

Introduction to the Review on use of Witness Statements by James Hope¹

International arbitration in Scandinavian countries increasingly reflects and incorporates practices developed in other countries. Evidence law and practice in litigation have influenced arbitral procedures. Evidentiary approaches have traditionally varied considerably between common law and civil law countries. The International Bar Association (IBA) sought to bridge the chasm by developing guidelines that provided a compromise approach to evidence suitable for international arbitration. The “IBA Rules on the Taking of Evidence in International Arbitration” have become widely used as party-agreed applicable rules or guidelines to inform evidence practice.² The Rules seek to harmonize approaches to evidence taking by providing principles to supplement the minimal procedural rules in arbitration and to ensure “efficient, economical and fair process” for the taking of evidence in international arbitration.”³

The IBA approach introduced the use of so-called “witness statements” in international arbitration, a procedure which had been developed in English litigation proceedings. A witness-statement is a written and signed statement by a witness that records the testimony of a witness and is provided to the arbitral tribunal and the opposing party prior to the hearing. Usually, the witness subsequently testifies at the hearing based on the statement. The use of written witness statements in civil litigation contravenes the evidentiary approaches in Scandinavian procedural law where witnesses are heard orally in court. The use of witness statements, particularly when used in place of a direct examination, arguably conflicts with the principles of orality and immediacy.

In international arbitration, national procedural rules do not apply and the parties may agree to procedures that provide the desired flexibility, international approaches and so-called “best practices”. To the extent that the parties have not agreed otherwise, arbitrators have wide discretion to conduct the proceedings, including evidence taking and presentation, as they deem appropriate provided they comply with mandatory provisions of the *lex arbitri*. Generally, this requires that the arbitrators provide the parties with a reasonable opportunity to present their case and to be treated equally.

Today witness statements have become widely used in international arbitration in Scandinavia and their use has begun to creep in to domestic arbitration. Some commentators and users criticize this development fearing abuse and weakening the integrity of witness testimony, while others welcome it as providing more predictability and efficiency.

In April of 2016, the use of witness statements was the subject of a lively debate in Stockholm, at the Global Arbitration Review (GAR) Live event. One of the organizers of the event, James Hope, shared with the debaters and audience, an article that he authored providing a background on witness statements. We publish his article here to provide readers with summaries of relevant texts and with an overview of the issues at stake in the debate. To encourage the debate he lists ten proposals to regulate the use witness statements.

1 Introduction by Patricia Shaughnessy.

2 The IBA Rules on the Taking of Evidence in International Arbitration (2010), which revised the 1999 version of the “Rules”, which was preceded by Supplementary Rules Governing the Presentation of Evidence in International Commercial Arbitration (1983).

3 Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration* 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee.

Witness Statements in International Arbitration – the Cost of “Gilding the Lily”

James Hope

1 Introduction

The witness statement is a standard feature of modern international arbitration. In fact, we take it for granted.

We take it for granted that witness statements are drafted largely by counsel, that they end up being long and complex documents, that they stand in place of the witness’s direct oral testimony – and that they cost a large amount of money to prepare.

But it was not always like this. In fact, written witness statements are a comparatively new invention, even in England where they were first adopted. In the early 1980s, the general rule was that witnesses before the English courts gave oral direct testimony at trial. It was only in the 1980s that written witness statements were adopted for use in certain parts of the High Court in England, and only in the mid-1990s that witness statements became generally used in the English courts.

The aim was to encourage efficiency and save costs. However, since the 1990s, there have been periodic criticisms in England about the way in which practitioners draft witness statements. All too often, witness statements include far more than the witness’s actual evidence, they are far removed from the witness’s own words, and above all, they have become too expensive.

Yet in the world of international arbitration, the practice of long, expensive witness statements remains accepted, almost without challenge.⁴ Is it not time to take a closer look at the witness statement?

2 The Current Practice in International Arbitration

Witness statements are optional under the IBA Rules on the Taking of Evidence in International Arbitration 2010 (the “IBA Rules”).

Article 4(4) provides:

⁴ There is considerable discussion and criticism of witness statements in some domestic arbitration – for example, in Sweden. There is much to say in that context by reference to Swedish civil procedural law, but that is beyond the scope of this article.

“The Arbitral Tribunal may order each Party to submit within a specified time to the Arbitral Tribunal and to the other Parties Witness Statements⁵ by each witness on whose testimony it intends to rely ...”. (Emphasis added)

When it comes to the main hearing, Article 8(4) provides:

“... If the witness has submitted a Witness Statement or an Expert Report, the witness shall confirm it. The Parties may agree or the Arbitral Tribunal may order that the Witness Statement or Expert Report shall serve as that witness’s direct testimony”. (Emphasis added)

As the text of these articles shows, the IBA Rules do not require that written witness statements should be submitted, or that they should take the place of direct testimony at the hearing. However, the working group’s commentary reveals a clear preference for written witness statements to be used:⁶

“Pursuant to the IBA Rules of Evidence, the arbitral tribunal may order the parties to submit to the arbitral tribunal and the other parties a written “witness statement” (see Article 4.4). The arbitral tribunal, in consultation with the parties, should determine whether or not to require such witness statements, depending on the circumstances of each case.

If witness statements are used, the evidence that a witness plans to give orally at the hearing is known in advance. The other party can thereby better prepare its own examination of the witness and select the issues and witnesses it will present. The tribunal is also in a better position to appreciate the testimony and put its own questions to these witnesses. Witness statements may in this way contribute to a shortening of the length of oral hearings. For instance, they may be considered as the “evidence in chief” (“direct evidence”), so that extensive explanation by the witness becomes superfluous and examination by the other party can start almost immediately.”

The working group also writes as follows at page 24 of its commentary:

“Where witnesses and experts have provided written witness statements or expert reports, they are first confirmed at the beginning of the testimony. The third sentence of Article 8.4 states the rule applied in many arbitrations where witness statements are used, that such statements may serve in lieu of the witness’s direct testimony. Having the witness statement stand entirely in lieu of direct testimony provides an incentive for witness statements to be comprehensive.

