

# The Interplay between Written Witness Statements and Oral Examination in International Commercial Arbitration

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Rute Alves

*“In short, this discretion empowers the arbitrator to draw the line between efficiency and due process in a manner appropriate to the circumstances at hand and thereby to serve both ends.”* L. Yves Fortier<sup>1</sup>

This work aims at analysing how written witness statements and oral examination, although constituting two independent means of evidence, are interrelated, as well as to understand to what extent such interplay contributes to enhance efficiency of arbitral proceedings.

In the end, the author expects to demonstrate that written witness statements followed by oral examination do not have to occur in relation to every single witness who has prior submitted a statement. Rather, it is to tribunals to evaluate written witness statements casuistically and to exercise their discretion to accept or refuse the oral examination of witnesses, taking into consideration the materiality and relevance of each witness’ appearance at the evidentiary hearings.

## I. WRITTEN WITNESS STATEMENTS

### 1. Common practices in submitting written witness statements: an undisputable method

Submission of written witness statements has become a frequent practice in international commercial arbitration<sup>2</sup>. Tribunals and parties tend essentially to see statements as a form of foreseeing the issues on which the witness will testify at the hearing stage; it facilitates the preparation<sup>3</sup> of tribunals and parties for the hearings. There is no conventional manner to present

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<sup>1</sup> L. YVES FORTIER, *“The Minimum Requirements of Due Process in Taking Measures Against Dilatory Tactics: Arbitral Discretion in International Commercial Arbitration – A Few Plain Rules and A Few Strong Instincts”* in ICCA Congress Series no. 9, p. 396 (A. J. van den Berg, ed., 1999)

<sup>2</sup> See e.g. ZUBERBÜHLER/HOFMANN/OETIKER/ROHNER, *IBA Rules of Evidence, Commentary on the IBA Rules on the Taking of Evidence in International Arbitration* (Sellier. European Law Publishers 2012), 91; MICHAEL HWANG S. C. AND ADREW CHIN, “The Role of Witness Statements in International Commercial Arbitration” in *International Arbitration 2006: back to basics?* ICCA, Congress Series no. 13, (Kluwer Law International 2007), 650.

<sup>3</sup> NATHAN D. O’MALLEY, “Rules on Evidence in International Arbitration, An Annotated Guide” (Informa 2012), 116

written witness statements<sup>4</sup> as procedures may be tailored to better suit the dispute<sup>5</sup>. Hence, unless otherwise agreed, tribunals and parties are free to decide whether the utilisation of witness statements serves the particular dispute, as well as the time<sup>6</sup> and the contents of statements.

Rules on submitting witness statements are provided by some institutions; for instance, article 27.2 of the UNCITRAL Rules and 20.3 of the LCIA Rules allow parties to present testimonies in writing as long as they are signed. ICC Rules are silent on this particular subject, thus in light of the general rules established in article 19.1, unless the parties expressly establish a procedure for submitting written testimonies, the tribunal has discretion to decide whether witness statements fit the particular case<sup>7</sup>.

Article 4.4 of the IBA Rules also sets out the possibility of parties submit written witness statements. The time for submissions is not defined; however the rules offer important guidance on two topics: the possibility of pre-schedule statements presentation aligned with organization of the evidentiary hearings and the opportunity to reply to the other party's witness statements, expert reports or other submissions that have not been submitted at the first "round" of pleadings<sup>8</sup>. Such additional or revised witness statements<sup>9</sup> may be given by the same witnesses or by other persons named as witnesses afterwards for the purposes of replying.

Article 4.5 of IBA Rules points out the elements that each statement must contain, namely the relationship with the parties<sup>10</sup>, an affirmation of truth, the signature and the description of facts. Statements reflect a subjective perspective of the facts<sup>11</sup> and therefore who can be considered as

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<sup>4</sup> See e.g. LEW/MISTELIS/KRÖLL, *Comparative International Commercial Arbitration* (Kluwer Law International 2003), 571-572; GARY B. BORN, *International Arbitration: Law and Practice* (Kluwer Law International 2012), 165-166; PAUL-A GÉLINAS, "Evidence through witnesses" in *Arbitration and Oral Evidence*, in Levy/Veeder (eds), (International Chamber of Commerce, ICC 2004), 30

<sup>5</sup> MICHAEL SCHNEIDER, "Witnesses in international arbitration, presentation of materials from arbitration practice", *ASA Bulletin* (1993) Vol. 11, 32

<sup>6</sup> ANNE SCHLAEPFER, "Witness statements" in *Arbitration and Oral Evidence*, Levy/Veeder (eds), (International Chamber of Commerce, ICC 2004), 69;

<sup>7</sup> CRAIG/PARK/PAULSSON, *International Chamber of Commercial Arbitration* (Oceana Publications 3<sup>rd</sup> Edition 2000), 434;

<sup>8</sup> Therefore, several rounds of witness statements permitted by the tribunal for rebutting previous submissions or due to divisions in the evidentiary hearings may occur. - *Ibid.* 93-94.

