CHAPTER 5

Re-examining the Approach to Factual Witness Evidence in International Arbitration

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Every man's memory is his private literature.

– Aldous Huxley

§5.01 INTRODUCTION

The concept of witnesses having a central role in the determination of legal disputes is as old as the law itself and is a constant across all major legal systems. But the way in which witness evidence is assessed, the primacy it plays (or does not play) and how it is deployed and verified differs significantly, not least between the civil and common law systems. One author notes that 'few differences between common law and civil law procedure are as striking as the attitudes toward the testimony of witnesses'.[1] Although civil and common law legal systems adopt different approaches to witness evidence, they share a common goal – that of seeking to arrive at what is most likely to be the truth. This task is by no means straightforward; science has demonstrated that human memory is easily distorted and often inaccurate.[2]

Generally speaking, common law jurisdictions adopt an adversarial approach to witness evidence, placing a focus on what the witness says and that testimony being open to probing and challenge through processes such as cross-examination. In

1. John M. Townsend, Siegfried H. Elsing, *Bridging the Common Law and Civil Law Divide in Arbitration* (Arbitration International, vol. 18, 2002), 4 DOI: 10.1023/a:1014200908066.
2. ICC Commission, *The Accuracy of Fact Witness Memory in International Arbitration Report* (International Chamber of Commerce, 2020) 1.5(a).

contrast, civil law jurisdictions tend to place greater emphasis on documentary evidence and the adoption of an inquisitorial approach where witnesses are subject to relatively limited questioning by a judge or other decision-maker instead of by an opposing party's counsel. (These are, of course, generalisations and significant diversity of approach sits within common law and civil law systems.)

It is in the nature of court-based national legal systems that there is relatively little opportunity for 'cross-pollination' from other legal systems since rules on the right to appear in a national court mean that the legal profession participants (judge and counsel) will be from the same legal 'culture' and their practising experience will commonly be quite narrow. (There are of course exceptions where a legal system is a 'hybrid' or where a particularly high volume of international work means that more diverse cultural approaches are experienced.)

The position in international arbitration is quite different, with an ever-broadening diversity of practitioners, many of whom have very significant experience of different legal systems. Such diversity of background and approach has supported a 'reconciliation' of approaches through 'soft' laws such as the IBA Rules on Taking of Evidence in International Arbitration that provide parties with a flexible framework for management of witness evidence. It is notable (at least for a common law author, albeit one with plenty of time spent arguing before civil law tribunals) that common practice in international arbitration reflects predominantly the common law approach with frequent use of lengthy written witness statements often prepared with significant assistance of lawyers. It is striking that the adoption of a common law practice of written witness statements has taken place just as criticism of the 'cottage industry' of witness statement preparation has taken root in London, with 'an impression shared by a substantial majority of the judges of the Commercial Court that factual witness statements were often ineffective at performing their core function of achieving best evidence at proportionate cost in Commercial Court trials'.[3]

This chapter looks at a little history behind the current position in international arbitration and suggests steps that may be taken to ensure that the world of international arbitration benefits from the diversity of approaches that underpin it in its use of witness evidence rather than using an approach that is increasingly criticised in the legal system from which it was largely copied.

§5.02 ORIGIN OF THE CIVIL AND COMMON LAW DIVIDE

Reforms introduced by Henry II (who was the King of England from 1154 until 1189) marked the start of the common law divergence from the Romanist jurisdictions on the Continent.[4] (With Scotland taking a slightly different approach as it has to this day.) Such reforms included the creation of a group of royal judges and the introduction of

3. Witness Evidence Working Group, *Factual Witness Evidence in Trials Before the Business and Property Courts* (https://www.judiciary.uk/wp-content/uploads/2019/12/Witness-statement-working-group-Final-Report-1-1.pdf), 1.
4. Arthur R. Emmet, *Towards the Civil Law?: The Loss of 'Orality' in Civil Litigation in Australia* (University of New South Wales Law Journal, 2003).

the jury in civil cases.[5] Due to the increased quality of justice that was considered to be dispensed by the royal judges, the old local courts were abandoned by litigants.[6] Thus, 'England adopted an adversarial system of trial by jury, together with a qualitative system of evidence, under which – though many types of evidence were excluded – the weight attributed to that which was admitted was not mechanically fixed but submitted in each case to the judgment of a group of lay men'.[7] By contrast, the Continental jurisdictions adopted an inquisitorial system of trial by public officials[8] and a system of evidence under which everything was admitted but was allowed only a fixed weight.[9]

§5.03 THE COMMON LAW APPROACH TO WITNESS EVIDENCE

Common law jurisdictions generally adopt an adversarial system of justice where the role of a judge is to mediate, superintending the lawyers as they adduce their competing versions of the facts and the law.[10] Therefore, one of the aims of witness evidence is to persuade the judge and, in achieving that objective, witness evidence forms a central part of a hearing.

