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Is It Time to Modernize Witness Statements in Arbitration?

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Direct testimony in arbitration, especially international arbitration, is often in the form of a written witness statement, rather than orally at a hear-

ing. So, too, in the courts of England and Wales.

Effective April 2021, the Business and Property Courts of England and Wales made several revisions in witness statement practice. This article considers what those English courts did, whether it would make sense for arbitration to follow that lead, and how the arbitration community might do so. First, a little background on the status quo.

Court v. Arbitration

The existing use of witness statements in English Courts: Part 32 of the English Civil Procedure Rules (available at <https://bit.ly/3z52geY>) governs evidence. Several subdivisions of that Part address witness statements. R. 32.4 (1) provides “A witness statement is a written statement signed by a person

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which contains the evidence which that person would be allowed to give orally.”

R. 32.5 (2) provides “Where a witness is called to give oral evidence ... [the] witness statement shall stand as [the] evidence in chief unless the court orders otherwise.”

R. 32.5 (5) deals with use of the witness statement by another party if not used at trial by the original proponent. R. 32.8 provides the form of witness statements. R. 32.11, 32.12 and 32.7 deal with the use of witness statements for cross-examination at trial and otherwise. R. 32.13 deals with the availability to the public of a witness statement and 32.14 punishment for false statements.

Practice Direction 32, ¶¶ 17.1-25.1 (available at <https://bit.ly/3ckCkm5>), deal with several attributes of the form of witness statements and their statement of truth—the functional equivalent of an oath or affirmation. (There are formal distinctions between Civil Procedure Rules and Practice Directions both in how they are adopted and where they are effective. None of that matters for the present discussion).

The existing use of witness statements in arbitration: In arbitration there is no single comprehensive source of authority governing all procedure in all matters. Witness statements are nonetheless common. G. Born, *International Commercial Arbitration* (3d Ed.) §15.07[V].

Many arbitrators begin thinking about witness statements by reference to the International Bar Association Rules on the Taking of Evidence in International Arbitration (available at <https://www.ibanet.org/resources>). It is possible in a particular matter some institutional rule addresses witness statements. The IBA or institutional rules only apply if the parties agree or the arbitrators so order.

The IBA Rules have this definition: “Witness Statement” means a written statement of testimony by a witness of fact.” It is fairly similar to the English definition above. Article 4 of the IBA Rules deals with witnesses and subparts 4-8 address witness statements.

The International Institute for Conflict Prevention and Resolution’s “Protocol on Disclosure of Documents & Presentation of Witnesses in Commercial Arbitration,” Section 2 (a), also deals with witness statements (available at <http://bit.ly/2RII2of>).

[CPR publishes *Alternatives to the High Cost of Litigation*.] The UNCITRAL Model Rules simply note in Article 27 (2), “Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, may be presented in writing and signed by them.”

Most of these leave lots of room for what can go in a witness statement, addressing

Accurate Accountings

The subject: Witness statements.

The practice change: The U.K. reforms its court processes to make witness statements more effective.

The suggestion: Consider, strongly, applying the ‘Practice Directive’ to witness statements in arbitration.

mainly formalities like attestation to the truthfulness of what is said. Some refer to what would have been oral direct.

The Courts’ Reports

What the Business and Property Courts Did: Two reports by working groups commissioned by the Business and Property Courts of England and Wales looked at witness statements and identified several problems. See Witness Evidence Working Group (Oct. 28, 2020) (available at <https://bit.ly/2T0Naqj>).

Overall, they found witness statements deviating from what would be permitted on direct testimony in open court. The absence of real-time constraints—adverse counsel to object and a judge to rule—led to content creep. In particular:

- Witness statements had grown from a witness providing facts into an opportunity for the party to tell its story in a persuasive, comprehensive way.
- They had grown to include matters that do not need witness evidence, were better addressed by documents, were not known first-hand to the witness (who had not witnessed them), or more than one of these.