<sup>9</sup> Article 4.6 of the IBA Rules.

<sup>10</sup> In commercial transactions witnesses are more likely to have connections with one of the parties, what in certain circumstances may result in having interest in the outcome of the case: NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDFERN, and MARTIN HUNTER, *Redfern and Hunter on International Arbitration* (Fifth Ed., Student Version, OUP 2009), 401

<sup>11</sup> See e.g. ZUBERBÜHLER/HOFMANN/OETIKER/ROHNER, *IBA Rules of Evidence, Commentary on the IBA Rules on the Taking of Evidence in International Arbitration* (Sellier. European Law Publishers 2012)86-87; CHRISTIAN OETIKER, "Witnesses

witness is a pertinent matter as some individuals may have an interest in the outcome of the proceedings, subsequently giving a biased testimony. Nevertheless, unlike the civil systems which are recognized for having a narrower approach concerning the persons who can testify as witnesses, the approach in international arbitration seems to be broader<sup>12</sup>.

For instance, Article 4.2 of IBA Rules establishes that “any person” may be a witness, including those with direct relationships with parties<sup>13</sup>. The tendency to generally accept witnesses disregarding their relationships with the parties may imply that tribunals would be more pre-disposed to hear witnesses at the hearings in order to test the straightness of their testimony. However, even if the tribunal does not allow oral examination one should not overlook that tribunals have a wide discretion in evaluating the evidence submitted, thus the relationships will inevitably be pondered<sup>14</sup> when weighting the testimonies<sup>15</sup>.

Furthermore, the substance of witness statements is also evaluated through the way they are written. For this reason the usefulness of written witness statements may be in question when they are written by lawyers. On one hand, it can be defended that with no lawyers’ assistance witnesses may not focus on the important disputed facts<sup>16</sup>. On the other hand, despite the version of the facts may be exactly the same described by the witness, one can argue that witnesses’ statements lose identity once adapted by counsels.

Ideally witness statements should be as much genuine and contemporary as possible, without being affected by terms of law and the technical language of counsels<sup>17</sup>. If statements are not clear, the possibility of either the opposite party or the tribunal to request the appearance of the witness at the hearings increases.

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before the International Arbitral Tribunal”, ASA Bull (2007) Vol. 25, 260; M. BÜHLER AND C. DORGAN, “Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbitration - Novel or Tested Standards?” (2000) J. Int. Arb Vol. 17 no. 1; PAUL-A GÉLINAS, “Evidence through witnesses” in Arbitration and Oral Evidence, in Levy/Veeder (eds), (International Chamber of Commerce, ICC 2004), 31-34.

<sup>12</sup> EMMANUEL GAILLARD AND JOHN SAVAGE (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999), 699-700

<sup>13</sup> In the same way article 20.7 of LCIA Rules.

<sup>14</sup> One can also defend that “The acceptance of any person as a witness promotes efficient fact-finding” since individuals that frequently have the best knowledge of facts are likely to have connections with the parties: M. BÜHLER AND C. DORGAN, “Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbitration - Novel or Tested Standards?” (2000) J. Int. Arb Vol. 17 no. 1, 9

<sup>15</sup> As it is well noted by Christian OETIKER, “the testimonies of a party’s executives will usually be given less weight than testimonies of an independent witness”: OETIKER, 253

<sup>16</sup> Articles 20.6 of LCIA Rules and 4.3 of IBA Rules expressly allow the interview of the witnesses by the parties’ representatives.

<sup>17</sup> LAURENT LEVY, “Testimonies in the Contemporary Practice” in *Arbitral Procedure at the Dawn of the New Millennium*, Reports of the International Colloquium of CEPANI October 15, 2004 (Bruylant 2005), 114/115

In the majority of the cases, tribunals rely on their chance to personally hear the witnesses to better comprehend their credibility.

## 2. Advantages generally identified to witness statements: time-saving and cost efficiency

The submission of written witness statements allows tribunals to be pre-prepared to hear witnesses focused exclusively on the relevant aspects of the dispute. Conversely, the parties can base their strategies in selecting the most appropriate questions to oral-examine the witnesses and therefore the surprise effect is significantly reduced<sup>18</sup>.