Historically, the rule in England was that witnesses gave oral testimony at trial. It was thought that the 'best evidence is often obtained by a traditional examination-in-chief, when witnesses are giving their evidence in their own words and give a more genuine version of their recollection'.[11] This approach changed in 1986 with the introduction of Order 38, Rule 2A of the Civil Procedure Rules, which saw written witness statements introduced into certain parts of the High Court[12] and was extended to the general courts of the Queen's Bench Division of the High Court in 1988.[13] In 1995, it was further provided that in the absence of any order to the contrary, 'every witness statement shall stand as the evidence in chief of the witness concerned'.[14] This change has been described in the notes to the White Book as 'an outstanding and far-reaching change in the machinery of civil justice'.[15] It may come as a surprise to civil law practitioners that written witness statements are a relatively recent innovation in the common law.

5. Emmet, *supra* n. 4.
6. R.C Van Caengegem, *Judges, Legislators and Professors: Chapters in European Legal History* (Cambridge University Press, 1987), 114.
7. Julius Stone and W.A.N Wells, *Evidence: Its History and Policies* (Butterworths North Ryde, 1991), 29 in Emmet, *supra* n. 4.
8. Stone and Wells, *supra* n. 7 in Emmet, *supra* n. 4.
9. Emmet, *supra* n. 4, 2.
10. John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources* (Cambridge Law Journal, 1999), p. 1169.
11. Witness Evidence Working Group, *supra* n. 3, 6.
12. Order 38, Rule 2A of the Civil Procedure Rules applied to any cause or matter which is proceedings in the Chancery Division, the Commercial Court, the Admiralty Court or as official referees' business.
13. James Hope, *Witness Statements in International Arbitration: The Cost of 'Gilding the Lily'*, Commercial Dispute Resolution, 17 June 2014, 4.
14. Practice Direction, *Civil Litigation: Case Management* (1995, 1 WLR 262), 3.
15. Hope, *supra* n. 13, 5.

The primary reasons for requiring written witness statements were to ensure 'fair and expeditious disposal of proceedings and the saving of costs'[16] and encourage a '"cards on the table approach" which would in some cases promote settlement and in other cases make for a fairer trial'.[17] Such was the perceived success of the reforms that other common law jurisdictions quickly followed suit and replaced examination in chief (also known as direct examination, the process whereby the witness gives his or her 'story' orally and where leading questions are generally not permitted by counsel).

§5.04 THE CIVIL LAW APPROACH TO WITNESS EVIDENCE

Civil law jurisdictions are generally based on an inquisitorial system where the role of investigating and adjudicating sits primarily with professional judges, although lawyers play a significant role in guiding and limiting judicial enquiry.[18] Witnesses are considered to be evidentiary sources of the court, and it is the judge, not the parties, who decides which witnesses are to be heard and will be in charge of their examination. Additionally, in many civil law jurisdictions, the parties' counsel are not supposed to talk to the witnesses before the trial and witness preparation is regarded as uncomfortably close to manipulation of evidence.[19] The courts also tend to give higher regard to written documents as evidence rather than overly polished witness statements.[20]

In our experience, witness evidence takes a relatively lesser role overall in civil law proceedings, and it is commonly advanced in the form of direct examination at trial rather than formal witness statements. Perhaps most surprising to common law practitioners is the fact that opposing counsel can and often do contact a party's witnesses in advance of the trial. Furthermore, cross-examination is often not confrontational, with no 'putting' of positive cases to the witness, and it is not uncommon for evidence to be challenged in post-hearing submissions despite relevant questions not having been asked of the witness at the hearing. Indeed, a civil law judge or arbitrator may well take a dim view of 'aggressive' cross-examination. Such approaches raise a practical issue for a common law advocate (and one the author has experienced in Stockholm) where the ethical obligation to 'put' a proposition to a witness such that she or he has a chance to respond is criticised by a tribunal as 'arguing with the witness'.