- They were drafted by a process that risked altering a witness’s memory of an event, for example, by showing them documents, even when the predicates at trial for showing them the document (usually failed memory requiring use of something to refresh it or that was a timely recollection recorded) were absent.
- When use of documents was permitted, failing to disclose they had been used.
- They failed to use as few drafts as possible (so as to limit changing the witness’s memory), failed to use the witness’s own words, failed to be concise, or some combination.

As a result, Practice Direction 57AC was adopted, and applies to witness statements signed on or after April 6, 2021 (available at <https://bit.ly/2T0aKU5>).

The Practice Direction begins with a section laying out in what circumstances it is and is not applicable. Section 2 then reminds users of the purposes of a trial witness statement.

Section 3 of Practice Direction 57AC details the content of witness statements. It provides the statement should be what a court would permit a witness to testify to if done orally—the first two bullet points above.

It then invokes a Statement of Best Practice (attached as an appendix) amplifying some of this. The appendix also adds principles addressed to the last three bullet points above—preserving the witness’s best memory of the events.

Section 4 creates two requirements for confirmation of compliance. In addition to the historic statement of truth of the witness, Section 4.1 requires the witness to confirm the witness’s understanding “that the purpose of this witness statement is to set out matters of fact of which I have personal knowledge [and] that it is not my function to argue the case, either generally or on particular points, or to take the court through the documents in the case.” Section 4.3 requires the relevant legal representative also certify compliance with the Practice Directive.

Section 5 contains sanctions including the possibility of making an order requiring one or more of: redrafting a witness statement, striking it out, requiring oral evidence, making a costs order against the violator.

The Appendix to the Practice Directive elaborates and amplifies these points. It par-

ticularly focuses on the last three bullet points above—preservation of a witness’s memory as it was and diminishing opportunities for it to be influenced by the process of drafting the witness statement.

Does This Transfer to Arbitration? Arbitration is not bound by any country’s rules of procedure, and indeed, arbitration’s rules of procedure may remind one of a thousand flowers blooming.

But arbitration uses a similar device as in the court procedural rules—witness statements—with a similar purpose. The problems identified in the Working Group reports also crop up in arbitration. This suggests at least considering whether all or some part of Practice Direction 57AC should be adopted in the arbitration community.

This view is buttressed by a recent development. In November 2020, the IBA issued “The Accuracy of Fact Witness Memory in International Arbitration” (2020) (available at <https://bit.ly/3uSSauD>). It mentions witness statements on average once a page. The last three bullet points above significantly overlap with the IBA report.

Put another way, there seems to be nothing inimical to arbitration in the Practice Direction. Implementing the Practice Direction’s principles would seem to serve arbitration’s goal of efficiently producing a correct and just result.

Implementation in Arbitration

There are several possible ways to implement all or some of Practice Direction 57AC and its Appendix.

The most immediate is for an arbitral tribunal to provide for its (or portions of its) applicability in Procedural Order Number 1. If witness statements are included in that order, providing more detail on what that means is logical. Whether incorporation of the Practice Direction by reference, or placing parts of its language in the procedural order, this can be done starting now.

Second, the IBA, having issued a report sharing at least some of the goals of Practice Directive 57AC, could consider amending the Rules on Taking of Evidence to reflect so much of it as seems logical.

Third, CPR can consider updating its Protocol’s sections on witness statements to implement the principles of the Practice Directive as seems appropriate. Of course, other institutional providers of arbitration services can do likewise.

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Witness statements expedite actual hearings of cases. Their circulation among legal representatives in advance of the hearing permits shorter, sharper, clearer cross examination than would occur in their absence.

Implementing some or all of the Practice Directive would serve two goals. First, it would shorten witness statements by excluding matter that has crept into them but would not be allowed in oral direct testimony and likewise shorten cross examination. The Practice Directive has steps to assure that goal is enforceable.

Second, it would update the process of drafting witness statements in light of added learning from the academic study of memory to assure more accurate description of the witness’s memory. The arbitral community should follow the lead of the English Business and Property Courts.