Nothing in the IBA Rules of Evidence, however, prevents an arbitral tribunal from hearing witnesses in another manner, such as the traditional method in certain civil law countries where witnesses are initially questioned by the arbitral tribunal, followed by questioning by the parties. This is a technique which presupposes a thorough knowledge of the case and a full study of the law by the arbitral tribunal.”

5 “Witness Statement” is defined as “a written statement of testimony by a witness of fact” (see Preamble, under “Definitions”).

6 Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration, page 16 (see www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx”).

In fact, the use of witness statements is standard practice in international arbitrations taking place in England, and indeed throughout the world. Russell on Arbitration (23rd edition, 2007, section 5-142) states simply that, if witnesses are used, “*it is usual for such evidence to be given in the form of written witness statements which are exchanged prior to the hearing of the arbitration*”.

Since the use of witness statements is also standard practice in the English courts, we tend to take them for granted in England. However, a review of the history reveals that a very different practice existed in the English courts as recently as the early 1980s.

3 The Introduction of Witness Statements in the English High Court

The basic rule under the old Rules of the Supreme Court was that witnesses were required to give evidence orally at trial. Order 38, rule 1 provided:

“General rule: witnesses to be examined orally (O.38, r.1)

1. *Subject to the provisions of these rules and of the Civil Evidence Act 1968 and the Civil Evidence Act 1972, and any other enactment relating to evidence, any fact required to be proved at the trial of any action begun by writ by the evidence of witnesses shall be proved by the examination of the witnesses orally and in open court.”*

It should be noted that this rule was subject to quite a number of exceptions. In particular, it only applied to actions commenced by writ, and thus it did not apply to originating summons procedure, nor did it apply in the context of interlocutory applications. Nevertheless, it was an important rule.

However, witness statements had been used in some arbitrations in England before the 1980s, and in about 1981 they began to be used by consent in official referees’ business (the precursor to the Technology and Construction Court).

In 1986, provision for written witness statements was introduced into certain parts of the High Court, pursuant to Order 38, rule 2A⁷. This rule provided:

“Exchange of witnesses’ statements (O.38, r.2A)

2A.—(1) *This rule applies to any cause or matter which is proceedings in the Chancery Division, the Commercial Court, the Admiralty Court or as official referees’ business, and in this rule “the Court” includes an official referee.*

(2) *At any stage in any cause or matter to which this rule applies, the Court may, if it thinks fit for the purpose of disposing fairly and expeditiously of the cause or matter and saving costs, direct any party to serve on the other parties, on such terms as the Court shall think just, written witness statements of the oral evidence which the party intends to lead on any issues of fact to be decided at the trial.*

(3) *Directions given under paragraph (2) may—*

(a) *make different provision with regard to different issues of fact or different witnesses,*

(b) *require any witness statement served to be signed by the intended witness,*

(c) *require that statements be filed with the Court.*

⁷ Added by R.S.C. (Amendment No. 2) 1986 (S.I. 1986 No. 1187).

(4) Subject to paragraph (6), where the party serving a statement under paragraph 2 does not call the witness to whose evidence it relates no other party may put the statement in evidence at the trial.

(5) Subject to paragraph (6) and unless the Court otherwise orders, where the party serving the statement does call such a witness at the trial—

(a) the party may not without the consent of the other parties or the leave of the Court lead evidence from that witness the substance of which is not included in the statement served, except in relation to new matters which have arisen in the court of the trial;

(b) the Court may, on such terms as it thinks fit, direct that the statement served, or part of it, shall stand as the evidence in chief of the witness or part of such evidence;

(c) whether or not the statement or any part of it is referred to during the evidence in chief of the witness, any party may put the statement or any part of it in cross-examination of that witness.

...” (Emphasis added)

Later, in 1988, this rule was extended to the general courts of the Queen’s Bench Division of the High Court, and further amendments and extensions were made in 1992. By a practice direction issued in January 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”.

4 Witness Statements as a Form of Pre-trial Discovery

RSC Order 38, rule 2A was revolutionary at the time. It was described in the notes to the “White Book” (“The Supreme Court Practice”), note 38/2A/2, as constituting “an outstanding and far-reaching change in the machinery of civil justice”:

“It extends the bounds of pre-trial discovery to the area of the evidence of facts, and it does so not by way of taking the depositions of the witnesses by their oral examination as in America, nor by way of “examination for discovery” by the oral examination of the parties as in Canada, but by way of the direct written statement of the witnesses of their evidence of the facts which they can prove of their own knowledge [ref.]. It embodies a fundamental innovation in the law and practice relating to the identity of the intended trial witnesses of the parties and relating to the confidentiality of their statements or “proofs” of evidence. It provides a radical alteration to the manner of elucidating the evidence in chief of witnesses at the trial by their oral examination in open court, as provided [sic] by r.1 supra. It removes some of the defective factors and the more confrontational aspects of the adversary system of civil procedure. Above all it greatly improves the pre-trial process by providing the machinery for enabling all the parties to know before the trial precisely what facts are intended to be proved at the trial, and by whom, and thereby it reduces delay, costs and the opportunity for procedural technicalities and obstruction towards the trial.”

It is rare today to see written witness statements described as a form of pre-trial discovery. When viewed in that light, then their universal use in international arbitration is suddenly open to question, at least in the context of international

arbitration. After all, a wide-ranging pre-trial discovery of documents is generally frowned upon in international arbitration, and few people would ever consider that oral depositions would be an appropriate part of international arbitration procedure.

It should be stressed that it is rather too late to question the appropriateness of written witness statements in international arbitration as a general rule. They are far too established for such wholesale criticism to be taken seriously – moreover, when properly used, they provide a very good means of preparing cases for trial. However, it is worth remembering that written witness statements were considered to be revolutionary when they were introduced into English court procedure in the mid-1980s.

Written witness statements should be recognised for what they are. This is indeed a form of pre-trial discovery, and as such it may indeed be legitimate in some jurisdictions to question their appropriateness.

