THE CHALLENGES AND THE FUTURE OF COMMERCIAL AND INVESTMENT ARBITRATION

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Witness Statements in International Commercial Arbitration

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1. Introduction

Written fact witness statements are commonplace in international commercial arbitration these days.[1] A number of arbitration rules provide explicitly for the use of witness statements by the tribunal, e.g. UNCITRAL Arbitration Rules, LCIA Arbitration Rules, SCC Arbitration Rules, Swiss Rules of International Arbitration. However, even if the respective rules do not refer to witness statements (e.g. ICC rules), there is no dispute that the arbitration tribunal may request their submission. The various arbitration rules that refer to witness statements typically do not go much beyond confirming that the arbitration tribunal may request that the parties submit written statements from witnesses. In this context, the International Bar Association Rules on the Taking of Evidence in International Arbitration (2010) (the IBA Rules on Evidence) not only confirm the practice of submitting witness statements, but also provide useful guidelines on such things as what exactly should be included in the witness statements, and how they relate to the oral examination given at the hearing. The IBA Rules on Evidence codify the procedures developed in international arbitration over the years,[2] and hence constitute an important benchmark for assessing various arbitration practices. The International Bar Association Guidelines on Party Representation in International Arbitration (2013) (the IBA Guidelines on Party Representation) also provide useful guidance on the issue of the lawyers' role in the preparation of witness statements.

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[1] According to Queen Mary University of London and White & Case LLP, 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, available at: http://annualreview2012.whitecase.com/International_Arbitration_Survey_2012.pdf, p. 3, 'In a significant majority of arbitrations (87%), fact witness evidence is offered by exchange of witness statements'.

[2] A. Redfern, M. Hunter, *Redfern and Hunter on International Arbitration*, 2009, p. 401.

2. Advantages and disadvantages of witness statements

Witness statements are used for a number of reasons. Firstly, they allow the tribunal to render better decisions. They are particularly useful in large arbitrations with complex issues.[3] Thanks to witness statements, the witness's story is presented in order and is known ahead of the hearing so the examination of witnesses may be focused on the most important issues that are at the heart of the dispute. Secondly, they save time and costs. They enable the tribunal to make an informed decision as to which witness should be called to the hearing. If the parties or arbitrators so decide, the witnesses may not be requested to testify at the hearing and the entire witness testimony will be confined to written statements.[4] Even if there is an oral examination of a witness at the hearing, a focused examination will be more time-effective than an unprepared examination. Thirdly, they allow the counsel for the opponent to decide which witnesses should be cross-examined and to prepare for the cross-examination. Without witness statements, opposing counsel may often be surprised by new material provided by the witness and hence may be unable to ask the right questions.

This does not mean that witness statements should be used in every case. In small, simple cases, it may be more efficient to simply conduct an oral examination of witnesses. In addition, if the lawyers representing the parties are unaccustomed to arbitration practice, there is a risk that any witness statement that they help to prepare (or fail to help to prepare) may be of little use. The witness statements are sometimes dismissed as useless because they are drafted by lawyers and by implication may not be trusted. However, as Gary Born rightly notes, 'this criticism substantially overstates the defects in witness statements, and

[3] P. Bienvenu, M. J. Valasek, *Witness Statements and Expert Reports*, in: D. Bishop, E. G. Kehoe (eds.), *The Art of Advocacy in International Arbitration*, p. 239.

[4] According to Queen Mary University of London and White & Case LLP, 2012 International Arbitration Survey: Current and Preferred Practices…, pp. 3, 24: 59% of respondents believe that the use of witness statements as a substitute for direct examination at the hearing is generally effective. There is a wide divergence of opinions in various categories of respondents, however: 'The majority of North American respondents (73%), common lawyers (71%), arbitrators (69%) and private practitioners (60%) believe that the use of written fact witness statements as a substitute for direct examination at the hearing is effective, whereas fewer civil lawyers (51%), in-house counsel (40%) and Latin American respondents (35%) have the same view.'

does not address the benefits or efficiency from, or possible alternatives to, such statements'.[5]

