Kluwer Arbitration Blog

The Witness Statement as Disclosure

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As counsel, I know the excitement and curiosity when, receiving the other party's filing, I turn to the Witness Statement volume first: which witnesses have they put forward? How did they explain certain key meetings or documents? Are they bringing Mr. A to testify? Later, of course, I read the statements repeatedly and scribble marginal notes as to where there are contradictions or gaps to be exploited in cross-examination.

As arbitrator I also often glance through the witness statements early-on in order to get a more direct "feel" for the case, its players and its history, as well as for planning purposes.

Witness Statements (WS) are key element in the presentation of evidence and the organization of the hearing, on which both counsel and arbitrators rely. I have done some reading and research on WS in drawing up this post – but it mostly relies on my personal experience.

In my view factual witness statements (expert statements are a different animal) are designed to accomplish three somewhat overlapping purposes:

1. **Efficiency**: the WS is supposed to reduce the time in hearings by presenting all or most of the direct testimony in advance;
2. **Evidence submission**: the party or its counsel has prepared the WS in order to present a recital of pertinent facts and developments as lived or seen by that witness; and
3. **Disclosure**: the WS is a means of disclosure to adverse counsel and the Tribunal of what the witness knows and has to say about issues in the case.[1)]

It is this third, somewhat neglected, aspect of WS on which I particularly wish to comment in this blog submission.

It is well accepted that WS are in fact largely prepared by counsel. Indeed my experience causes me to agree with Laurent Lévy when he writes that *"arbitrators would not actually benefit from a statement which the witness drafted on his own. The help of counsel … enables the witness to focus on the relevant issues, which in turn*

proves a useful tool for the arbitrators."[2)]

What experienced and careful arbitration practitioners know is that is difficult to get the WS "right". Ideally the WS: is clear and concise; provides key information or views that are not evident from documents; is truthful and without contradiction so that it holds up on cross-examination; helpful to supporting or explaining the case or defense of the party submitting it; **and** fairly discloses the testimony and pertinent knowledge of the witness such that the arbitrators and opposing counsel can properly prepare and be informed, and unnecessary surprise avoided.

This is a tall order, and counsel do not always get it right; my own experience, for example, includes the following:

• a sales agreement dispute where my opposing counsel was an intelligent but headstrong corporate lawyer who did not understand the purpose of the WS as evidence, much less as fair disclosure. Accordingly, she submitted, at various times, more than a dozen laconic but argumentative WS (sometimes the same witness twice, and sometimes several identical sentences in different WS), whenever she thought they sustained a point she wanted to make (even as to document production and various procedural issues.)

• a metals recycling contract arbitration where the Russian party presented only one, fairly central, witness with a 1.5 page WS (which he neglected even to bring to the hearing in the original Russian). It was obviously not possible to prepare a cross-examination based on that skimpy and uninformative WS, and I was constrained to base much of the rather unsatisfactory examination on pertinent documents and facts the witness had not referred to in writing (on the other hand, I do not believe the witness conveyed much helpful information to the Tribunal.)

• 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.

• sitting as a Chairman is a Berlin-venued arbitration in which a central witness submitted a 2.5 page German language WS that contained a quite specific *legal* conclusion written in German 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.

Given the importance and ubiquity of WS in international arbitration it is interesting to note that few major arbitration rules define them explicitly; when they do mention WS it is often merely language to the effect that witness testimony "may be presented by a party in written form". (New) LCIA Rules, Art. 20.2, see also Swiss Rules Art. 25(3); UNCITRAL Rules Art. 27 (2)

On the other hand Art. 4(5)(b) of the IBA Rules on the Taking of Evidence contain some strong instructions as to the content of a WS:

> "Each Witness Statement shall contain:
> […] (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;"

Paragraph 3 of the Preamble to the IBA Rules on the Taking of Evidence also enshrines the principle that: *"The taking of evidence shall be conducted on the principles that each Party shall act in good faith and be entitled to know, reasonably in advance of any Evidentiary Hearing or any fact or merits determination, the evidence on which the other Party relies".*

A proper WS statement is thus part of this good faith evidentiary conduct; the WS should be revelatory and, although written, it is the prior disclosure, not of a document, but of testimony. If it does not adequately and fairly disclose the pertinent testimony of the witness a number of consequences follow: opposing counsel may not be able to make an informed decision as to whether it is worth calling the witness for oral testimony and cross-examination; the party submitting the WS may not have gotten its full evidence in should the witness not be called for cross; if the witness is cross-examined then the counsel doing it has an inadequate record on which to plan his questions, and may be tempted (or required) to go further afield in his cross-exanimation, with a resulting uneven and less efficient playing field. Last but not least, the arbitrators are themselves less well informed and must work harder (and they don't always) than if the WS provided full and proper disclosure of the Witness's knowledge.