5 Reasons for Adopting the use of Witness Statements

It is interesting to note the reasons that were given at the time for adopting the use of witness statements in the English courts. The notes to the “White Book”, note 38/2A/2, state ten different reasons, as follows:

- “The rule is designed to achieve several beneficial objectives, including:*
- (1) the fair and expeditious disposal of proceedings and the saving of costs (para. (2)). It is aimed at accelerating the process and reducing costs in the fair disposal of actions in the High Court;*
 - (2) the elimination of any element of “surprise” before or at the trial as to the witnesses each party intends to call at the trial or as to the substance of their evidence. The parties will no longer be able to spring or to be exposed to surprises as to the trial witnesses or their evidence, but will be required to “place their cards on the table”;*
 - (3) the promotion of a fair settlement between the parties. With all or substantially all the factual evidence before them, subject to cross-examination, the parties will be able to make a more realistic appraisal of the strengths and weaknesses of their own and each other’s cases, which should contribute towards the fair and expeditious disposal of the proceedings by settlement or otherwise;*
 - (4) the avoidance of a trial, thereby saving a great deal of wasteful time, effort and cost on the part of the practitioners, the judiciary and the court staff, as well as the parties and their witnesses;*
 - (5) the identification of the real issues and the elimination of unnecessary issues;*
 - (6) the encouragement of the parties to make admission of facts, which they are often reluctant to do;*
 - (7) the reduction in the number of pre-trial applications, such as for further and better particulars of pleadings or for further discovery of documents or for interrogatories;*
 - (8) the provision of the framework whereby routine and evidence-in-chief can be given in summary form, see para. 5(b).*
 - (9) the improvement of the process of cross-examination;*
 - (10) the concentration of both the parties and the trial Judge on the real matters in controversy between the parties;*

In the light of the operation of the Rule, both at the stages of pre-trial as well as the conduct of the trial existing practices of practitioners and judiciary may require adjustment.”

These objectives were written in the future tense. Now, with the benefit of hindsight, we can ask ourselves how many of these expected benefits have actually materialised.

Most obviously of all, the first objective – efficiency and the saving of costs – has clearly not been achieved. Witness statements typically account for a large proportion of the costs of preparing the case. In large cases, they are often very long and detailed documents, and accordingly they are often very expensive to prepare. Yet the very reason given in Order 38, rule 2A(2) for directing the service of witness statements was “*for the purpose of disposing fairly and expeditiously of the cause or matter and saving costs*” (see above). As is suggested later in this article, this is one of the principal issues that we would do well to reconsider.

Some of the other expected benefits are also rarely achieved in practice. Do witness statements identify the real issues and eliminate unnecessary issues? All too often, they do the opposite. All possible background facts and issues are mentioned, in the fear of missing something that might prove to be useful later at trial. Rather than enabling the parties and the trial judge or arbitral tribunal to concentrate on the real matters in controversy between the parties, witness statements in large cases often end up burying the real issues in a huge mass of paperwork.

6 Criticisms of Witness Statements in Lord Woolf’s Reports on “Access to Justice”

In Chapter 22 of his Interim Report on “Access to Justice” in 1995, Lord Woolf reported that Commercial Court practitioners were finding that the practice of written statements was “*having a devastating effect on costs*”:

“6. The Inquiry has received a considerable volume of information indicating that the exchange of statements is not proving as beneficial as had been intended. At a meeting of the Commercial Court Users’ Committee on 1 February 1995, there was general agreement that it was having a devastating effect on costs. This was because statements were being treated by the parties as documents which had to be as precise as pleadings and which went through many drafts. It was suggested that this practice would continue if practitioners feared that they would not be allowed to supplement the contents of a statement at the trial. It was felt that limiting costs recoverable would not assist. On the other hand it might help if the statements were recorded in a question and answer form.

7. A Commercial judge expressed the position very clearly. He said: “From the court’s point of view they may save time and reduce costs, but there are downsides. First, an enormous amount of time is now spent by lawyers ironing and massaging witness statements; that is extremely expensive for clients, and the statements can bear very little relation to what a witness of fact would actually say. Second, they can produce an unfair result because a witness can be unfairly

caught saying something contrary to that which a lawyer has put in his statement. It may not be dishonesty, but inexperience in checking lengthy statements, that leads to being caught, and time is taken up in the trial trying to resolve which it is. Third, the exchange also allows lawyers to spend hours preparing cross-examination and can thus lead to prolix cross-examination. That prolixity is compounded by the fact that the statement crosses every 't' in the first place and those 'ts' cannot be left unchallenged."

8. The views as to expense in complex cases were confirmed by others. At a meeting held by a number of court users, a leading QC indicated that in a case in which he was then involved, £100,000 had been expended in preparing statements, yet it was his view that a more satisfactory result would have been achieved if the judge had had the opportunity of seeing and hearing the witness examined in chief in the normal way. Other contributors indicated that as a consequence of the statements being treated as the witness's evidence in chief, the witness had often to face hostile cross-examination before he had had time to adjust to giving evidence.

9. There is justification for the concerns which are being expressed about the results of requiring witness statements to be exchanged. The problem is primarily in relation to the heavier litigation. Nonetheless, it does spread to more modest litigation and it needs to be addressed."

Lord Woolf firmly endorsed the general practice of requiring the exchange of witness statements, because of the universally accepted benefits of "cards on the table" litigation. However, he suggested that a change in the court's approach was required.

Rather than automatically assuming that the witness statements should stand in place of direct examination, he suggested that a flexible approach to allowing witnesses to amplify their statements at the trial would have the effect of producing shorter, and less expensive, witness statements. He wrote as follows in Chapter 12 of his Final Report in 1996:

"54. ... the problem which I noted in the interim report is a serious one. Witness statements have ceased to be the authentic account of the lay witness; instead they have become an elaborate, costly branch of legal drafting. Although the general view of judges appears to be that the use of witness statements shortens trial time, the great majority of cases do not go to trial: the costs of preparation are incurred in all cases but the savings of trial time in only a few.

55. Part of the problem lies in the fear that a witness will not be permitted to depart from or amplify his statement at the trial itself. Whether or not this fear is well-founded, it has led to the elaborate over-drafting which I described in the interim report, with a view to ensuring that the witness statement is complete in every detail.