3. The contents of witness statements

There is no single template for witness statements in international arbitration. The statements vary in content and length. Generally, witness statements can be divided into two main categories: the first includes short, simple statements listing general topics and outlining the witness testimony, while the other – statements containing full and detailed testimony. In most cases full witness statements are preferable to short ones.[6] Full statements present the witnesses' entire story. Hence, they serve the very purpose for which witness statements are used – they help the tribunal and the parties to concentrate on the important issues at the hearing, or even let them skip the oral examination of the witness altogether, and they allow the other party to prepare for the cross-examination. If witness statements are to help the arbitrators decide the case, and if the parties are to be on a level playing field, the tribunal should clearly set out its expectations

[5] G. Born, *International Commercial Arbitration*, Second Edition, Wolters Kluwer, 2014, p. 2259.

For what the users of arbitration see as the pros and cons of witness statements, see Queen Mary University of London and White & Case LLP, 2012 International Arbitration Survey: Current and Preferred Practices…, p. 25.

[6] This does not mean that the longer the witness statement, the better. Counsels should ensure that they are not unnecessarily long. 'Another problem is that witness statements get too long. Something counsel often overlook is that each party has a large team of lawyers and consultants, while the arbitrators have to read everything themselves. There should be more attention paid to ways to cut down length: for instance, a witness saying "I have seen the witness statement of Mr. X and I confirm that I have the same recollection of these events." You don't have to repeat the same things in several witness statements.' M. Schneider, *Act III: Advocacy with Witness Testimony*, Arbitration International, Volume 21, 2005, Issue 4, p. 589.

This is a fine example of professional malpractice: 'sitting as a sole arbitrator in a distributorship dispute when a party represented by hard working, but arbitration inexperienced, British solicitors submitted a 360 page WS detailing each and every purported malfunction of certain machines over a 15 year period. It was simply impossible to read this monster in its entirety and the submission would have been more intelligently handled by a much shorter and synthetic WS, with attached schedules and references to relevant documents'. N. Ulmer, *The Witness Statement as Disclosure*, Kluwer Arbitration Blog, 26 December 2014, available at: http://kluwerarbitrationblog.com/blog/2014/12/26/the-witness-statement-as-disclosure/#fnref-11365-2.

regarding the contents of the witness statements in a procedural order. When arbitrators expect detailed statements, a laconic witness statement may lead them to determine not to hear the witness.[7]

According to Article 4.5 of the IBA Rules on Evidence, witness statements must contain:

(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.

As documented by Article 4.5 (b), the IBA Rules on Evidence clearly favour the long version of witness statements. The list contained in the IBA Rules on Evidence is not exhaustive. Other elements are also proposed such as:
(1) a photograph of a witness; this should help arbitrators to identify the witness and remember oral testimonies, especially in cases with a large number of witnesses,
(2) executive summary; this is to help the arbitrators focus on the main points of the testimony, and is particularly helpful in cases with technical matters where arbitrators are handling large amounts of information.[8]

4. Preparation of witness statements

It is a generally accepted practice that witness statements are prepared with the assistance of lawyers. If they are to serve their purpose, they must

[7] N.D. O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide*, Informa Law from Routledge, 2012, p. 119.

[8] M. Hwang SC and A. Chin, *The Role of Witness Statements in International Commercial Arbitration*, in: A. van den Berg (ed.), *International Arbitration 2006: Back to Basics?*, Montreal: ICCA Congress Series 2006, Volume 13, p. 656.

be ordered, must be focused on important issues, and must be logical and consistent. It is difficult to meet all these requirements without help from an experienced counsel. As Laurent Lévy puts it, 'The arbitrators would not actually benefit from a statement, which a witness drafted on his own. The help of counsel in drafting the witness statement enables the witness to focus on the relevant issues, which in turn proves a useful tool for the arbitrators.'[9] There is a fine balancing act in the preparation of witness statements. If they are all of the lawyers' making, they may be too perfect to be credible for the tribunal, and a witness may be in a difficult position when confronted with the contents of 'his' statement at the cross-examination.[10] If, however, the lawyers are not sufficiently involved in the drafting, the statements may be chaotic and incoherent, both internally and with other documents in evidence. Ideally, the witness's story should be told in his words, and the lawyers' work should be 'invisible'.[11] It can be said of a good witness statement that 'it is the witness who carries the tune, while the good advocate acts merely as sound engineer.'[12]