§5.05 CURRENT PRACTICE RE-WITNESS EVIDENCE IN INTERNATIONAL ARBITRATION

Deploying witness statements has become standard practice in international arbitration and in our experience wherever the arbitration takes place and under whatever

16. White Book, note 38/2A/2.
17. Lord Justice Jackson, *Review of Civil Litigation Costs: Preliminary Report (Volume Two)* (TSO (The Stationary Office), 2009), 403.
18. Emmet, *supra* n. 4.
19. Dr Andreas Respondek, *How Civil Law Principles Could Help to Make International Arbitration Proceedings More Time and Cost Effective* (Singapore Law Gazette, February 2017), 3.
20. Respondek, *supra* n. 19.

applicable law. It is striking that, with few exceptions, the manner in which such witness statements are prepared and deployed follows the practice prevalent in common law jurisdictions, such as simultaneous exchange, rules as to the citing and exhibiting of documents referred to, albeit without the safeguards applied in many litigation systems such as requirements that the witness statement contain a 'statement of truth' confirming that the facts stated in the witness statement are true[21] (proceedings for contempt of court may be brought if a statement of truth is found to have been false[22]) and that the witness statement is in the witness' own words.[23] The prevalence of common law practices is likely due in significant part to the fact that common law seats such as London, Singapore and Hong Kong have, according to one international survey,[24] become the preferred global seats (but it should be noted that the survey was undertaken by a London based academic institution in the English language, and so may not properly reflect a truly global picture). Another survey undertaken by the same academic institution also found that a key reason for the choice of seat was the law governing the substance of the dispute. [25] It is suggested that another factor supporting the adoption of common law practices may be the extent to which many English and US law firms became global firms from the 1990s onwards, influencing the adoption of English and US practices. London law firms had historically dominated international shipping work, which sector had been using international arbitration for decades before its wide scale adoption for international projects and a myriad of international commercial transactions.

§5.06 CRITICISMS OF THE COMMON LAW APPROACH

While the common law approach to witness evidence largely dominates within international arbitration, it is facing mounting criticism in the jurisdictions from whose court systems the practices derive and from an array of different sources. Leading arbitration practitioners have commented that:

> Written witness statements can bear little relation to the independent recollection of the factual witness, with draft after draft being crafted by the party's lawyer or the party itself, with the witness's written evidence becoming nothing more than special pleading, usually expressed at considerable length. It rarely contains the actual unassisted recollection of the witness expressed in his or her own actual words.[26]

21. Practice Direction 32, para. 20.2.
22. Civil Procedure Rule 32.14.
23. Practice Direction 32, paras 18.1 and 19.1(8).
24. Queen Mary University London, *International Arbitration Survey: Adapting Arbitration to a Changing World* (Queen Mary University London and School of International Arbitration, 2021), 8.
25. Queen Mary University London, *International Arbitration Survey: Improvements and Innovations in International Arbitration* (Queen Mary University London and School of International Arbitration, 2015), 11.
26. Laurent Levy and V.V. Veeder, *Arbitration and Oral Evidence* (Kluwer Law International, 2004), 7.

Pieter Sanders, who is often referred to as the father of the New York Convention,[27] has stated:

> Drawn up with the party or its legal advisers the witness may be influenced in formulating his or her Statement which has to be signed and affirmed by him or her as being the truth. In my opinion, the Witness Statements preceding the hearings of the witnesses in person are not in accordance with the expectations of many parties in international arbitration.[28]

It is striking that some of the most trenchant criticism of witness statements comes not from arbitration practitioners but from national judges. In *Ceviz v. Frawley & Anor*, the High Court of England and Wales criticised both the written and oral evidence of the witnesses of fact, stating that '[the witness statement] was 22 pages long, comprised 111 paragraphs and contained a great deal of comment and commentary that has no place in a witness statement'.[29]

In fact, in March 1994, just eight years after written witness statements were introduced, the Lord Chancellor, a senior member of the Cabinet who, prior to the Constitutional Reform Act 2005, was also the head of the judiciary,[30] appointed Lord Woolf to 'review the rules of civil procedure with a view to improving access to justice, reducing the cost of litigation and removing unnecessary complexity'.[31]

Lord Justice Jackson made similar statements when he reviewed civil litigation in England and Wales some fifteen years later. On 3 November 2008, Sir Anthony Clarke MR appointed Lord Justice Jackson to lead a 'fundamental review into the costs of civil litigation'.[32] The review was requested as Sir Anthony Clarke MR was 'concerned at the costs of civil litigation and believe[d] that the time [was] right for a fundamental and independent review of the whole system'.[33] In his review, Lord Justice Jackson identified a number of problems regarding witness statements:

> To prepare an effective witness statement in a complex case, substantial input is required from the witness. The lawyer must spend sufficient time with a witness so that he understands what the witness is trying to say. This in itself can rack up costs and this is before several iterations of the statements have been drafted and comments from the witness, counsel and the rest of the solicitor team have been taken into account. Often what appears to happen is that a witness statement

27. J. William Rowley KC, *The New York Convention at 50: Pieter Sanders – A tribute*, https://globalarbitrationreview.com/article/the-new-york-convention-50-pieter-sanders-tribute (accessed 17 April 2023).
28. Pieter Sanders, *Quo Vadis Arbitration?: Sixty Years of Arbitration Practice* (Springer Netherlands, 1999), 262.
29. *Ceviz v. Frawley & Anor* [2021] EWHC 8 (Ch), 3, 10.
30. UK Parliament, https://www.parliament.uk/site-information/glossary/lord-chancellor/, (accessed 17 April 2023).
31. A.A.S. Zuckerman, *Lord Woolf's Access to Justice: Plus ça change* (The Modern Law Review, 1996), 773.
32. Lord Justice Jackson, *Review of Civil Litigation Costs, Final Report*, TSO (The Stationary Office), 2010), 27.
33. Lord Justice Jackson, *supra* n. 32.

> simply repeats what is already in the documents and it ends up being a carefully crafted court document more akin to submissions than the story of a lay person.[34]

So, some thirty years after the witness statement became an integral part of English court proceedings on the basis that they would save time and costs – they have come under challenge as failing to deliver this and, instead, have increased costs and served to obscure what the evidence of the witness, in fact, is, replacing it with a lawyer's version of what that evidence should be. The extent of judicial criticism, from the same judicial sources responsible for the introduction of witness statements in the first place, suggests that reform is necessary. And if reform in the courts is necessary, it would be surprising if the position in international arbitration was fundamentally different.

§5.07 PURPOSE OF WITNESS STATEMENTS AND CHALLENGES IN PRESENTING WITNESS EVIDENCE

In order to understand and attempt to resolve the criticisms levelled against witness statements, it is important first to understand their fundamental purpose (which is no different as between court litigation and international arbitration). There is the general consensus, at least in England, that witness statements are intended to promote the 'fair and expeditious disposal of proceedings and the saving of costs'.[35] However, the current practice as to the lawyer-led preparation of witness statements has given rise to 'a real concern […] that sometimes the use of witness statements, instead of saving costs and promoting fairness, has the opposite effect'.[36]

At the meeting of the Commercial Court Users Committee – the principal channel for the flow of information between the Court, litigants and lawyers[37] – in March 2018, concerns regarding the effectiveness of witness statements were raised. As a result, a working group was set up to consider ways in which the current practice could be improved (the 'Witness Evidence Working Group'). It was tasked with assessing factual witness evidence in trials before the Business and Property Courts in England and Wales.

The Witness Evidence Working Group found that only 6% of survey participants thought that the current system of witness statements 'fully' achieved the aim of producing the best evidence possible, with 45% of participants considering that it did so only partly or not at all.[38] Of those who gave reasons as to why witness statements did not fulfil their purpose,[39] 68% thought that they were too long, 73% felt they included legal arguments, and 55% thought that witness statements failed to reflect

34. Lord Justice Jackson, *supra* n. 17, 403.
35. White Book, *supra* n. 16.
36. Lord Justice Jackson, *supra* n. 17, 401.
37. HM Courts & Tribunals Service, *The Business and Property Courts of England & Wales, The Commercial Court Guide* (Eleventh Edition, 2022), paras A3.1 and A3.2.
38. Witness Evidence Working Group, *supra* n. 3, 9.
39. Seventy-five per cent of all participants that responded gave reasons as to why witness statements did not fulfil their purpose.

witnesses' own evidence.[40] The Witness Evidence Working Group outlines that a consistent theme emerges: the 'over-lawyered nature of witness statements'.[41]

At the same time, it seems clear that the answer is not to dispense with written witness statements altogether. In fact, a survey conducted by the School of International Arbitration at Queen Mary University of London and White & Case LLP found that 92% of respondents opposed eliminating witness evidence.[42] The answer, therefore, lies in changing the process by which witness statements are prepared in regard to the science of memory; here lies the true challenge in preparing witness statements.