56. To tackle this, I recommended in the interim report that judges should be flexible in allowing a witness to amplify what he has said in a witness summary or a witness statement. Many judges are no doubt flexible in allowing witnesses to depart from the letter of their statements where it is reasonable to do so. A number of judges have commented that it is in any event helpful to them to hear the witness give evidence in his or her own words before coming under the pressure of cross-examination. It also helps to put the witness at ease. I would not quarrel with this, so long as the overall need for economy is kept in mind, especially on the fast track.

57. *The new rules will provide that the court can allow evidence which has not been foreshadowed by a witness statement to be given at trial where admitting the evidence will not cause any other party injustice. It should be noted that, in the light of the overriding objective at the start of the new rules, additional expense to a party caused by a late, unjustified change of tack by his opponent can be regarded as a potential aspect of injustice. Departing from present assumptions, however, this type of prejudice should not be regarded as remediable simply by an order for costs. There may accordingly be cases where the court has to refuse to allow the additional evidence to be given.*

58. *If the courts are flexible about allowing a reasonable degree of amplification of witness statements at trial, then they can expect the lawyers to be less concerned to draft absolutely comprehensive statements. This is not to be taken as encouragement deliberately to omit relevant material, but simply to rein back the excessive effort now devoted to gilding the lily. In the interim report, I recommended that courts should disallow costs where they thought the drafting of witness statements had been disproportionate. Trial judges, and to some extent procedural judges, will need to make a real effort, especially in the early phase of the new system, to scrutinise witness statements rigorously. This is the only way in which they will be able to pinpoint repetitious or inappropriate material, such as purported legal argument or analysis of documents. This is a fault which must in the main be attributed to the legal profession and not to its clients; wasted costs orders may therefore be appropriate in some instances of grossly overdone drafting. Only if the legal profession is convinced by demonstration that it has an active judicial critic over its shoulder will it be persuaded to change its drafting habits.*

59. *In connection with this change of approach, I make the following recommendations about the content and form of witness statements:*

- (a) witness statements should, so far as possible, be in the witness's own words;*
- (b) they should not discuss legal propositions;*
- (c) they should not comment on documents;*
- (d) they should conclude with a statement, signed by the witness, that the evidence is a true statement and that it is in his own words.*

60. *When the Civil Evidence Act 1995 is brought into force, hearsay evidence will become admissible, with only a minimum of formality required to identify it. The lawyers' present task of editing a witness statement so as to remove hearsay will become unnecessary, thus saving cost. Since a witness statement will in future be able to refer to matters beyond the direct knowledge or observation of the witness, the statement should indicate, where appropriate, the sources of knowledge, belief or information on which the witness himself is relying. In this respect the difference between witness statements and affidavits will diminish."*

7 Lord Justice Jackson's Review of Civil Litigation Costs

Times have moved on since 1996. Yet the criticisms remain much the same. Lord Justice Jackson made the following remarks in Chapter 42 (Volume 2) of the Interim Report of his Review of Civil Litigation Costs, which was published in May 2009:

"1.1 The transition from oral to written evidence-in-chief. The use of written witness statements in substitution for oral evidence was a procedural reform

progressively introduced (to the best of my recollection) in or about the 1980s and subsequently embodied in the rules. The purpose of this reform was essentially twofold, namely (a) to save the time and cost of oral evidence-in-chief and (b) to enable each party to know what evidence it would have to meet. Such a “cards on the table” approach would in some cases promote settlement and in other cases make for a fairer trial.

1.2 Shorter and less substantial cases. Written witness statements have generally achieved their objective in shorter and less substantial cases. It is certainly my impression that in such cases witness statements lead to a saving of time and costs. Indeed the submissions made during Phase 1 do not suggest otherwise. It is true that sometimes, even in the shorter and less substantial cases, witness statements are unduly prolix. Also there is sometimes a problem where witness statements are taken over the telephone or taken by inexperienced staff. However, these are matters that can be addressed without any need for rule changes.

1.3 Larger and more substantial cases. The real problem concerning witness statements arises in larger and more substantial cases. There is a real concern here that sometimes the use of written witness statements, instead of saving costs and promoting fairness, has the opposite effect. Therefore in this chapter, when dealing with witness statements, I shall concentrate upon their use in the larger and more substantial cases.”

Lord Justice Jackson then reviewed the current practice in relation to witness statements, noting that while they tended to work well in smaller cases, there were notable problems in large cases where the length and cost of witness statements tended to spiral out of control. He also noted several reforms that had been introduced in the Commercial Court:

“5.1 The Commercial Court Long Trials Working Party (“LTWP”) identified a number of problems with the current regime which are broadly in line with those set out above. The LTWP’s main concerns are twofold. First, witness statements address many more matters than they need to, leading to lengthy unfocused statements. They often take the reader through the documents and the party’s case rather than recording the witness’ memories of the relevant events. Secondly, exhibits lead to vast duplication of hard copy documents.

5.2 Over the past year several reforms have been trialled by the Commercial Court:

- Witness statements must be as short as possible and only cover issues on which the witness can give relevant evidence. There must be headings in the witness statement to correspond with the relevant issue in the list of issues.*
- Documents referred to should be given a reference (usually a disclosure number) and there should be no hard copy exhibit. If disclosure has been given electronically, the documents should be hyperlinked within the witness statement (if the technology allows).*
- At the CMC [Case Management Conference] the judge should consider whether to impose a limit on the length of witness statements.*
- Costs sanctions may be imposed if statements are lengthy or contain irrelevant material.*
- The parties and judge should consider at the pre-trial review whether it will be of assistance to the court to hear a witness give evidence in chief (e.g. in fraud cases).*

- *The court should dispense with witness statements if the time and expense involved in the preparation would be disproportionate. In such (rare) circumstances, the court may order the party wishing to call the witness to serve a short summary of the evidence he is expected to give.”*

In addition to costs sanctions, Lord Justice Jackson also canvassed three rather radical possibilities:

“(i) Make witness summaries the norm. If this approach is adopted, 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.

(ii) Confine witness statements to matters that are not within the documents. If this approach is adopted, there would need to be an express rule to the effect that witness statements should be limited to (a) brief confirmation that identified documents are accurate (if that is indeed the witness’ assertion) (b) such further matters as are not apparent from or are contrary to the documents relied upon.