The following recommendations regarding the drafting of witness statements are given in arbitration literature:

(1) the first draft of the witness statement should be prepared by the witness; lawyers should then work on this document; this process can be repeated a number of times until satisfactory results have been achieved; if, for some reason, the witness is unable to prepare the first draft, then the lawyers should meet with the witness and through open questions ask him to describe the story in detail;[13]
(2) witness statements should not contain legal arguments or legal jargon; a fine example what should *not* be done is this:

> […] a central witness submitted a 2.5 page German language WS that contained a quite specific *legal* conclusion written in German

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[9] L. Lévy, *Testimonies in the Contemporary Practice: Witness Statements and Cross Examination*, in: *Arbitral Procedure at the Dawn of the New Millennium: Reports of the International Colloquium of CEPANI*, October 15, 2004, Brussels: Bruylant 2005, p. 115.

[10] V.V. Veeder QC noted 'It is perhaps surprising that many sophisticated practitioners have not yet understood that their massive efforts at reshaping the testimony of their client's factual witnesses is not only ineffective but often counterproductive. Most arbitrators have been or remain practitioners, and they usually can detect the "woodshedding" of a witness', V.V. Veeder QC, *The 2001 Goff Lecture, The Lawyers' Duty to Arbitrate in Good Faith,* Arbitration International vol. 18 No. 4, 2002, p. 444.

[11] P. Bienvenu, M.J. Valasek, *Witness Statements…*, p. 248.

[12] P. Bienvenu, M.J. Valasek, *Witness Statements…*, p. 256.

[13] P. Bienvenu, M.J. Valasek, *Witness Statements…*, pp. 248–251.

legal terminology. The witness was neither a lawyer nor a native German speaker (and the WS was supposed to have been submitted in English); it was quite obvious that the material had been inserted by German counsel, but in answer to my question the witness claimed he had come to that legal conclusion on his own;[14]

(3) the witness statement should be drafted in the witness's native tongue, or a language in which the witness can comfortably be cross-examined; this way one can make sure that the witness can verify the accuracy of the final draft and the witness will be more confident and more credible at cross-examination; as Nigel Blackaby points out: 'If a witness signed a statement in English and then demands to be cross-examined in another language, there is an easy first cross-examination question whether they understood what they signed';[15]
(4) the witness statement should be organised in a consistent way, e.g. the story may be presented in chronological order or in an issue-by-issue order;[16]
(5) the paragraphs of the witness statement should be numbered to make easy reference to a particular part of the statement during the cross--examination and in the briefs;[17] it is also good practice to insert cross--references to other witness statements and other documents in the file;[18]
(6) witnesses should restrict their statements to facts about which they have direct knowledge;[19] when they depart from this rule, the parts of the witness statement that are based on hearsay should be highlighted; this is to help preserve the credibility of a witness, who does not pretend to have first-hand knowledge of all the facts.[20]

There are also ethical issues concerning contact with and the preparation of witnesses. National rules in this respect vary widely.[21] However, there is a general agreement that preparing witnesses in international arbitration is an acceptable practice.[22]

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[14] N. Ulmer, *The Witness Statement…*

[15] N. Blackaby, *Witness Preparation – A Key to Effective Advocacy in International Arbitration*', A. van den Berg (ed.), *ICCA Congress Series No. 15*, Rio 2010, p. 122.

[16] P. Bienvenu, M.J. Valasek, *Witness Statements…*, p. 254.

[17] M. Hwang SC and A. Chin, *The Role of Witness Statements…*, p. 659.

[18] A. Redfern *et al.*, *Law and Practice of International Commercial Arbitration*, London: Sweet & Maxwell, 2004, pp. 298, 308.

[19] N. Blackaby, *Witness Preparation…*, pp. 121–122.

[20] M. Hwang SC and A. Chin, *The Role of Witness Statements…*, p. 658.

[21] N. Blackaby, *Witness Preparation…*, p. 125.

[22] See P. Bienvenu, M.J. Valasek, *Witness Statements…*, p. 254.

The IBA Rules on Evidence provide that 'It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them (Article 4.3).'

