Kluwer Arbitration Blog

Will London-Seated Arbitration Follow The English Courts' Approach To Witness Statements?

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This post considers Practice Direction 57AC ("**PD57AC**"), which changes the approach to witness evidence in the English Courts, and its potential impact on London-seated arbitration.

The New Approach to Witness Statements in English Litigation

On 6 April 2021, the English Business and Property Courts marked a significant change in the approach that lawyers, and witnesses, are to take to witness statements, as PD57AC came into effect.

Witness statements in the English Courts became the norm with the introduction of the Civil Procedure Rules ("**CPR**") in 1999. The intention was to save time in Court and ensure that a witness's evidence was not determined by their ability to recall the facts under the stress of being in Court. It was hoped that the evidence would be more accurate.[1)]

The outcome was that statements became (i) over-lawyered, (ii) a vehicle for submissions, whereby a witness would provide a commentary on a substantial number of key documents (often quoting those documents at length), and, as the years passed, (iii) longer and longer, and (iv) more and more expensive. As it was put by Sir Geoffrey Vos V-C:

> "*[W]itness statements became gargantuan and costly, and did not stick to the main evidential points in issue, but began over time to range far and wide over the entire history of the relationship between the parties. They were drafted by lawyers and often moved miles away from the [precise words] of the witnesses.*"

Cross-examination risked being a contest as to which witness could best remember the contents of their voluminous witness statement, with advocates regularly alighting upon a word the meaning of which the witness did not know.

PD57AC seeks to address these issues in relation to trial witness statements as follows:

1. The purpose of a trial witness statement is to set out in writing the evidence in chief that a

witness of fact would give if they were allowed to give oral evidence (para. 2.1).

2. Trial witness statements are important in informing the parties and the Court of the evidence a party intends to rely on (para. 2.2).
3. A trial witness statement must contain only (para. 3.1):
    - evidence as to matters of fact that need to be proved at trial by the evidence of witnesses in relation to one or more of the issues of fact to be decided; and
    - the evidence as to such matters that the witness would be asked by the relevant party to give, and the witness would be allowed to give, if they were called to give oral evidence at trial.
4. A trial witness statement must set out only matters of fact of which the witness has personal knowledge that are relevant, and must identify by list what documents, if any, the witness has referred to for the purpose of providing the evidence in their trial witness statement (para. 3.2).
5. The witness is not only required to provide the statement of truth but also required to sign a 'confirmation of compliance' making clear the understanding that the witness statement is only to contain matters of fact of which they have personal knowledge (para. 4.1).
6. The legal representative also has to sign a 'certificate of compliance' with PD57AC (para. 4.3).
7. The Court has the full range of sanctions if there is non-compliance, including a refusal of permission to rely on, or strike out part or all of, the witness statement (paras. 5.1-5.2).

PD57AC has led to a sea-change in the preparation of witness statements:

1. Prior to PD57AC, lawyers could spend weeks, or sometimes months, meticulously reviewing disclosure and piecing together a narrative, often with an answer to perceived weaknesses. This could all precede the involvement of the witness. Following this process, the witness would review, (possibly) amend and sign.
2. Following PD57AC, the process is far more witness-led; it starts with interviews and/or questionnaires with the witness, seeking to elicit "own words", much like oral examination-in-chief.[2)] The lawyer's job is now to bring those answers together into the witness's own language, following which the draft goes back and forth between the witness and the lawyer numerous times until it is what the witness would say orally.
3. As to content, whereas before the statement could be a behemoth covering every aspect of the case by reference to hundreds of pages of exhibits, it is now limited solely to what the witness wishes to contribute as factual evidence. In the Commercial Court, it should be no more than 30 pages in length.

In our view, this is a welcome change that seeks to ensure the Court will be provided with the best approximation of a witness's evidence-in-chief to it being given orally. There will be less need for the Judge to decipher the witness' true evidence from cross-examination. Early experience suggests it shortens witness statements and reduces the costs of drafting.