(iii) Stipulate a maximum length. The Commercial Court reforms provide that in some cases there should be a guillotine on the length of witness statements. One Phase 1 submission suggested that a maximum word count should always be imposed. It could be that a default length could be set out in the rules (to be determined) and the parties would have to apply to the court, with reasons, to vary this. If that proposal is regarded as unrealistic, an alternative approach could be implemented whereby parties apply at the first CMC if they consider it would be reasonable and proportionate, bearing in mind the overriding objective, for limits to be imposed on the length of witness statements.”

Thereafter, in Chapter 38 of his Final Report, *Review of Civil Litigation Costs*, December 2009, Lord Justice Jackson wrote:

“2.1 The role of witness statements. As was explained in chapter 42 of the Preliminary Report, witness statements serve a number of purposes, including (a) reducing the length of the trial (by largely doing away with the need for anything more than short examination-in-chief); (b) enabling the parties to know in advance of the trial what the factual issues are; (c) enabling opposing parties to prepare in advance for cross-examination; and (d) encouraging the early settlement of actions. To this I would add the objective of providing useful and relevant information to the court to enable it to adjudicate upon the case in an efficient manner.

2.2 Having considered the extensive submissions on this issue, I conclude that witness statements can and do fulfil the important objectives identified in the previous paragraph. I do not consider that the fact that some witness statements are too long means that they should be done away with as a tool of civil litigation. The problem is primarily one of unnecessary length, rather than whether witness statements should be used at all in civil litigation. One reason for unnecessary length is that many witness statements contain extensive argument. Such evidence is inadmissible and adds to the costs.

2.3 Measures to control prolixity. There are two primary measures that should be deployed to try to ensure that witness statements are not unnecessarily lengthy. The first is case management, and the second is imposition of costs sanctions.

2.4 Case management. Under our current system, there are few restrictions in practice on a party's ability to produce and rely upon witness statements in civil proceedings. The courts do not, in general, inquire as to how many witnesses a party proposes to call, upon what matters they will give evidence (and whether those matters are relevant to the real issues in dispute) and how long their witness statements will be. Nevertheless CPR Part 32 gives the court power to do all of this. The Commercial Court is now exercising these powers, as part of that court's commitment to more active case management: see section HI of the Commercial Court Guide, as revised in May 2009. In my view the best way to avoid wastage of costs occurring as a result of lengthy and irrelevant witness statements is for the court, in appropriate cases, to hear argument at an early case management conference (a "CMC") about what matters need to be proved and then to give specific directions relating to witness statements. The directions may (a) identify the issues to which factual evidence should be directed, (b) identify the witnesses to be called, (c) limit the length of witness statements or (d) require that any statement over a specified length do contain a one page summary at the start with cross-references to relevant pages/paragraphs. Any CMC which goes into a case in this level of detail will be an expensive event, requiring proper preparation by the parties and proper prereading by the judge. I certainly do not recommend this approach as a matter of routine. It should, however, be adopted in those cases where such an exercise would be cost effective, in particular in cases where the parties are proposing to spend excessive and disproportionate sums on the preparation of witness statements.

2.5 German procedure. A not dissimilar approach is the "Relationsmethode" of German civil procedure, which is mentioned in chapter 55 of the Preliminary Report. As I understand it, the procedural rules in German civil proceedings require each party to identify the witnesses whom they intend to rely upon to prove the factual matters contained in the pleadings. After the pleadings are in, the presiding judge will review them and identify which factual matters are in dispute and (in consequence) which witnesses the judge will receive evidence from on particular matters.

2.6 Possible adoption in England and Wales. The aspect of the "Relationsmethode" which I believe can and should be adopted in civil litigation in England and Wales is the identification of proposed witnesses by reference to the pleadings. If in any given case the court so directs, each party should identify the factual witnesses whom it intends to call and which of the pleaded facts the various witnesses will prove. This is a task which the parties will be doing internally anyway, so hopefully it will not add unduly to costs. The filing of such a document (which might possibly be a copy of the pleadings with annotations or footnotes or an extra column) will be necessary groundwork for any case management conference at which the judge is going to give effective case management directions, for the purpose of limiting and focusing factual evidence, in order to save costs.

2.7 Costs sanctions. To the extent that case management does not prevent parties from producing prolix witness statements, costs sanctions should be applied against the party responsible for adducing the prolix or irrelevant statements. A simple example (which involves the use of case management) is where a court has ordered at a CMC that witness statements are not to exceed 10 pages. If a party serves a witness statement that is, say, 30 pages in length, there should be

a presumption that the party is to face an adverse costs order in relation to the witness statement, unless there are good reasons for the court not to make such an order. An adverse costs order could (in the case of an otherwise successful party) be that the party is not to receive its costs of preparing the statement, or (in the case of an otherwise unsuccessful party) that the party is to pay its opponent's costs on an increased basis. The court would retain a discretion not to make an adverse costs order, which could be exercised if a witness statement is only slightly over the ordered limit or if there is good reason for the excess.

2.8 Even in cases where the court has given no detailed directions about factual evidence (i.e. the majority of cases), the judge can still impose costs sanctions for prolix or irrelevant evidence. The judge can either give an indication about costs to be disallowed or allowed on detailed assessment or, alternatively, take those matters into account immediately upon summary assessment.

2.9 Views expressed in Phase 2. In making the proposals set out above, I am drawing on many of the submissions made during Phase 2, without identifying them individually. It should, however, be noted that in a survey of clients carried out by one major City firm 84% of respondents (i.e. 49 out of 58) considered that the courts should be readier to impose costs sanctions for irrelevant evidence. Furthermore at the Professional Negligence Lawyers Association Conference in Birmingham on 25th June 2009 I specifically invited debate about witness statements. None of the options set out in PR paragraph 42.6.3 found favour. A number of experienced solicitors and counsel contributed to the debate. The general view was that more effective case management was the way forward. The judge at the first CMC should identify the key issues to be addressed by witnesses. Witness statements should then be focused on those key issues and deal with any other matters more briefly and summarily.

...