The IBA Guidelines on Party Representation read:

> A Party Representative may assist Witnesses in the preparation of Witness Statements and Experts in the preparation of Expert Reports. (Guideline 20)
> A Party Representative should seek to ensure that a Witness Statement reflects the Witness's own account of relevant facts, events and circumstances. (Guideline 21)

Under the LCIA Rules:

> Subject to the mandatory provisions of any applicable law, rules of law and any order of the Arbitral Tribunal otherwise, it shall not be improper for any party or its legal representatives to interview any potential witness for the purpose of presenting his or her testimony in written form to the Arbitral Tribunal or producing such person as an oral witness at any hearing. (Article 20.5)

Pursuant to Article 25.2 of the Swiss Rules, 'Any person may be a witness or an expert witness in the arbitration. It is not improper for a party, its officers, employees, legal advisors, or counsel to interview witnesses, potential witnesses, or expert witnesses.'

There are limits as to how far counsel can go in shaping the witness statement. Although the counsel may help to present the witness's story, he may not induce the witness to give a false account of the facts or knowingly allow the witness to give such an account. Otherwise, 'it would be gross professional misconduct for a lawyer to try to persuade a fact witness to tell a story that both the lawyer and the witness in question knew to be untrue and to prepare the witness to make such a story to sound as credible as possible'.[23]

The IBA Guidelines on Party Representation also confirm this rule. Guideline 11 provides the following:

> A Party Representative should not submit Witness or Expert evidence that he or she knows to be false. If a Witness or Expert intends to present or presents evidence that a Party Representative knows or later discovers to be false, such Party Representative should

[23] A. Redfern, M. Hunter, *Redfern and Hunter on…*, p. 402.

promptly advise the Party whom he or she represents of the necessity of taking remedial measures and of the consequences of failing to do so. Depending upon the circumstances, and subject to countervailing considerations of confidentiality and privilege, the Party Representative should promptly take remedial measures, which may include one or more of the following:

(a) advise the Witness or Expert to testify truthfully;
(b) take reasonable steps to deter the Witness or Expert from submitting false evidence;
(c) urge the Witness or Expert to correct or withdraw the false evidence;
(d) correct or withdraw the false evidence;
(e) withdraw as Party Representative if the circumstances so warrant.

A comment to Guideline 11 explains that: 'A Party Representative therefore should not assist a Witness or Expert or seek to influence a Witness or Expert to give false evidence to the Tribunal in oral testimony or written Witness Statements or Expert Reports.'

5. Timing of witness statements and additional witness statements

It is the arbitral tribunal who decides when witness statements are to be submitted.

Pursuant to Article 4.4 of the IBA Rules on Evidence:

> The Arbitral Tribunal may order each Party to submit *within a specified time* to the Arbitral Tribunal and to the other Parties Witness Statements by each witness on whose testimony it intends to rely, except for those witnesses whose testimony is sought pursuant to Articles 4.9 or 4.10. [emphasis added]

Witness statements may be exchanged sequentially or simultaneously. Consecutive exchanges are usually made in the statement of claim and the statement of defence. They allow the parties to concentrate on relevant issues, but they favour the defendant as he will know the testimony of claimant's witnesses before he submits his witness statements. Simultaneous exchanges place both parties on an equal footing. They also save time. The downside is that: 'simultaneous exchanges make it harder for the tribunal to integrate such material and the submissions

may be "ships that pass in the night."'[24] It is submitted that the best option is to hold two rounds of simultaneous exchange, with the second round of witness statements dealing only with the issues raised in the first round.[25]

The practice of submitting second-round rebuttal witness statements is confirmed by the IBA Rules on Evidence (Article 4.6):

> If Witness Statements are submitted, any Party may, within the time ordered by the Arbitral Tribunal, submit to the Arbitral Tribunal and to the other Parties revised or additional Witness Statements, including statements from persons not previously named as witnesses, so long as any such revisions or additions respond only to matters contained in another Party's Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration.

6. Interplay between witness statements and the oral examination of witnesses

Typically, the submission of witness statements is followed by an oral examination of the witnesses at the hearing. The fact that the examination of evidence is divided into two stages, first – written, and second – oral, raises a number of issues that are discussed below.