Also by accessing the witness written statements while planning the hearings, tribunals can select only the indispensable testimonies and determine whether witnesses are satisfactorily aware of the facts in dispute<sup>19</sup> and whether their attendance is necessary at the hearings. Even when the confirmation of written statements is required by the tribunal or parties, the length of evidentiary hearings may be reduced and its efficiency increased.

Taking into account that evidentiary hearings involve considerable costs, by saving time, parties are also saving money, what plays an important role in arbitration<sup>20</sup>.

Overall, benefits generally attributed to written statements seem to be closely related to their implications at the evidentiary hearings stage. However, it must not be disregarded that evidentiary hearings may not be held. Having said that, one may question how written statements can remain useful when they are not followed by oral examination of the respective witnesses.

## II. Oral examination

### 1. Common practices and Rules governing oral examination of fact witnesses: LCIA; UNCITRAL, IBA

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<sup>18</sup> BÜHLER/DORGAN, 4-5

<sup>19</sup> ANNE SCHLAEPFER, "Witness statements" in *Arbitration and Oral Evidence*, Levy/Veeder (eds), (International Chamber of Commerce, ICC 2004), 65

<sup>20</sup> One of the reasons increasing costs in arbitration is the time spent with procedural issues: KLAUS SACHS, "Time and Money: Cost Control and Effective Case Management" in Loukas A. Mistelis and Julian D. M. Lew (eds), *Pervasive Problems in International Arbitration* (Kluwer Law International 2006), 113

A distinction is typically drawn between three phases of oral examination: direct, cross-examination and re-direct examination.

It has been suggested that the use of written statements before the hearings may lead to the elimination of direct examination at the hearings<sup>21</sup> since witnesses are considered as having given the direct testimony in writing<sup>22</sup>. In these cases, oral examination could be shorter and it initiates straight with cross-examination on the points impeached by the opposing party.

When allowed, direct examination is generally brief and confined to the assertion of previous written statements. This method allows concentrating the procedures on the main issues in dispute earlier affirmed by witnesses as being of their knowledge<sup>23</sup>.

Modern arbitral institutions include general lines on presentation of oral evidence<sup>24</sup>, including on examination of witnesses<sup>25</sup>. Article 20.3 of LCIA Rules allows the parties to request the presence of witnesses at the hearing whilst article 20.2 clarifies that discretion on appearance of witnesses remains on the tribunal's side. The request may be made not only by the party producing the witness but also by the party who intends to cross-examine the witness<sup>26</sup>.

ICC Rules are less detailed than LCIA Rules. Article 25.3 of ICC Rules empowers the tribunal to hear witnesses appointed by the parties, what means that the tribunal has the discretion to decide

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<sup>21</sup> ANTONIO CRIVELLARO, "An Art, a Science or a 'Technique?'" in Albert Jan van den Berg (ed), *Arbitration Advocacy in Changing Times*, ICCA Congress Series no 15, (Kluwer Law International 2011), 18; An empirical survey carried out in 2012 by the School of International Arbitration (SIA) of the Queen Mary, University of London, shows that "59% of respondents believe that the use of fact witness statements as a substitute for direct examination at the hearing is generally effective": 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process at <http://www.whitecase.com/files/Uploads/Documents/Arbitration/Queen-Mary-University-London-International-Arbitration-Survey-2012.pdf>, 25.

<sup>22</sup> Some authors have considered that hearings aim at cross-examining rather than to hear the direct testimony. See BERNARDO CREMADES, "The Oral Presentation of Fact Witnesses in International Commercial Arbitration" in Albert Jan van den Berg (ed), *International Arbitration 2006: Back to Basics?* ICCA Congress Series no 13 (Kluwer Law International 2007), 646. In defence of the direct-examination for evaluating the sense of the witnesses' honesty, See also MARINN CARLSON, "The Examination and Cross-Examination of Witnesses" in Albert Jan van den Berg (ed), *Arbitration Advocacy in Changing Times*, ICCA Congress Series no 15, (Kluwer Law International 2011), 202.

<sup>23</sup> See e.g. OETIKER, 267; BORN, 169; G. MEHREN, AND C. T. SALOMON, "Submitting Evidence in an International Arbitration: The Common Lawyer's Guide", *Journal of International Arbitration* 20(3), 2003, 289, [http://www.squiresanders.com/files/tbl\\_s29publications/fileupload5689/8985/arbi%2020-3%20solomon.pdf](http://www.squiresanders.com/files/tbl_s29publications/fileupload5689/8985/arbi%2020-3%20solomon.pdf), 289

<sup>24</sup> LAURENT LEVY AND LUCY REED, "Managing Fact Evidence in International Arbitration" in *International Arbitration 2006: back to basics?* ICCA, Congress Series no. 13, (Kluwer Law International 2007), 638: While evaluating the need for harmonization of procedural rules in international arbitration in order to find the truth, the authors concluded that the solution does not imply detailed outlines.