The ICC Commission's Report on the Accuracy of Fact Witness Memory in International Arbitration (the 'ICC Report') notes that a witness' exposure to pre and post-event information can change the witness' memory of the event.[43] The ICC Report highlighted four areas of concern.

[A] The Impact of Phrasing on Responses to Questions

The ICC Report references studies which demonstrate that qualifying descriptors in a question can heavily influence the answer given. In one study, participants who were asked to estimate 'How long was the movie?' answered with an average of 130 minutes, compared with those who were asked 'How short was the movie?' who responded with 100 minutes on average.[44] This shows that the specific wording used in witness interviews can materially change the evidence that a witness recounts. However, standard practice in the preparation of witness statements involves a witness being questioned or interviewed by a lawyer who may go on to prepare a first draft of a witness statement based on the answers given by the witness. Therefore, the manner in which a witness is questioned can potentially have a material impact on his evidence.

[B] The Misinformation Effect

The misinformation effect is 'a phenomenon where typically misleading information which participants are exposed to after an event interferes with or impairs their original memory of that event'.[45] Studies have shown that where two subjects viewed somewhat different versions of an incident and discussed the events subsequently, they unwittingly transmitted misleading information to each other, which can substantially alter a witness' memory and report. The ICC Report even found that people 'tend to incorporate details of other witnesses' memory reports into their own memory

40. Witness Evidence Working Group, supra n. 3, 9.
41. Witness Evidence Working Group, *supra* n. 3, 9.
42. Queen Mary's University London, *International Arbitration Survey: Current and Preferred Practices in the Arbitral Process* (Queen Mary University London and School of International Arbitration, 2012), 29.
43. ICC Commission, *supra* n. 2, 2.5.
44. ICC Commission Report, *supra* n. 43, 11.
45. ICC Commission Report, *supra* n. 43, 11.

reports, even if that information contradicts what they have observed'.[46] In the arbitration context, this means that evidence given by witnesses may not be accurate as a result of prior discussions between the witness and others involved in the dispute.

[C] False Memories

At its extreme, the 'misinformation effect' has been shown to result in individuals 'recalling' entire fabricated events which happened to them personally. False memories can also arise from manufactured evidence. In one experiment, participants were asked to corroborate that they had seen another participant cheating. Those participants shown a false video were more likely to provide corroboration than those who had not seen the video despite the video showing something that had not happened.[47]

[D] The Impact of Retelling on Subsequent Recall

Research has shown that taking a particular perspective after an event can later lead to a biased recollection of the event. Participants in one study were provided with a story regarding an interaction with two roommates during their first week of a new year at college. One group was asked to write a letter complaining about the roommates, the second group was asked to write a positive letter about the roommates and the final group was merely asked to write about the roommates. When their memory was later tested, the participants' recollection of events was materially influenced by the stance they had been asked to take when writing the letters.

The ICC Report demonstrates that in the context of a commercial dispute, where a witness is often engaged in telling his or her story from a particular perspective, there is a real risk of a biased retelling.[48]

§5.08 A SUGGESTED WAY FORWARD

Although the ICC Report sets out a number of measures that could be taken to reduce distorting influences and their effects in international arbitration, the report concluded that it would not be appropriate to 'systematically take some or all [of the steps] to ensure that the memories of the witnesses who give evidence are as accurate as can be'.[49]

The ICC Report arrived at this conclusion because: (i) witness evidence does not always depend on accuracy, for example, where it is used to provide context, background or technical explanations; and (ii) even where accuracy is important, it is

46. ICC Commission Report, *supra* n. 43, 12.
47. ICC Commission Report, *supra* n. 43, 13.
48. ICC Commission Report, *supra* n. 43, 13.
49. ICC Commission Report, *supra* n. 43, 26.

not advisable to change current practices which ensure, for example, witnesses are prepared and provide helpful evidence.[50]

The authors would agree with the ICC Report's conclusion that there is no need for a 'systemic' change. However, the following steps can be taken in appropriate cases to ensure that witness evidence is necessary, accurate, helpful, and prepared without unnecessary costs being incurred.[51]

[A] Is Witness Evidence Necessary?

The starting point is for parties and counsel to consider whether or not witness evidence is necessary. In the experience of the authors, there is an increasing trend for witness statements simply to repeat what is set out in contemporaneous documents. This is unnecessary and leads to costs being incurred needlessly.

