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International Arbitration

Expert Analysis

Preparing Witness Statements In International Arbitration

By **John Fellas**

Witness statements are the standard method by which the direct testimony of witnesses is submitted in evidence in international arbitration proceedings. Typically, they are submitted in writing some months before any hearings and, in most cases, little time is spent at hearings on the examination-in-chief of a witness—typically a 10 to 15 minute "warm up." The bulk of hearing time is spent on cross-examination. In a previous article in this column, I offered some practice pointers for conducting cross-examination in international arbitration proceedings. ("Cross-Examination in International Arbitration," NYLJ, Aug. 7, 2015). Here, I do the same for the preparation of witness statements.

My focus is not on the formal content of a witness statement. For that I refer the reader to Article 4.5 of the IBA Rules on the Taking of Evidence in International Arbitration. Rather, I want to focus on how to avoid submitting a witness statement that is a time-bomb—a statement that apparently strongly supports your client's case at the time it is submitted, but that, months later at the hearings, blows up in the witness's face the minute she is cross-examined about it.

A lawyer's role is to present the most persuasive case she can, given the cards she has been dealt, given the inescapable mix of favorable and unfavorable facts that underlies most disputes. When it comes to witness statements, central to that role is submitting the witness's honest account of the relevant events in a manner that provides the strongest possible support for the case, but at the same time minimizes the witness's vulnerability to attack on cross-examination. After all, once a witness statement is submitted, the opposing party's lawyers will spend weeks poring over it in search for grist for the cross-examination mill: misleading statements; key omissions; inconsistencies with contemporaneous documents, etc.

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There is an obvious reason to submit a witness statement that can withstand the slings and arrows of cross-examination: If the witness's version of events is shown, on cross examination, to be unreliable as to some issues, the arbitrators may view it to be unreliable as to others. But there is another reason that is sometimes overlooked: the real-time experience of the witness being cross-examined. Cross-examination is stressful at the best of times; there are few situations in life when you are compelled to answer questions—in front of an audience evaluating your credibility and reliability—from a person whose sole aim is to prove you to be a liar, incompetent, or both. Witnesses need to feel confident that their statement is defensible. And a witness's performance on cross-examination may suffer as that confidence gradually drains away when inaccuracies, inconsistencies and incongruities are brought out through questioning.

The preparation of a witness statement involves something of a dilemma. On the one hand, there is the professed

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expectation of arbitrators that a witness statement should tell the witness's own story in her own words. On the other, there is the practical reality, of which arbitrators are also aware, that a lawyer is indispensable to its preparation.

Some decry the involvement of lawyers in the preparation of witness statements, claiming that it is incompatible with the notion that the witness tell her own story in her own words. The reality, however, is that the lawyer's involvement can result in a witness statement that provides more assistance to the arbitrators than they would receive in its absence. Thus, while the notion that a witness should tell her own story may seem simple enough, the witness's "own story" may not focus on the facts that bear on the legal issues upon which the dispute turns. Many moons ago, as a junior lawyer, I interviewed a witness who had primary responsibility for a relationship with a distributor that had soured and resulted in that distributor's termination. The central legal question was whether the distributor had materially breached the distribution agreement. The witness, however, in offering his account of the case had a very different focus: how he had maintained a good personal relationship with his counterpart throughout and how he was worried he might lose his job. Those facts—that preoccupied the witness—would have been of little assistance to the arbitrators in the resolution of the case.

Thus, a central role of the lawyer is to tease out from the universe of facts known to the witness those relevant to the legal issues upon which the case turns. But the benefits of a lawyer's involvement go beyond that. Lawyers can also ensure that the witness's account of events is accurate; a lawyer will often know better than the witness whether her recollection squares with the contemporaneous documents or the recollection of other witnesses.

In addition to their role in helping develop the substance of the witness's testimony, lawyers also typically assist in the drafting of a witness statement. There are good, practical reasons for this. First, witnesses invariably have day jobs and typically cannot devote the necessary time to the iterative process of drafting, revising, testing, and polishing their statement. For the lawyer, by contrast, the preparation of the witness statement is her day job. Second, lawyers are often far more experienced than most witnesses in marshalling facts and presenting them in a coherent, written narrative in a manner that is sensitive to the legal issues in a case.

> Do not turn the fact witness into a legal advocate. The purpose of a witness statement is to recite the witness's honest account of the facts, not to argue the case.

But even though a lawyer can be essential to the preparation of a witness statement, it is precisely the involvement of another person with a particular set of professional skills that can be problematic: Lawyers are advocates who want to win their cases; they have their own vocabulary and, especially in the international arbitration context, they may be from a different country to the witness. In assisting in the preparation of the witness statement, the lawyer needs to curb some of her natural inclinations.