<sup>25</sup> BORN, 166

<sup>26</sup> This depends on what parties have previously agreed concerning the conduction of the arbitral proceedings: article 14. Unless otherwise agreed by parties, the Tribunal has discretion to decide on these matters (14.2).

whether it is necessary to hear witnesses<sup>27</sup>. In addition, article 25.6 clarifies that the tribunal may decide to resolve the case considering only the documents submitted, unless the parties request a hearing<sup>28</sup>. No further rules on examination are provided in ICC Rules; however, it is common practice that a witness delivers concise direct statement interspersed by the lawyer who named the witness. Cross examination is also regularly permitted to the extent that the witness can respond to all the relevant issues revealed in the respective written statement<sup>29</sup>.

It is among the IBA Rules that central guidance on conducting oral examination can be found. Article 8.3 details the procedure on examining witnesses, namely the order in which the parties should interrogate witnesses, the power of the tribunal to schedule the hearings by phases and to order witnesses conferencing, as well as its authority to directly put questions to the testimonies at any time<sup>30</sup>.

Article 4.7 and 8.1 set up that the parties can request the appearance of any witness to testify at the hearings. It amounts to say that the party producing the witness can require the appearance of his own witness, even though the opponent has waived cross-examining such witness. In cases where the parties have not agreed that written statements serve as direct testimony<sup>31</sup>, it seems that is to the tribunal to decide whether the relevance of the witness justifies its appearance<sup>32</sup>.

Such situation may raise the difficulty of understanding what it is actually the purpose of written statements if not the direct testimony and, consequently, the question of whether tribunals should admit the appearance of witnesses in cases where oral direct-examination is not expected to add anything new to the written statements and their presence has not even requested by the opponent.

## 2. Assessing the credibility of witnesses: cross-examination and redirect-examination

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<sup>27</sup> YVES DERAIS AND ERIC A. SCHWARTZ, *Guide to the ICC Rules of Arbitration*, (2nd edition Kluwer Law International 2005) 274-275

<sup>28</sup> This is especially important when one of the parties is not participating. The situation of requesting a hearing should not be misunderstood with the discretionary powers of the tribunal to decide on whether each testimony should appear on the hearing according to the particular elements of the case.

<sup>29</sup> CRAIG/PARK/PAULSSON, 439, specially points ii) and iii).

<sup>30</sup> Article 8.3 (a), (b), (c), (f), (g).

<sup>31</sup> According to article 8.4 written witness statements may serve as direct testimony if agreed between parties or ordered by the tribunal.

<sup>32</sup> See article 8.2 together with 8.4. Even in cases where the parties haven't agreed that written witness statements will serve as direct testimony, the tribunal is allowed to consider so.

Oral examination is typically considered the chance to evaluate witnesses' trustworthiness in live<sup>33</sup>. This advantage is generally seen together with the fact that witness statements are often written by the parties' counsels<sup>34</sup>, so that the tribunal is not given the witness' own words and consequently other elements may have not been disclosed in written statements.

Bearing the above, it can be argued that if the intention is to disclose additional facts, it seems that cross-examination is more useful than direct-examination. In fact, cross examination may be beneficial, as it permits additional information to be revealed<sup>35</sup> regarding points that the counsel has not prepared the witness to answer about. One may defend that this is also the position contained in IBA rules where article 8.4 allows the parties to agree that written statements may serve as direct-examination, or the tribunal to order it. Providing this, witnesses may not be direct-examined even though they appear at the hearings, i.e., they are straight submitted to cross-examination.

Comparing with direct-examination, re-direct examination can be seen as more productive as it allows the parties to clarify the witnesses' previous statements helping less confident witnesses<sup>36</sup>.

Direct-examination may be also deemed beneficial when it enables the tribunal to obtain the first impression of witnesses while they are still relaxed, before facing a more hostile situation of cross-examination.

### **III. IBA RULES: CONSEQUENCES OF EXAMINATION HAS NOT BEEN HELD IN WEIGHTING THE EVIDENTIARY VALUE OF WRITTEN STATEMENTS**

#### **1. Unavailability of witnesses to appear at the evidentiary hearing**

Each reason presented by witnesses or parties for not being available is likely to differently impact in tribunals' evaluation of written statements<sup>37</sup>, albeit it depends on the rules agreed by the parties and the discretion of the tribunal in arbitral proceedings<sup>38</sup>.