Generally, witness statements are required to: (i) prove disputed facts which cannot be proven by other documentary evidence; (ii) explain the context of certain documents, e.g., a telephone conversation which preceded an email exchange; (iii) provide background, e.g., explaining the efforts made by the founders of a company which led to goodwill in the market; and (iv) providing technical experience – although this would typically be the subject of expert evidence.[52]

The authors would suggest that arbitration practitioners should not shy away from following the civil law traditions of placing reliance upon documentary evidence where such evidence is clear. Certainly, in our experience, arbitral tribunals (even those from common law backgrounds) do not favourably consider witness statements that simply repeat the contents of documents already on the record.[53]

[B] Is Accuracy Important, and Is There a Risk of Contamination?

Counsel should consider taking alternative approaches to drafting witness statements depending on the extent to which: (i) accuracy in a witness' evidence is important; and (ii) there is a risk of contamination.

Accuracy is likely to be important where there are disputed facts and limited contemporaneous documents, such as where negotiations have taken place over a telephone call. But if there is a low risk of contamination because there is only one individual with the relevant information, then it may not be proportionate or appropriate to take all of the steps set out below.

50. ICC Commission Report, *supra* n. 43, section VI, 26 and 27.
51. *See also*: ICC Commission Report, *supra* n. 43, section V, 20.
52. ICC Commission Report, *supra* n. 43, section IV.B, 17.
53. *See also*: Appendix to CPR Practice Direction 57AC, paras 3.4 and 3.5, 3.

[C] Limited Direct Evidence

One of the benefits of practising in international arbitration is the ability to adopt practices deriving from different legal systems. The authors have experienced the practice in Stockholm of allowing some limited direct evidence from a witness, as well as using a witness statement. Not only does this give some 'colour' to the written testimony but it also means the witness is more 'invested' in the process of giving evidence and so less likely to delegate the exercise of preparing a witness statement to lawyers. Knowing that a witness will also be giving direct evidence (which can never be fully controlled by the lawyer in a way that written statements can) should serve to instil some caution and mean that written statements more closely align with the witness' factual knowledge. This approach also has the virtue of being straightforward to deliver on and not to require changes of any dramatic nature to existing protocols.

[D] Witness Summaries

The Report of the Witness Evidence Working Group, which considered the practice of factual witness evidence before the Business and Property Courts in England and Wales, has suggested the use of witness summaries instead of full witness statements. Under this approach:

> each witness would briefly outline the facts within his/her knowledge that are relevant to the issues in dispute, but would not go into extensive detail and would not refer to all of the documents (although it may be difficult for the witness to tell his/her story without reference to the key documents). Such an approach would mean that evidence-in-chief would need to be restored, in order that the witness can supplement his/her summary.[54]

The authors do not consider that witness summaries should replace witness statements. Properly drafted witness statements are of significant utility to an arbitral tribunal, particularly where unsophisticated witnesses, or witnesses whose first language is not the same as that of the arbitration (a common occurrence), are concerned. It is also a significant consideration that arbitrations are commonly more time-constrained than court trials, with much less capacity to accommodate lengthy direct examination (or for the adjournments necessary to accommodate cross-examination preparation if there is no advance notice of what a witness is going to say).

Instead, the authors are of the view that it may be appropriate to consider whether a witness should be first asked to prepare a summary of his evidence, which then forms the basis of interviews with lawyers according to which a witness statement can be prepared. Such an approach draws on the practice in the Supreme Court of Victoria, where witness statements are not 'ordered as a matter of course for commercial cases'[55] but where the court may order the provision of a witness outline which must 'clearly identify the topics in respect of which evidence will be given and the

54. Lord Justice Jackson, *supra* n. 17, 407.
55. Hope, *supra* n. 13, 17.

substance of that evidence. A witness outline must be directed only to matters in issue'.[56]

The preparation of witness summaries in the way proposed by the authors would minimise risks of inaccuracies in witness recollection and would allow for the preparation of a witness statement that seeks to clarify rather than alter or interfere with a witness' evidence.

The authors also consider, drawing on their previous experience of limited direct evidence from witnesses of fact in Stockholm arbitrations, that adopting this practice would bring significant benefits.