2.12 Supplementary oral evidence. It is sometimes said that exhaustive witness statements are required because a party is concerned that the evidence of the witness will not be capable of being amplified at trial. The court already has discretion to allow supplementary evidence-in-chief under CPR rule 32.5(3). In the experience of many judges (and also my own experience) it is usually helpful to hear short supplementary evidence-in-chief, especially if that oral evidence goes to the central issues in the case. I am told by the Bar that judges differ in their approach to supplementary oral evidence: some judges are receptive to such evidence, whereas others will not allow it save for good reason (e.g. a new development in the trial). Total consistency is unachievable, but a broadly similar approach is desirable. In my view, judges should generally be willing to allow a modest amount of supplementary oral evidence (a) because this approach is generally helpful to the court and (b) because this approach reduces pressure on solicitors to cover every conceivable point in witness statements.

2.13 No rule change is required in order to implement the various proposals set out above. All that is required is effective use of the existing rules, as set out in paragraphs 2.4, 2.6, 2.7, 2.8 and 2.12 above. Nevertheless, courts which give detailed guidance in their court guides may care to indicate in those guides an intention to use the existing powers in respect of witness statements more actively."

Useful remarks on how to draft witness statements are also contained in Annex A, paragraph 37 to the recent report by the Judicial Working Group on Litigants in Person, which was published in July 2013. While these remarks specifically

relate to cases involving litigants in person, they are sensible points that are equally worth noting by lawyers:

“Witness statements

37. The new CPR Part 32.2(3) gives judges considerable discretion to control witness statements.

Please give serious consideration to using this discretion. In particular:

- *Stress to the litigants, both represented and in person, that the witness statements should a) address the issues and b) not address anything else (apart from essential background).*
- *Advise litigants in person that while their statement, and in the occasional case the statement of another prime mover in the relevant events, may properly give the essential background to the dispute, the statements of supporting witnesses should be carefully confined to the issues they deal with. Judges may usefully discuss with litigants in person the issue(s) each of their witnesses will cover, and an order may be made restricting the witnesses to those issues. Where no order is made to limit the issues covered by individual witnesses, it may still be helpful to require litigants to identify each issue covered by the witness in the witness statement itself.*
- *Require numbered paragraphs.*
- *Stress that witness statements should be confined to factual matters and should never contain statements of opinion.*
- *Where the witness does not have English as a first language, the litigant should be informed that the manner in which the statement has been prepared must be clear on the face of the statement. (Ideally the witness should make the statement in their mother tongue and it should be translated by a competent interpreter who should make a suitable endorsement to the statement. Alternatively, if the statement has been written in English and translated, it must be explained how the witness’s words came to be written in English and who translated it when the statement of truth was signed.)”*

8 Recent English Cases on the Subject of Witness Statements

Witness statements have also been the subject of a number of English cases in recent years. The following is a selection.

Smith v. J&M Morris (Electrical Contractors) Limited [2009] EWHC 0025 (QB)

On the subject of litigants-in-person, HH Judge Oliver-Jones QC made the following salutary remarks in *Smith v. J&M Morris (Electrical Contractors) Limited* [2009] EWHC 0025 (QB):

“I have often had occasion to remark about the failure to comply with the CPR so far as witness statements are concerned, as well as the obvious lack of skills of witnesses, and those acting for litigants, in formulating them. It is not infrequently the case that witness statements prepared by litigants-in-person are superior in form and substance to those prepared by solicitors or their agents based upon questionnaires, interviews (often by telephone) or correspondence with witnesses. It is often the case that witness statements, drafted by solicitors or their agents in good faith (I exclude, of course, any case of deliberate intent to deceive by a witness or drafter), are signed or otherwise accepted by witnesses

without any or any proper consideration of their accuracy, completeness or even truth.”

Statement by Mr Justice Peter Smith regarding the Farepak group litigation, 21 June 2012

It is relevant to note the statement by Mr Justice Peter Smith dated 21 June 2012, following the collapse of disqualification proceedings concerning the Farepak group, in which the following was said in relation to witness statements⁸:

“47. The courts have regularly reminded parties that the purpose of witness statements is to replace oral testimony. It is not to rehearse arguments, it is not to set out a case and whilst it necessarily has to be drafted with the collaboration of lawyers, it should not be a document created in the language of lawyers by the lawyers, because the lawyers do not go into the witness box and defend it. This is unfair to defendants, as this case showed. It is also unfair to the witnesses.”

JD Wetherspoon PLC v. Jason Harris [2013] EWHC 1088 (Ch)

In 2013, in *JD Wetherspoon PLC v. Jason Harris* [2013] EWHC 1088 (Ch), the Chancellor of the High Court, Sir Terence Etherton struck out parts of a witness statement on the grounds that they constituted as abuse of process. The Chancellor is robust in his language:

“33. The vast majority of Mr Goldberger's witness statement contains a recitation of facts based on the documents, commentary on those documents, argument, submissions and expressions of opinion, particularly on aspects of the commercial property market. In all those respects Mr Goldberger's witness statement is an abuse. The abusive parts should be struck out.

...

38. CPR r.32.4 describes a witness statement as:

"a written statement signed by a person which contains the evidence which that person would be allowed to give orally".

39. *Mr Goldberger would not be allowed at trial to give oral evidence which merely recites the relevant events, of which he does not have direct knowledge, by reference to documents he has read. Nor would he be permitted at trial to advance arguments and make submissions which might be expected of an advocate rather than a witness of fact. These points are made clear in paragraph 7 of Appendix 9 to the Chancery Guide (7th ed), which is as follows:*

"A witness statement should simply cover those issues, but only those issues, on which the party serving the statement wishes that witness to give evidence in chief. Thus it is not, for example, the function of a witness statement to provide a commentary on the documents in the trial bundle, nor to set out quotations from such documents, nor to engage in matters of argument. Witness statements should not deal with other matters merely because they may arise in the course of the trial."

40. *Nor would Mr Goldberger be permitted to give expert opinion evidence at the trial. A witness of fact may sometimes be able to give opinion evidence as*

8 www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/farepak-judges-statement.pdf.”

part of his or her account of admissible factual evidence in order to provide a full and coherent explanation and account. That is what, it would appear, Master Bowles recognised when he refused the first Defendant's application to adduce expert evidence on market practice. It is what the first Defendant has done in his witness statements. Mr Goldberger, however, has expressed his opinions on market practice by way of commentary on facts of which he has no direct knowledge and of which he cannot give direct evidence. In that respect he is purporting to act exactly like an expert witness giving opinion evidence. Permission for such expert evidence has, however, been expressly refused.