Consider the drafting of the witness statement. On the one hand, it goes without saying that the witness statement should be in the witness's own words. On the other, that notion is often too crude to provide much guidance when it comes to the practical realities of witness statement preparation. Imagine a common type of back-and-forth between a lawyer and a witness when it comes to witness statement preparation. You are interviewing the witness, and, as happens in normal conversation, the witness, *using her own words*, does not express herself clearly on a particular point. And so, just as also occurs in normal conversation, you may restate back to the witness in *your own words* what you thought she meant, only to have her affirm that restatement. What guidance does the principle that you should use the witness's own words provide here? Should you use the witness's own words, even though they were unclear? Or should you use your words that the witness affirmed? This difficulty is magnified when you have to interview a foreign witness through an interpreter.

Without in any way disavowing the notion that the witness statement should use the witness's own words, I want to extract from it a principle that provides concrete guidance in every case: Do not use words that are obviously not those of the witness. What do I mean by this?

Do not use vernacular that may be familiar to you but unfamiliar to your foreign witness. One example: People outside of North America are not likely to be familiar with the phrase "Monday morning quarterbacking"—an expression that once appeared in a statement of a Greek witness submitted by my adversary. Do not write like a lawyer,

such as "Mr. X's position elevates form over substance, and is thus without merit" or "It is beyond cavil that ABC Ltd. breached the contract." Only lawyers talk that way. And do not cut and paste from pleadings or from someone else's witness statement.

When a witness is confronted with such statements on cross-examination, she has two choices. Either she will admit that they are not her words, which undermines her statement in the eyes of the arbitrators: "If this isn't in the witness's own words, what else isn't?" Or she will claim the words as her own, which undermines her credibility with the arbitrators who will know better. Some believe they can inoculate a witness from this type of type of attack by having the witness say in her statement: "I acknowledge that my lawyer assisted me in preparing this witness statement." But that concession does not address several specific questions that can be put to a witness about the drafting of her statement. Take, for example, this question to a witness about her statement: "Are these your words?" If the witness says "yes," the impact of pointing out on cross-examination a litany of statements that are obviously not in her words can be both to shake her confidence and undercut her credibility. If she says "no," there's no good response to the obvious follow up: "Well, tell the arbitrators whose words they are."

Let me turn now to two practice pointers relating to the substance of a witness statement. The first relates to dealing with unfavorable facts. There is no formal requirement that a witness statement address every relevant fact of which a witness has knowledge. So it is always an open question as to whether a witness should address bad facts in her statement or wait to see if they come up on cross-examination. There is no hard and fast rule for every situation, but there is a clear rule in one situation: You should address material, bad facts about which the witness obviously has knowledge (e.g., an admission is in an email she wrote). The disclosure of a bad fact—whether in a witness statement or on cross-examination—will always harm a case to some degree or other. But if a witness statement does not address an unfavorable fact of which the witness obviously has knowledge, there is added harm: The accusation on cross-examination that the witness was not candid with the tribunal in her statement.

Finally, do not turn the fact witness into a legal advocate. The purpose of a witness statement is to recite the witness's honest account of the facts, not to argue the case. That is the task of the lawyer in the brief or memorial. In most cases the line between factual evidence and legal argument is clear. But there is one area, which arises in virtually every commercial arbitration, where the line routinely gets blurred.

Commercial disputes that give rise to arbitration proceedings almost invariably arise out of an underlying contract (e.g., a license agreement) that contains an arbitration clause. And such disputes typically turn, in whole or in part, on competing interpretations of that contract. While the line between factual evidence and legal argument supporting an interpretation of a contract is not always easy to locate, it is important to resist the temptation of staying too far onto the legal argument side of that line.

There is nothing improper about a witness testifying to certain facts about a contract, such as the commercial context in which a contract was executed, the negotiating history, or the course of its performance. To be sure, the arbitrators may not always find such evidence to be relevant given the governing law of the contract. But, often, that cannot be known at the time the witness statement is submitted. For example, in a case governed by New York law where extrinsic evidence (such as negotiating history) can be relevant if contractual language is ambiguous, one typically won't know at the time the witness statement is submitted whether or not the arbitrators will view the language to be ambiguous.

But it is important that the non-lawyer, fact witness avoid engaging in her witness statement in the type of contractual analysis a lawyer might undertake, such as parsing of the language of the contract to support some interpretation of the contract. This is for four reasons. First, it is not necessary since that can be done in the memorial. Second, it is not credible since the arbitrators will suspect, with good reason, that the interpretation comes from the lawyers not the witness. Third, it leaves the witness open to questions to which there may be no easy answer: When did you first come up with this interpretation? Is there any contemporaneous document showing that you ever shared the interpretation you offer now with the other side? Finally, it leaves your witness vulnerable to cross-examination about all aspects of the contract. The objection, "My client is not a lawyer and so should not be asked to interpret the contract," simply won't work when the witness has already done just that.