[E] Witness Interviews

Bearing in mind that witness statements were intended to replace lengthy direct examination,[57] it is logical that witness interviews are conducted in a manner that is similar to a direct examination. This would mean using open-ended and not leading questions to minimise the impact of phrasing on responses,[58] interviewing witnesses individually to minimise contamination of memory and keeping an accurate record of the interview so that any subsequent witness statement can accurately reflect the witness' evidence.[59]

[F] Preparation of Witness Statements

In England, trial witness statements are now to be prepared in accordance with the Statement of Best Practice, which forms part of Practice Direction 57AC of the Civil Procedure Rules. This requires that 'The preparation of a trial witness statement should involve as few drafts as practicable'[60] because 'Any process of repeatedly revisiting a draft statement may corrupt rather than improve recollection.'[61] Witness statements should also be as far as possible in the witnesses' own words[62] and should be based on the record of the interviews with the witness and the witness summary.[63] Witness statements should not contain commentary, speculation, argument or any narrative about disclosed documents.[64]

56. The Commercial Court of the Victoria Supreme Court (Practice Note No. 10 of 2011), 38.
57. In fact, para. 2.1 of PD57AC states '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 at trial without having provided the statement.'
58. ICC Commission Report, *supra* n. 43, section II.A; Appendix to CPR Practice Direction 57AC, para. 3.10.
59. ICC Commission Report, *supra* n. 43, section V.A.(ii).
60. Appendix to CPR Practice Direction 57AC, *supra* n. 53, para. 3.8.
61. Appendix to CPR Practice Direction 57AC, *supra* n. 53, para. 3.8.
62. Appendix to CPR Practice Direction 57AC, *supra* n. 53, para. 3.6.
63. Appendix to CPR Practice Direction 57AC, *supra* n. 53, paras 3.9 and 3.12.
64. Appendix to CPR Practice Direction 57AC, *supra* n. 53, para. 3.5.

[G] Use of AI and Similar Technologies

The focus of recent months on the use of artificial intelligence tools such as ChatGPT has yet to feed into the debate about the use of witness statements, but the stated intentions of certain EU states to legislate to contain the use of AI reflect a set of concerns that will doubtless be expressed by judges and arbitrators; what credibility can ever be attached to a statement that is machine produced rather than the product of a witness' work? Soon enough, we can expect to see express prohibitions on the use of AI to draft statements, easily introduced in institutional rules or by tribunals in procedural orders. However, the authors can see no foolproof way of policing such restrictions.

§5.09 ENFORCEMENT CHALLENGES

Reforms such as Practice Direction 57AC which implement changes in relation to factual witness evidence in national courts are strictly enforced by the courts, including by way of orders which require non-compliant sections of the witness statements to be revised.[65]

The authors do not consider such a strict approach appropriate in international arbitration and concur with the ICC Task Force's view that the preparation of witness statements should not become subject to enquiry by the Tribunal.[66] Such an approach is only likely to result in unnecessary delay and costs. Instead, similar to the approach under the London Maritime Arbitrators Association Rules ('LMAA Rules'), the advancing of needless, irrelevant and prolix witness evidence could be a factor which the Tribunals can consider in apportioning costs.[67] In that context, it is worth noting that the LMAA Rules include a Checklist in the Fourth Schedule which also addresses the manner in which factual evidence should be presented to the Tribunal. The authors suggest that there is a great deal of more scope generally for efficiencies in the conduct of arbitrations to be fostered by the use of more discerning orders for costs (including at various stages during the proceedings) that reflect more fully how parties respectively have run an arbitration.

§5.10 CONCLUSION

Civil and common law jurisdictions have over the centuries developed their own practices in relation to factual witness evidence. Both approaches have their advantages and disadvantages, but international arbitration enjoys the privileged position of being able to choose on an 'á la carte' basis the best elements of each. Practices such as greater use of a discerning approach taken to how witness statements are to be

65. *Blue Manchester Limited v. (1) Bug-Alu Technic GmbH & (2) Simpsonhaugh Architects Limited* [2021] EWHC 3095 (TCC), 3, 6.
66. ICC Commission Report, *supra* n. 53 para. 6.9.
67. LMAA Terms 2021, Schedule 2, para. 19(b).

prepared and deployed, usefully drawing from the experience of reforms in national court systems, including recent English reforms, should be encouraged. Arbitration practitioners – particularly tribunals – should increasingly challenge lazy assumptions as to how witness evidence should be deployed efficiently and fairly, exploiting to the fullest degree the flexibility that is said to be one of international arbitration's greatest strengths.