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<sup>33</sup> It is impossible "to put the witness's candour on paper": CARLSON, 202; *See also* M.A. CYMROT, "Cross-examination in international arbitration", *Dispute Journal: of the American Arbitration Association*, Vol. 62, 55

<sup>34</sup> VEEDER, *Introduction*, 7: The author states that because of the counsels' intervention when writing the statements "written statements can bear little relation to the independent recollection of factual witness".

<sup>35</sup> JULIAN LEW, "Document disclosure, evidentiary value of documents and burden of evidence" in *Written Evidence and Discovery in International Arbitration*, Teresa Giovannini and Alexis Mourre (eds), (International Chamber of Commerce, ICC 2009), 14; With the same opinion CREMADES, 646.

<sup>36</sup> Crivellaro advises to use redirect-examination only in situations in which the counsels are certain that witnesses gave unexpected answer based on misunderstanding during the cross-examination and that they will not give the same answer in re-direct examination: CRIVELLARO, 18

According to the IBA Rules, reasons for oral examination does not take place may be gathered as follows: unavailability of witnesses related to “valid” or “non-valid” reasons, waiver of witnesses’ appearance by parties and refusal by the tribunal.

Once the request for the appearance of a witness has been confirmed by the tribunal, article 4.7 states that if the witness does not appear and does not provide any “valid” reason, his written statement should be disregarded, unless the tribunal consider there are exceptional circumstances justifying taking the statement into consideration<sup>39</sup>.

“Valid” reasons to cancel the production of witnesses must be as serious as death, illness, extremely difficult conditions or expensive and unforeseen costs for travelling in order to personally be present at the hearing<sup>40</sup>. Issues which are under the control of parties before the statements have been submitted, such as inconvenience, conflicting appointments and matters related to expenses<sup>41</sup> should generally be deemed as non-valid reasons<sup>42</sup>. Additionally, non-valid reasons may also comprise the cases where there is an actual refusal of the witness in being examined.

Even if no valid reason is provided, the second part of article 4.7 leaves to the tribunal’s discretion the possibility of under “exceptional circumstances”<sup>43</sup> to take the statement into consideration. Although the IBA Rules do not define what constitutes “exceptional circumstances”, an example may occur when the tribunal has little evidence available<sup>44</sup>.

Different non-valid reasons may imply different consequences. The power of discretion given in article 9.1 of IBA Rules allows tribunals to make “inferences against the party who did not make the

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<sup>37</sup> See ICC case No. 12990 where it is admitted that when a witness failed to appear the tribunal may consider the witness statement if a valid reason is provided and the tribunal has regarded “to all surrounding circumstances”: ICC case no 12990, *Gulf Resources Corp. v. Republic of Congo*, [2005], ICC Bulletin, 2010 Special Supplement Decisions on ICC Arbitration Procedures

<sup>38</sup> LEVY, 127.

<sup>39</sup> “Commentary on the Revised text of the 2010 IBA Rules on the Taking Evidence in International Arbitration”, by 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, <<http://www.ibanet.org/Document/Default.aspx?DocumentUid=DD240932-0E08-40D4-9866-309A635487C0>>, 17; This is also the solution provided by article 20.4 of LCIA rules.

<sup>40</sup> Article 8.1 allows the use of videoconference, however when deciding the use of this technology the tribunal should firstly assess if equality between parties will be ensured. Not only regarding the conditions to the witness testifies but also concerning the reasons for the witness cannot testify in live. - *Ibid.*; See also GÉLINAS, 37.

<sup>41</sup> Except extremely situations which will always depend on the tribunal’s evaluation.

<sup>42</sup> NATHAN D. O’MALLEY, “Rules on Evidence in International Arbitration, An Annotated Guide” (Informa 2012), 127

<sup>43</sup> O’Malley explains that “what constitutes a valid reason may be largely a factual question”: O’MALLEY, 126.

<sup>44</sup> *Ibid.*, 129.



witness available”<sup>45</sup>. In this situation, the demonstration of an explanation to not appear – even if in the view of the tribunal such circumstance is non-valid – may influence the tribunal’s opinion differently comparing with a situation in which the witness expressly refuses to attend the hearings without giving a reason at all. The latter may lead tribunals to question what actually motivated the witness to refuse being heard and it can implicitly influence the opinion of arbitrators when evaluating the testimony given by other witnesses.