6.1. Should witnesses who have not submitted witness statements be examined orally?

It is generally agreed that if witness statements are used, only witnesses who have submitted a witness statement will be examined orally at the hearing.[26] One of the reasons why witness statements are used is to avoid surprises at the hearing. It would therefore be irrational for the tribunal to allow the parties to decide what witness evidence they will present ahead of the hearing, and what is to be revealed only at the hearing.

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[24] J. Waincymer, *Part II: The Process of Arbitration*, in: *Procedure and Evidence in International Arbitration*, Kluwer Law International 2012, p. 905.

[25] M. Hwang SC and A. Chin, *The Role of Witness Statements…*, pp. 654, 655; J. Waincymer, *Part II…*, pp. 905, 906.

[26] C. Oetiker, *Witnesses before the International Arbitral Tribunal*, 25 ASA Bulletin, Issue 2, 2007, pp. 256–257.

6.2. Who decides if a witness who has submitted a witness statement should be examined at the hearing?

It is generally accepted that an arbitration tribunal may request that any witnesses who have submitted statements attend the hearing for oral examination. Almost all arbitration rules give arbitrators broad discretion with respect to admitting and determining the relevance and value of the evidence provided. The question is, however, what are the limits of that discretion if one or both parties request that a witness whose witness statement has been submitted be examined at the hearing? Can the arbitrators deny such a motion? In my opinion, the right view is that the tribunal may refuse to examine witnesses orally even despite a joint motion by both parties, if it finds that the evidence provided by the witness is irrelevant to the outcome of the case.[27] If, however, the evidence of the witness is relevant, the arbitrators should not dismiss the motion to cross-examine the witness. It is generally agreed that there is a right to cross-examination in international arbitration.[28]

That leaves us with the most controversial question of what arbitrators should do if a party who has submitted a witness statement requests

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[27] N.D. O'Malley, *Rules of Evidence…*, 127;

'Even if the parties can, in principle, request to examine witnesses of the opposing party, it is within the power and discretion of the arbitral tribunal to deny, in the context of anticipated appraisal of evidence, examination of a witness called by one party if it deems the testimony of this witness to be not relevant. In Switzerland this practice was confirmed by the Swiss Federal Tribunal (Bundesgericht; Tribunal fédéral): the refusal of the arbitral tribunal to hear a witness who had delivered a written witness statement did not constitute a violation of the right to be heard, since the right to such a hearing was not set forth in the applicable ICC rules of arbitration. Nevertheless, the arbitral tribunal should make only sparing use of the power not to hear witnesses who have delivered written witness statements, if this is contrary to the request of one party, and should decide on the relevance of the testimony of a witness only after hearing the witness.' C. Oetiker, *Witnesses before…*, p. 258.

I believe that arbitrators should not feel pressured to hear a witness who does not add anything to the case just because a party or the parties so request. In addition, requiring the arbitrators to decide on the relevance of the testimony of a witness only after hearing the witness misses the entire point of rejecting irrelevant evidence.

[28] 'To some extent international practice has created consensus on arbitral norms on matters such as witness statements and the right to cross-examination.' W.W. Park, *The 2002 Freshfields Lecture – Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion*, Arbitration International 19(3), 2003, available athttp://www.williamwpark.com/documents/Freshfields%20Lecture.doc, p. 13.

that the witness whose statement it relies on be examined at a hearing and the opposing party waives cross-examination. There is no common opinion in the arbitration community on this issue.

On the one hand, it is argued that, 'there is no rule in international commercial arbitration that bars a party from orally examining its own witnesses by way of supplemental examination in chief, even after witness statements have been submitted.'[29] Presumably based on this premise, Art. 8.1 of the IBA Rules on Evidence provides that:

> […] Each witness (which term includes, for the purposes of this Article, witnesses of fact and any experts) shall, subject to Article 8.2, appear for testimony at the Evidentiary Hearing if such person's appearance has been requested *by any Party* or by the Arbitral Tribunal. [emphasis added]

In the same line of thought, the SIAC rules read:

> 22.4 The Tribunal may direct the testimony of witnesses to be presented in written form, either as signed statements or sworn affidavits or any other form of recording. Subject to Rule 22.2, *any party* may request that such a witness should attend for oral examination. If the witness fails to attend, the Tribunal may place such weight on the written testimony as it thinks fit, disregard it or exclude it altogether. [emphasis added]

Although through different wording, the SCC rules have the same effect. Article 28 provides that:

> (2) The testimony of witnesses or party-appointed experts may be submitted in the form of signed statements.
> (3) Any witness or expert, on whose testimony a party seeks to rely, shall attend a hearing for examination, unless otherwise agreed *by the parties*. [emphasis added]

On the other hand, there is an argument which states that a party who has submitted a witness statement may not request to hear its witness if the other party has waived the cross-examination of that witness.[30] It seems that the LCIA Rules take such approach:

> Article 20.4 The Arbitral Tribunal and *any party* may request that a witness, *on whose written testimony another party relies*, should attend for oral questioning at a hearing before the Arbitral Tribunal. [emphasis added]

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[29] M. Hwang SC and A. Chin, *The Role of Witness Statements…*, p. 652.
[30] C. Oetiker, *Witnesses before…*, p. 257.

In my opinion this is the better position. A witness statement should contain the entire testimony of the witness, i.e. everything the witness has to say should be presented in the witness statement. Submitting a witness statement first and then requesting the oral examination of this witness wastes time and raises costs. It may also be used as a dilatory tactic.[31]

6.3. Can a witness who has submitted a witness statement expand on the material given in the witness statement?

It is not desirable to allow the parties to introduce new material after the witness statements have been filed. Hence, a procedural order should explicitly state that the witness statement must contain full evidence in chief.[32] Otherwise the parties may be tempted to submit only a brief, skeleton witness statement and then provide all the details only at the hearing. By doing so, they may effectively deprive the counsel for the other party of the ability to properly cross-examine the witness. Hence, it has rightly been suggested that witnesses should be allowed to expand on the matters contained in the witness statement in four instances:

(a) the witness wishes to correct an error or ambiguity in his witness statement or affidavit;
(b) the witness wishes to elaborate on some relatively small detail in his witness statement or affidavit;
(c) the witness wishes to respond to matters raised in the opposing party's witness statement which he had not seen when his own statement was filed;
(d) the witness wishes to give evidence about relevant facts which have occurred since the date of the witness statement.[33]

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[31] If, however, a party requests the cross-examination of a witness, it is a good practice to begin the oral examination with a short direct examination that will allow the witness to get more comfortable with the arbitration process as a 'warm-up' to the cross-examination. According to Queen Mary University of London and White & Case LLP, 2012 International Arbitration Survey: Current and Preferred Practices…, p. 25, 'Most interviewees, however, would still like to keep a limited direct examination (e.g., 5–10 minutes) to allow the witness to settle in and to discuss any issues that arose after the witness statement was submitted.'

[32] M. Hwang SC and A. Chin, *The Role of Witness Statements…*, p. 655.

[33] *Ibid.*, p. 654.

6.4. What are the consequences of waiving the right to cross-examine the other party's witness?

The most sensible solution seems to be that waiving cross-examination does not entail any negative consequences for the waiving party. The IBA Rules on Evidence take such a stance. Article 4.8 reads: 'If the appearance of a witness has not been requested pursuant to Article 8.1, none of the other Parties shall be deemed to have agreed to the correctness of the content of the Witness Statement.'

There are good reasons for this. A party wishing to question a witness statement does not necessarily have to cross-examine the witness. It may undermine the evidence provided by the witness by other means, e.g. by making arguments based on documents, by pointing out inconsistencies in the evidence provided by the witness with other evidence, and so forth. If the arbitrators were to make negative inferences from the waiver to cross-examine, the counsels would in effect be obliged to cross-examine every witness of the other party if they do not agree with any part of his witness statement. This may lead to a waste of time and greatly increase the costs of arbitration. Also, the concept of cross-examination is to various degrees alien or underdeveloped in civil law countries. Although cross-examination is a standard practice in international arbitration and civil law practitioners have grown accustomed to it, it could nevertheless be an unpleasant surprise for a civil law counsel to find out that the other party's witness statement has been accepted as correct simply because he decided not to cross-examine a witness.