However, the old process of providing a narrative on the underlying documents may not be gone. This may now form part of a longer skeleton argument for use at trial, as is more appropriate for submissions, subject again to page limits (50 pages in the Commercial Court).

The Impact on International Arbitration

Until this recent development, the approach to witness statements in commercial litigation and

arbitration in London has been much the same. The significant shift in the English Court's approach begs the question of what will now happen in London-seated arbitration.

The interface between arbitration and litigation in London lies in applications to the curial English Courts under the Arbitration Act 1996. In that context, Baker J (who chaired the working group that led to PD57AC), had previously made statements seeking to limit over-lawyerly witness evidence in *Orascom TMT Investments SARL v VEON Ltd* [2018] EWHC 985 (Comm), §5 and *Exportadora de Sal S.A de C.V v Corretaje Maritimo Sud-America no Inc*. [2018] EWHC 224 (Comm), §25.

In terms of arbitration itself, the London Maritime Arbitrators Association ("**LMAA**") has moved first and adopted a similar approach to PD57AC in Sch. 4, para. 2 of its 2021 Terms, applicable to arbitrations commenced after 1 May 2021.

Whilst other major London arbitral institutions confer powers on the tribunal to control witness evidence, there is, as yet, no real guidance on the correct approach to its content:

1. The ICC Rules (2021), provide the tribunal with the power to limit the length and scope of written evidence in the Expedited Procedure Rules (Appendix VI, Art. 3(4)), and make a similar broad suggestion "*so as to avoid repetition and maintain a focus on key issues"* as a possible Case Management Technique (Appendix IV, para. (e)), but there is nothing which makes clear the correct approach to the preparation of such statements.
2. The LCIA Rules (2020), provide the tribunal with powers to decide the manner, form and limit of such statements (Art. 20.4) but, again, there is no guidance as to the correct approach to their preparation more generally.
3. The IBA Rules on the Taking of Evidence in International Arbitration (2020), Art. 4(5)(b) (which is unchanged from their 2010 iteration) states that a witness statement shall contain "*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.*"

On one view, that IBA Rules are an invitation to the fuller narrative statements away from which PD57AC is trying to steer. It has, however, been rightly acknowledged in this context that best practice already involves "*adoption of the words actually used by the witness", "[not] finessing evidence to express it in terms that fit neatly with a legal argument or concept", "[confining] the statement to events of which the witness has direct knowledge"* and "*[not having] a witness comment on or explain every document in the case".*[3)]

Conclusion

PD57AC will have a big, and we think positive, impact on the approach to and contents of witness evidence in the English Courts. The LMAA has followed the Courts' lead. It remains to be seen whether others follow suit. On the one hand, the consensual nature of arbitration might be used as the basis to say that the parties should be left to take their own course in relation to the presentation of their witness evidence. On the other hand, provisions akin to PD57AC would not look out of place amidst the increasing codification of the procedures in institutional rules.

Whilst there is already scope to take the same approach under the ICC and LCIA Rules, in our view those institutions should consider similar provisions to PD57AC being made explicit in their rules (even if they are less prescriptive), and the IBA might usefully consider similar guidance. The result would be that neither party would feel at a disadvantage if it did not provide its entire case, and argument, in its client's witness statements. In our view, this would be a further positive step towards re-balancing the use of witness evidence in the London dispute resolution landscape.

References

?1 The ICC commissioned a study by Dr Wade of the University of Warwick which published its findings in November 2020 (the "**ICC Report**"). The study found that biasing people in favour of a particular company and exposing them to suggestive post-event information affected their memory reports. This arguably militates against an approach whereby a witness is required to recount everything for the first time in cross-examination.

?2 Those conducting such interviews could helpfully review Section V of the ICC Report which contains a number of measures that can be taken with a view to improving the accuracy of witness memory.

?3 See A Guide to the IBA Rules on the Taking of Evidence in International Arbitration, Roman Khodykin and Carol Mulcahy, 2019, at 7.94 to 7.100.

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