Indeed, one should bear in mind that once arbitrators have read the witness statements, there is a “psychological” factor which may be difficult to simply eliminate, even if they are willing to ignore such statements due to the witnesses’ non appearance. Perhaps, if the witness not able to be at the hearings has a totally different version of the facts than other witnesses, after the tribunal has knowledge of that, it may be technically impossible to delete such information from arbitrators’ minds.

Article 8.1 of IBA Rules provides that the appearance of witnesses should be requested by any party. Thus if no attendance is required<sup>46</sup>, no witness has to appear unless the tribunal decides to hear them on its own initiative<sup>47</sup>. In turn, article 4.8 addresses the question of how the tribunal should understand the waiver of a party to cross-examine a specific witness. It ascertains that the parties who have not requested the appearance of an opponent’s witness should not be considered as agreeing with the “correctness of the content of the witness statement”<sup>48</sup>.

In such situation, tribunals should evaluate the written statements at its own discretion taking into account other means of evidence submitted by parties and confronting such written statements with the discourse given by other witnesses at the oral examination stage<sup>49</sup>. This position makes clear that tribunals can evaluate the written statements *per se* without being subject to oral examination; it also means that witness statements and oral examination constitute two independent means of evidence that can subsist separately, albeit frequently referred together.

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<sup>45</sup> GÉLINAS, 36. Article 20.4 of LCIA Rules expressly provides that in case of refusal of the witness to attend the hearing the tribunal “may place such weight on the written testimony”. See e.g. SIMON NESBITT, *LCIA Arbitration Rules, Article 20 [Witnesses]* in: Loukas A. Mistelis (ed), *Concise International Arbitration*, (Kluwer Law International 2010), 436.

<sup>46</sup> In practice, it is standard that parties waive the oral examination of several witnesses what may increase significantly the efficiency of statements from witnesses: CHRISTIAN OETIKER, “Witnesses before the International Arbitral Tribunal”, *ASA Bull* (2007) Vol. 25, 257.

<sup>47</sup> Article 8.1 sets out that the Tribunal also has the right to request the appearance of witnesses. It may happen even when parties have waived their right of requesting a witness’ attendance.

<sup>48</sup> This provision only makes sense viewed from the side of the parties who have waived their right to cross-examine, since parties who produce the witnesses are supposed to agree with the content of the statement.

<sup>49</sup> ZUBERBÜHLER/HOFMANN, 102; OETIKER, 258.

The wide discretion of tribunals in deciding whether it is appropriate to hear witnesses has also been accepted since it complies with the parties' right to be heard<sup>50</sup>.

## 2. Discretion of the tribunal to refuse hearing witnesses and the guarantee of “due process”

Articles 8.2, 9.1 and 9.2 affirm the power of the tribunal to exclude the appearance of a witness when it reveals to be irrelevant, immaterial, unreasonably, burdensome or duplicative for the decision. The written statements of the witnesses whose testimony is excluded at the hearings should still “remain in file”<sup>51</sup> and may be given importance by the tribunal since nothing seems to obstruct the tribunal from taking them into account<sup>52</sup>.

In accordance with article 8.2 of IBA Rules, the “irrelevance” or “immateriality” of a witness' appearance that may lead to refuse oral examination is related to the oral examination itself and not to the statements submitted<sup>53</sup>. As so, while evaluating the advantages of hearing particular witnesses, not only the facts described in the statements should be taken into account, tribunals should also analyse the relationship of the witness with the parties<sup>54</sup> and ponder whether the oral examination of a witness with such particular features may be useful in light of the case at hand.

If for instance a party has submitted a written statement of its chairman<sup>55</sup> plenty of details that may contribute to the dispute but which inevitably represents a biased party's point of view, it seems that nothing restrains the tribunal from not hearing the witness grounded on the fact that oral

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<sup>50</sup> GÉLINAS, 37/38.

<sup>51</sup> ZUBERBÜHLER/HOFMANN, 102

<sup>52</sup> See *Parsons & Whittemore Overseas Co., Inc. v. Société Générale de l'Industrie du Papier (RAKTA)*, [1974] 508 F.2d 969. In this case Overseas company considered that the tribunal violated article V(1)(b) of the New York Convention on due process since it denied to delay proceedings in order to arrange for hearing one of Overseas' witnesses. The court, however, came to two very important conclusions. Firstly, it mentioned that when parties chose arbitration as mean for resolving disputes they take the inherent risk of being unable to produce one's witness before the tribunal. Secondly, the court found that the tribunal actually took into consideration the affidavit produced by the referred witness where it can be read that such affidavit constitutes “a good deal of the information to which I would have testified”. In the end, the court ruled that the tribunal acted within its discretion in refusing to reschedule a hearing.