41. I recognise, of course, that these rules as to witness statements and their contents are not rigid statutes. It is conceivable that in particular circumstances they may properly be relaxed in order to achieve the Overriding Objective in CPR r.1 of dealing with cases justly. I can see no good reason, however, why they should not apply to Mr Goldberger's witness statement in the present proceedings.”

The message is clear. As is specifically stated in the Court rules, the witness statement should contain the evidence which the witness would be allowed to give orally, and nothing more.

Maclennan v Morgan Sindell [2013] EWHC 4044 (QB)

CPR rule 32.2(3), which came into effect on 1st April 2013, gives the English court wide new powers to regulate the evidence that is provided in the form of witness statements:

“32.2(3) *The Court may give directions –*
(a) identifying or limiting the issues to which factual evidence may be directed;
(b) identifying the witnesses who may be called or whose evidence may be read;
or
(c) limiting the length or format of witness statements.”

In *Maclennan v Morgan Sindell* [2013] EWHC 4044 (QB), there was an application under CPR rule 32.2(3) to limit the number of witnesses that the claimant could call at the trial. The claimant proposed to call 43 witnesses in order to prove comparative earnings in a personal injury case. However, after reviewing the procedural status in some detail, the judge allowed only 14 witnesses to be called.

Napier Park European Credit Opportunities Fund Lt v Harbourmaster Pro-Rata Clo 2 B.V. & Ors [2014] EWHC 1083 (Ch) (09 April 2014)

In this case, the Chancellor of the High Court made disparaging remarks about the appropriateness and admissibility of the witness statements that had been submitting on all sides, and concluded: “*In short, large parts of the witness statements in the present case are of no value whatsoever in resolving the present dispute*”.

Faraday Development Ltd, R (on the application of) v West Berkshire Council & Anor [2016] EWHC 2166 (Admin)

In this case, Mr Justice Holgate pointed out the following:

“7. *Although the object of the skeleton argument for Faraday was to consolidate the Claimant's arguments it was nevertheless 64 pages long and accompanied by*

a summary. Ground 1 itself was subdivided into eight sub-grounds 1A to 1H. The Claimant also produced a prodigious amount of evidence, notably four witness statements and an affidavit by Mr Duncan Crook (a director of and major shareholder in Faraday) taking up some 52 pages or so of closely typed text. Much of this material was unnecessary or inappropriate. Mr Crook's statements went way beyond setting out the essential facts of the claim and producing relevant documents. For example, he offered an extensive commentary on the documents (see also his exhibit DC1, document 43). As was pointed out by the Chancellor Sir Terence Etherton in JD Wetherspoon plc v Harris [2013] 1 WLR 3296 (paragraph 39), it is generally not the function of a witness statement to provide a commentary on the documents in a trial bundle, especially where the points made are essentially matters for legal argument or submission. Much of Mr Crook's commentary on documents overlapped with points taken in the Claimant's skeleton argument, but it also raised additional observations not relied upon in the skeleton. That approach created unnecessary uncertainty for WBDC and for the Court as to the scope of Faraday's case. For that reason I asked Mr Banner to identify whether there were any additional points in Mr Crook's material upon which the Claimant would wish to rely, failing which they would not be dealt with in this judgment. He told me that there were none."

These criticisms of a witness statement providing “*an extensive commentary on the documents*” are worthy of note in the context of international arbitration. It is, in fact, rather common in large arbitration cases for witness statements to comment extensively on the documents.

Sometimes, when the witness has important and relevant comments to make, such comments are obviously necessary – for example, about what was discussed at a meeting and about whether subsequent meeting notes are accurate. However, the judge was right to point out that it creates unnecessary uncertainty if the same issues are discussed both in the witness statements and in legal arguments, particularly if the way the case is put differs somewhat from one place to another. Regrettably, this is all too common in large cases, and as the judge pointed out, this creates difficulties both for the opposite party and for the court or arbitral tribunal.

9 Witness Summaries Instead of Witness Statements?

As noted above, one suggestion that was mooted by Lord Justice Jackson was the use of witness summaries instead of full witness statements. However, this suggestion did not find favour in consultation and it was not adopted in his final report.

Nevertheless, in Australia, the Commercial Court of the Victoria Supreme Court has adopted this approach. A Notice to the Profession published in July 2009 states as follows:

*“NOTICE TO THE PROFESSION 5/2009
WITNESS STATEMENTS*

The Judicial Officers of the Commercial Court with the approval of the Chief Justice advise the profession as follows:

1. *Witness statements will no longer be ordered as a matter of course for commercial cases in the Commercial Court.*
2. *Whether a direction is made for witness statements will depend upon the requirements of each case to ensure its fair, efficient and economical disposition.*
3. *Where witness statements are not ordered for some or all witnesses or where, if ordered, a witness will not provide a witness statement, the party proposing to call the witness will be required to file and serve a summary of the evidence to be given by the witness.*
4. *A summary of evidence, where required, must clearly identify the topics in respect of which evidence will be given by the witness and the substance of the evidence.*
5. *Where a witness will prove or refer to a document the witness statement or summary of evidence must identify each such document by description and discovery number, or page number in the court book.*
- 6 July 2009.”

This has also subsequently been expanded upon in the Supreme Court of Victoria Commercial Court Practice Note No 10 of 2011:

“Witness Statements and Witness Outlines

13.11 A party seeking to utilise a witness statement for the purpose of leading evidence in chief will be required to satisfy the List Judge that this course will better achieve the Court Objective than if evidence were to be given viva voce (orally) in the usual way. Generally, the use of a witness statement will not be appropriate where the evidence sought to be led concerns a significant contested issue of fact where the recollection of the witness with respect to that issue is in question; and the same applies where the credit of the witness is in question. In any event these are matters going to the discretion of the List Judge in the particular circumstances. The List Judge may order that witness statements be provided by only some of the witnesses to be relied upon in a proceeding and, additionally, may order that only part of the evidence in chief of a witness be provided by way of witness statement.