Not everyone agrees with this position, however. It has been argued that:

> If a witness is to be challenged on any issue in his testimony, this should ordinarily have been put to the witness in order to give him an opportunity to defend his evidence. It is submitted that failure to cross-examine a witness on any part of his testimony (whether oral or written), where there was an opportunity to cross-examine, is tantamount to an acceptance of that testimony by the party against whom the evidence is adduced, and that party should not generally be able to impugn the unchallenged evidence of the witness, unless the testimony is otherwise contradicted or incredible, or where there was manifest notice of the intention to impeach that testimony. Accordingly, it is submitted that where evidence is not challenged and stands uncontradicted, it should

> ordinarily be accepted as correct by the tribunal, subject to issues of credibility.[34]

The authors seem to believe that a tribunal in an international arbitration should follow the rules and practices of common law jurisdiction because cross-examination is a common law concept. Most common law jurisdictions follow the '*Browne v. Dunn* rule', or 'the rule in *Browne v. Dunn*' based on the 1893 House of Lords' decision.[35] Under the *Browne v. Dunn* rule, a party cannot rely on evidence that contradicts the testimony of a witness without cross-examining that witness.

Given the divergence of opinions on this point and the risks involved, it is advisable that arbitrators and counsels in international arbitration discuss this issue in advance and clarify what conclusions may be drawn from a decision not to cross-examine witnesses.

6.5. How should the tribunal treat a witness statement if the witness is unavailable for examination at the hearing?

There are two distinct issues here: first, if the witness is unavailable for a valid reason, and second, if the witness is uncooperative and his failure to appear for oral examination has no objective justification.

It is submitted that if the witness is unavailable for a valid reason, then the witness statement should be left in the record.[36] When appraising the evidence, the tribunal should take into account the fact that the witness has not appeared and hence could not be cross-examined. Therefore, the value of such evidence is generally lesser than if the witness had appeared. 'Valid reason' is a vague notion, though the following definition seems uncontroversial:

> The basis for excusing a party's failure to present a witness generally stems from the event preventing attendance having been unforeseeable at the time of proffering the written statement. For example, the legitimate and serious illness of the witness (often

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[34] J. Bellhouse, P. Anjomshoaa, *The Implications of a Failure to Cross-examine in International Arbitration,* available at:
http://www.whitecase.com/files/Publication/c85b98c6-ff96-4ea9896bb24861566664/Presentation/PublicationAttachment/27a69470b7da435e90edc19115be8193/article_implications.pdf.

[35] *Brown v. Dunn* (1893) 6 R 67, H.L., available at:
https://docs.google.com/file/d/0B7dkDGhHaPW5V0M4T2hzTm1XbzQ/edit?pli=1.

[36] C. Oetiker, *Witnesses before…*, p. 258.

> substantiated by affirming correspondence from a physician), or death of the witness, and/or the disappearance of a witness due to reasons unconnected to the arbitration, are all grounds which may excuse a party from the consequence of not presenting a witness at the hearing. There are of course others.[37]

Opinions differ when it comes to the second scenario, i.e. the witness fails to appear without a valid reason. A 'restrictive' approach has it that witness statements should be confirmed orally, or else they should be disregarded. Article 4.7 of the IBA Rules on Evidence provides that:

> If a witness whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by that witness unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise.

According to a 'liberal' approach, the tribunal has discretion to decide whether the witness statement for that witness should be admitted in evidence or should be disregarded.[38] In my opinion, the restrictive approach is the better option. It creates a simple rule that discourages the party who relies on a witness statement from inducing the witness not to appear for cross-examination.

7. Final remarks

There is little controversy as to what witness statements should contain and how they should be prepared, although practitioners often do not get it right and tend to over-prepare them. More controversial is the relation of witness statements and oral examination. Notably, a waiver of cross-examination poses interesting questions concerning both parties in a case: can a party who submitted the witness statement in such a situation request a direct oral examination? Is the party waiving cross-examination deemed to have agreed to the correctness of the content of the witness statement? Even though I believe that the answer to both questions is negative, they remain open.

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[37] N.D. O'Malley, *Rules of Evidence…*, p. 130.

[38] C. Oetiker, *Witnesses before…*, p. 259.