So what is to be done to ensure that a WS properly discloses evidence and useful information?

One remedy is to ensure that the procedural rules of the case include language such as IBA Art. 4(5)(b) (quoted above); in fact I use a slightly more strongly worded injunction. This sets a standard and lets the parties know what the arbitrators expect. It can be given some teeth by adding that, absent a justified application, there will be little or no direct examination of the witness other than to confirm the witness statement (which in effect converts it into sworn testimony).

These measures are not a panacea, however, as parties do not always respect them. In my first example above the Tribunal's procedural order did have language that "The witness statement shall, in principle, stand in lieu of the witness's direct testimony". I complained repeatedly that opposing counsel's highly unprofessional submission of a flurry of "rifle shot" witness statements made it difficult to know which of the many witnesses should be called, and that I would require *more*, not less, time for cross-examination of those I did call, as I would first have to explore what aspects and documents of the dispute the witness was knowledgeable about. Asking to strike the

improper WS (which arbitrators are very reluctant to do anyway) would not, in that case a least, have accomplished the same purpose as a good in cross-examination before the arbitrators. The Tribunal did not really know what to do with my objections—but they did add to what, I believe, was significant skepticism of those WS and that party's evidence in general.

Doak Bishop has recommended that counsel should early on enquire of the Tribunal as to what genre of WS they are expecting (from "simple statement, listing general topics" to "full and detailed" and an "intermediate approach" between the two).[3)] Doak's recommendation is part of being an effective advocate, and I can only agree with it. I would, however, go further and recommend that arbitrators pro-actively inform counsel of what they want in the WS and explain that they expect it to provide a good and fair factual disclosure of what the witness knows on key matters within his knowledge. The Tribunal can add that WS that are unduly argumentative, faulty or otherwise fail to take into account these instructions may not redound to the benefit of the party submitting them. Another area counsel can be warned of is that the Tribunal will strictly apply the rule of Art. 4(5)(b) of the IBA Rules of Evidence, such that if a WS is so laconic and uninformative that opposing counsel does not request that the witness be brought for cross-examination then he or she will not appear as a witness at hearing and the only evidence that will be referred to is the skimpy WS itself (I mention this in part because I have seen a number of cases where one party waived cross-examination of a witness and the party producing the witness's WS, surprised by this, insisted on bringing the witness anyway.)

I think such a discussion is particularly important where the Tribunal has reason to suspect that counsel may not be familiar with arbitration practice and/or do not intend to conform to it. Unfortunately, many experienced arbitrators, if they talk about WS content at all, only emphasize that they want concision giving the impression that they are more interested in reducing their workload than in the details of the evidence.[4)] Concision and clarity are important objectives of course, but there are sometimes matters where a WS statement needs to be long and is perforce complex. So I hasten to add that the Tribunal should not actually give instructions as to how to draw up a WS, and that one size does not fit all, it is for the witnesses and their counsel to draw up the appropriate WS, but in doing so they must be aware of the Tribunal's guidelines.[5)] What the Tribunal can profitably do—orally and in the procedural rules—is to make clear that the principles and objectives of a WS include fair disclosure.

Recognizing, and seeking to ensure, the disclosure role of the WS helps level the playing field and aids the arbitral efficiency that is at the heart of the WS procedure in the first place.

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References

In a good 2008 article in Larry Newman and David Zaslowsky state that the *"Witness Statements are designed to accomplish at least two objectives :*
1. To reduce the time in hearings during which witnesses present their evidence in direct testimony, which is widely thought of as being, in any event, the product of careful rehearsal with counsel; and,
↑1 *2. To reduce the need for discovery because of the provision of the entirety of the testimony of the witness in advance of the hearing, thereby giving the other side the opportunity to counter this testimony with documents*". Newman and Zalskowsky, International Arbitration: Witness Statements, New York Law Journal, 28 May 2008. At the end of the day I think this is consistent with the three points I adumbrated above.

Laurent Lévy from "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:
↑2 Bruylant, 2007): *"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*".

↑3 Quoted in Pierre Bienvenu and Martin J. Valasek, "Witness Statements and Expert Reports" in The Art of Advocacy in International Arbitration, D. Bishop and E. G. Kehoe, eds (Juris): *"A statement that adopts an intermediate approach, identifying key points of a witness's testimony without all of the relevant facts and details"*.

↑4 This problem in part arises from the fact that there are a large number of arbitrators who have little or no recollection of the work involved in drawing up a WS – and would not themselves be able to carry out an effective cross-examination.

↑5 Note that the IBA Guidelines on party representation do, inter alia, enjoin counsel to ensure that WS reflect the witnesses own opinion, but those Guidelines merit separate discussion. A quick introduction can be found on this Blog. See Sapna Jhangiani, *How far do the new LCIA Guidelines for parties' legal representation and the IBA Guidelines on party representation go ?*

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