiency in the presentation of their case.

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[13] *See* Doug Jones, Redefining the Role and Value of Expert Evidence in International Arbitration, 17 Journal of the ACCL No. 2, 1 (2023).

[14] A further elucidation of the distinction can be founded in G Born, *International Commercial Arbitration* at 2422, ¶ 15.08 [V] (3rd edn, 2020) and in ACICA Practice & Procedures Board, *ACICA Explanatory Note: Memorials or Pleadings?* (2020).

Secondly, it allows each of the documents to cross-reference one another. In particular, it avoids the witness statements having to cite or recite contemporaneous documents; that can be done through the legal submissions which may cross-reference such documents. Indeed, modern hyperlinking technology allows the submissions to be presented such that by clicking on a reference, the referenced document will appear to the viewer.[15]

The second prong is to make procedural orders governing the preparation of witness statements. The following principles should inform those 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 any 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 had 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's memory (whether those documents have been referred to or not in the witness statement).

The appendix to this article contains a draft procedural order implementing those principles. In adopting those principles from the outset of preparing witness statements, witnesses, and the lawyers assisting them, will have in mind the principal purposes of witness statements, so as to seek to draft them to conform to those principles.

By adopting a memorial approach, instead of a pleading approach, the parties will be forced to focus on their case at an early stage, so as to identify (and hopefully narrow) the issues in dispute. It also forces the parties to find their case in their own documents, rather than relying on the discovery of documents by the other side.[16]

VI. What Effect Have the Proposals Had?

The principles set out in this article have been presented to

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

[16]PA Bergin, *The New Regime of Practice in the Equity Division of the Supreme Court of New South Wales*, 27 Comm. Law Quarterly 17, 45 (2013).

arbitration colleagues and practitioners in a number of settings. They have been implemented in commercial arbitrations. It is to this we turn.

The proposals have been advanced in a number of fora, across a number of jurisdictions, including Singapore,[17] London,[18] Melbourne,[19] India,[20] the United States[21] and Hong Kong.[22] As a result of those and other interactions, the authors have found that the proposals have been met with support from the profession, across a number of jurisdictions. They address a widely perceived deficiency in arbitral practice.

In practice, the proposed procedural order has been used in several large-scale international arbitrations to great effect and without objection, including in:

- an ICC arbitration seated in Singapore arising out of a contract for the sale and purchase of standard metallurgical grade bauxite;
- an LCIA arbitration seated in London arising out of production sharing agreements for the development of oil and gas blocks in the Middle East;
- an HKIAC arbitration seated in Hong Kong concerning the creation of a virtual cryptocurrency exchange in South Korea;
- a SIAC arbitration seated in Singapore concerning the construction of developments to a major international airport;
- an ICC arbitration seated in London concerning the construction of a petrochemical complex in the Middle East; and
- an ICC arbitration seated in London arising out of an engineering, procurement and construction contract for the construction of a polysilicon production plant in the Middle East.

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[17] *Managing Complex Litigation in the Commercial Courts: Session 3A*, Singapore International Commercial Court Conference (2022).

[18] K&L Gates, *Discussing Expert Evidence in International Arbitration with Professor Doug Jones AO*, Hub Podcast: Arb. World (24 March 2022).

[19] DS Jones, "Australia—The Very Model of a Modern Arbitration Law", Sir George Turner Public Lecture, Univ. of Melb. Law School Public Lecture (29 June 2022).

[20] *Dispute Resolution—Key Trends and the Way Forward*, Australia Virtual Arbitration Conference (3 June 2022).

[21] *The Role of Arbitrators—What They Can and Should do to Ensure that a Hearing is Efficient, Effective and Leads to a Sound Result*, Institute for Transnational Arb., 34th Annual Workshop and Annual Meeting (16 June 2022).

[22] Moot Alumni Association, *To What Extent Can a Tribunal Override the Parties' Agreement on Procedure?* XVI Annual Generations in Arb. Conf. (22 March 2022).

In these arbitrations, witness statements have become (in the experience of the authors): shorter, more focused, and closer to the witness's own words. By adopting a memorial approach, the legal submissions, witness statements, and contemporaneous documents have formed a more coherent whole, thereby presenting the parties' respective cases more clearly and being more easily understood by the tribunal.

The authors welcome further comment from the arbitration community about the proposals in this article.

VII. Conclusion

Tribunals want to hear from witnesses. They shape the tribunal's understanding of the contours of the dispute, while helping the tribunal discharge its 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.

The proposals in this article seek to address these issues, in three ways. First, identifying the proper purposes of witness statements, and encouraging parties and their lawyers to have those purposes in mind when preparing witness statements. Secondly, and in support of the preceding matter, by proposing a draft procedural order to govern the preparation of witness statements. Thirdly, and crucially, a move away from a pleading approach to arbitrations and towards a wider adoption of memorials. Memorials serve to integrate witness evidence, documentary evidence and legal argument in an interlocking manner, making it easier for the tribunal to understand each party's case, and facilitating arbitral efficiency.

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's 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's 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's 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's 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.