13.12 Where a witness has not been permitted to provide evidence in chief by witness statement, in whole or in part, the List Judge may order the provision of a brief written outline of the evidence that witness will give (“a witness outline”), to the extent that it has not been permitted by witness statement.

13.13 A witness outline must clearly identify the topics in respect of which evidence will be given and the substance of that evidence. A witness outline must be directed only to matters in issue.

13.14 Where a witness outline is ordered the List Judge may also order that no party may use any part of the contents of that document for the purpose of cross examination of the person providing the witness outline or any other person unless leave is granted by the List Judge. Nevertheless, this does not prevent a person cross examining any such person in relation to any act, fact, matter or thing referred to in the witness outline.

13.15 Any witness outlines should also be provided to the parties and to the List Judge in electronic format.

13.16 A witness statement is in written form the evidence that a witness would otherwise give orally and, subject to any contrary order, will when adopted stand as the evidence in chief of the witness. A witness statement and a witness outline (in the latter case allowing for its brevity and purpose, which is to outline evidence which a witness is expected to give to avoid another party being unfairly

surprised) should be in a form which would satisfy the evidentiary requirements for the oral evidence of the witness.

13.17 Practitioners who draft witness statements or witness outlines (allowing for their brevity and purpose) should bear in mind that a witness statement or witness outline that is not written in the witness's own words is unlikely to assist either the Commercial Court or the witness.

13.18 Witness statements should comply with the following requirements:

13.18.1 each witness statement must be in admissible form, in accordance with the rules of evidence, including the rules with respect to hearsay evidence, in accordance with the Evidence Act 2008 (Vic);

13.18.2 each witness statement before it is filed or served must include at the end of the statement the following verification:

'I verify that I have read the contents of this my witness statement and the documents referred to in it and that I am satisfied that this is the evidence in chief which I wish to give at the trial of the proceeding.';

13.18.3 each witness statement must be directed only to matters in issue; and

13.18.4 copies of witness statements, as tendered, should also be provided to the parties and to the List Judge in electronic format.

13.19 A party will be taken to have waived, for the purpose of the proceeding, legal professional privilege to the content of a witness statement or witness outline which has been served in that proceeding. Legal professional privilege attaching to the content of an unserved draft witness statement, including an expert's witness statement, or witness outline is not taken to be waived merely by the filing and service of the final form of such witness statement or witness outline.

13.20 Subject to paragraph 13.13, a party may refer to or use the contents of a witness statement (or witness outline) served by another party before it is adopted by the intended witness and put into evidence (or the witness providing the witness outline gives evidence), for the purposes of the proceeding; for example, for the preparation of the case to be answered, in opening submissions and in adducing evidence from a witness.

13.21 A party receiving a witness statement or witness outline is taken to have done so subject to an implied undertaking to the Court that the witness statement and its contents will not be used for any purpose other than for the legitimate purposes of the proceeding.

13.22 Where a witness will prove or refer to a document, the witness statement or witness outline must, if the provision of a Court Book has been ordered, identify each such document by description and either by page number in the Court Book or, if the Court Book has not been prepared by the time of service of the witness statement or witness outline or no Court Book has been ordered, by discovery number. It would not, however, be expected that a witness outline would usually make extensive references to documents.

13.23 Where an order for witness statements or witness outlines is made, a party may not without leave adduce from the witness evidence in chief other than evidence included in the witness statement of that witness or, where the witness will not provide a witness statement, the evidence referred to in a witness outline to be given by the witness."

10 Lessons for International Arbitration

As can be seen from the various references provided in this article, there has been much criticism and comment on the subject of witness statements in the English courts, and elsewhere, in recent years. Yet, such voices are strangely silent in the world of international arbitration.

Many of the comments referred to above regarding the prolixity of witness statements in larger cases apply just as much in international arbitration as they do in litigation. Calls are regularly made to save time and costs in arbitration. For example, the ICC Arbitration Commission has published two reports, in 2007 and 2014, on Techniques for Controlling Time and Costs in Arbitration. Yet, there is little here on the subject of witness statements. The two recommendations that are made are as follows:

“Witness statements

60 Limiting the number of witnesses

Every witness adds to the costs, both when a witness statement is prepared and considered and when the witness attends to give oral evidence. Costs can be saved by limiting the number of witnesses to those whose evidence is required on key issues. The arbitral tribunal may assist in identifying those issues on which witness evidence is required and focusing the evidence from witnesses on those issues. This whole process will be facilitated if the parties can reach agreement on non-controversial facts that do not need to be addressed by witness evidence.

61 Minimizing the number of rounds of witness statements

If there are to be witness statements, consider the timing for the exchange of such statements so as to minimize the number of rounds of statements that are required. For example, consider whether it is preferable for witness statements to be exchanged after all documents on which the parties wish to rely have been produced, so that the witnesses can comment on those documents in a single statement.”

In light of the criticisms that have appeared in England regarding witness statements, I suggest that a wider debate is required regarding best practices in the preparation of witness statements in international arbitration.

Meanwhile, and in order to encourage such a debate, here are some suggestions, all taken from the various proposals referred to above:

1. Disproportionate drafting of witness statements should be penalised by means of costs orders.
2. Witness statements should be, so far as possible, in the witness’s own words.
3. Witness statements should be confined to the factual evidence which the witness would be able to give orally.
4. Witness statements should not include opinion evidence.
5. Witness statements should not discuss legal propositions.
6. Witness statements should not engage in legal argument.

7. In appropriate circumstances, consideration can be given to asking each party to identify the factual witnesses whom it intends to call and which of the pleaded facts the various witnesses would prove.
8. In appropriate circumstances, consideration can be given to identifying or limiting the issues to which factual evidence may be directed, limiting the number of witnesses to be called, and/or limiting the length or format of witness statements.
9. In appropriate circumstances, consideration can be given to having witness summaries instead of full witness statements.
10. In order to prevent the over-preparation of witness statements, witnesses should be allowed to amplify their witness statements by giving a modest amount of supplementary oral evidence at trial.