<sup>53</sup> Article 8.2 of IBA Rules states that the tribunal may exclude the appearance of witnesses when it considers such appearance as “irrelevant, immaterial (...)”. As O'Malley sums up “relevance is the criterion dealing primarily with whether the evidence in question assists or is necessary for a party to meet its own burden of proof, whereas materiality goes to the issue of whether the tribunal regards the evidence to be of consequence to its final decision on the merits of the case.”: O'MALLEY, 245. One can thus infer two aspects: the content of statements may be revelatory enough that no witness's appearance reveals necessary to impact in the award and the immateriality or irrelevance of the appearance does not amount to the immateriality or irrelevance of the written statements.

<sup>54</sup> Article 4.5 (a) requests witnesses to disclose in the statements their relationship with the parties.

<sup>55</sup> This situation is commonly accepted in commercial international arbitration. See e.g. article 4.2 of IBA Rules and 20.7 of LCIA Rules.

examination is unlikely to add something new to the written statement already provided – it may be duplicative, immaterial and irrelevant to hear such witness – however, the respective statement has not to be disregarded; it may remain in file and being crossed with other means of evidence.

Indeed, when evidentiary hearings take place, evidence has been in the majority of times already disclosed. In several cases, witnesses have submitted more than one statement depending on how many rounds of memorials parties are allowed to submit. Following this assertion, one may infer that oral examination is the moment when written witness statements are in principle just to be “refined”<sup>56</sup>. Therefore the issue is whether such refinement is necessary. In the example above, it is to the tribunal to decide whether oral examination of one party’s chairman can reveal determinative material for the decision<sup>57</sup>.

The wide discretion of tribunals in excluding evidence has been commonly accepted by courts as long as it falls within their power of managing proceedings<sup>58</sup>. The non-existence of technical rules on evidentiary value and procedural codes in arbitration are the basis for the reluctance of national courts to deny enforcement of awards on grounds of excluding or curtailing oral examination of witnesses<sup>59</sup>.

In fact, the parties’ option for arbitration comprises the wide discretion of tribunals to focus on the concrete relevance of the proof rather than on technical evidentiary rules as an implicit choice.

#### **IV. WRITTEN WITNESS STATEMENTS NOT FOLLOWED BY ORAL EXAMINATION: A THEORY OF SURVEILLANCE**

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<sup>56</sup> O’MALLEY, 227

<sup>57</sup> This would depend on the details of the case. If the dispute concerns to an alleged oral agreement in a meeting where just few people were presented, namely the chairman producing the statement, the tribunal is likely to hear the witness, regardless his relationship with the party.

<sup>58</sup> MAXI SCHERER, *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Commentary*, in Reinmar Wolff (ed), (Verlag C. H. Beck oHG 2012), para 300-301; *See also* the decision of the United States Court of Appeal where Pharmaceutical Basics alleged that the arbitration procedures did not respect the due process requirements of article V(1)(b) because of the curtailment of cross-examination of one of the witnesses. The court considered that the tribunal had “ample evidence upon which to decide the dispute” and that the curtailment of cross-examination of one of the witnesses “was not such a fundamental procedural defect that it violated” the New York Convention. *Generica Limited v. Pharmaceutical Basics, Inc.* [1997], 125 F.3d 1123,

<sup>59</sup> GARY B. BORN, *International Commercial Arbitration*, (Vol. II, Kluwer International 2009), 2754-2755; *See* GAILLARD/SAVAGE, 698

Tribunals tend to widely accept all evidence submitted by parties, either because it falls within the scope of the dispute and are truly relevant in arbitrators' eyes or due to some other "hidden" factors such as an endeavouring to balance different legal parties' background. Nevertheless, the first purpose of every evidentiary procedure is submitting evidence in a way that allows tribunals to resolve the dispute by efficiently discovering the truth of facts<sup>60</sup>. Accordingly, one can argue that the rejection of oral examination in some cases may be the pathway to reach such objective. Furthermore, the refusal of oral examination should not be seen as any other rejection of evidence.

As above mentioned, written witnesses statements and oral examination are frequently seen as complementary. This may lead one to conclude that these means should be generally evaluated together; however in this author's opinion it is exactly the existence of such interconnection that requests tribunals to also reconsider more frequently the rejection of oral examination in light of efficiency of proceedings and discovery of truth.

In fact, the refusal of oral examination must not be seen as any other rejection of evidence since generally tribunals have firstly accessed the written statements already submitted. Such submission enables arbitral tribunals to instantaneously perceive whether a particular witness has something to add or to confirm before the tribunal<sup>61</sup>.

Moreover, the rejection of oral examination of certain witnesses does not obligatorily amount to reject the statements previously provided. Reversely, the tribunal may find statements sufficiently revelatory for the discovery of truth's purpose, and subsequently taking advantage of them to accelerate proceedings with no necessity of oral examination at all. The tonic must be Efficiency can rather be considered in view of the possibility of rejection and not in the sense of preparing hearings and reducing its length<sup>62</sup>.

It is true that on one hand what often justifies the interplay between written witness statements and oral examination is that both theoretically deal with the same facts. As so, the possibility of evaluating the credibility of each witness at the hearings is elected as a benefit of oral examination, particularly of cross-examination<sup>63</sup>. However, such advantage should not be deemed as the main

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<sup>60</sup> See e.g. Section 1(a) of the English Arbitration Act, 1996: "The object of arbitration is to obtain the fair resolution of disputes (...) without unnecessary delay".

<sup>61</sup> One should bear in mind that statements include details such as the relationship with the parties and the source of the witnesses' information as to the facts.

<sup>62</sup> As Lord Wilberforce states "Oral evidence can be very extravagant in time": RICHARD WILBERFORCE, "Written Briefs and Oral Advocacy", (1989) 5 *Arbitration International*, 348.

<sup>63</sup> JULIAN LEW, "Document disclosure, evidentiary value of documents and burden of evidence" in *Written Evidence and Discovery in International Arbitration*, Teresa Giovannini and Alexis Mourre (eds), (International Chamber of Commerce,

purpose of having the witnesses at the hearings. The accurate assessment of witnesses' credibility cannot be always seen as guaranteed.

In fact, in the same way that written witness statements can be prepared with lawyers' assistance – which may constitute the essential reason for tribunals intend to hear witnesses – also the preparation of witnesses for the cross-examination stage can be easily performed. Counsels of both parties have the chance to identify the points on which the opposite party will try to impeach witnesses' testimony during the oral examination as they have prior accessed the written statements of each other and no surprises are expected at the hearings stage.

At this point it is worth to mention an empirical survey conducted by the School of International Arbitration of Queen Mary University of London, in 2012<sup>64</sup>, before in-house counsels, private practitioners and arbitrators. The study shows that 90% of the respondents consider cross-examination as “either always or usually an effective form of testing fact witnesses”; however 55% of the respondents also reported that there was mock cross-examination of witnesses in their proceedings and 62% of them found it appropriate.

Such results may illustrate that orality, particularly in cross-examination, may become an illusion. Although the majority of the participants in arbitrations believe that oral examination is efficient, they also admit that it may be simulated. In other words, it is not certain that orality enhances the credibility or highlights the weakness of witnesses. The opposite may happen<sup>65</sup>: a very credible testimony may be uncontrollably nervous at the hearings and passes the impression that he cannot confirm what has been previously affirmed in writing.

Furthermore, taking into consideration who is listening to the witnesses is equally central. Arbitrators from common law countries are certainly more practised in dealing with oral evidence, thus they are expected to be more skilled in reading witnesses' words and behaviour at evidentiary hearings<sup>66</sup>. On the other hand, if the arbitrator is a professor more accustomed to written words

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ICC 2009), 14; *See also* DOAK BISHOP, “Toward a Harmonized Approach to Advocacy in International Arbitration” in Bishop and Kehoe (eds) *The Art of Advocacy in International Arbitration* (Juris Publishing 2004), 484; For this author, cross-examination generally aims to reach three objectives: “(1) to bring out favourable facts neglected by the opposition; (2) to impeach the credibility of the witness, often with a prior inconsistent statement; or (3) to establish background facts our authenticate documents”: Doak Bishop (ed), *The Art of Advocacy in International Arbitration* (Juris Publishing 2004), 484.

<sup>64</sup> *See footnote 22.*

<sup>65</sup> “In some cases oral evidence is counterproductive – it leads to divergence from the truth.”: WILBERFORCE, 349.

<sup>66</sup> Although even the most experienced common law arbitrators' and judges' ability to tell if someone is telling the truth “is not much scientific basis” In fact, “liars are believed as often as truth-tellers are disbelieved”: *Ibid.*, 349.

rather than orality it seems manifest that his ability will be less improved than a lawyer's ability, regardless of his legal background<sup>67</sup>.

Additionally, one may argue that it is common sense that when people write statements or at least sign a piece of paper they are more pondered than when a message is only verbally transmitted. As so, witnesses who give their version of the facts in writing, even if lawyers write them, might be conscious of their testimony when signing it<sup>68</sup>, which may lead to the devaluation of orality as a more reliable way to weight credibility. Indeed, there is a chance that written statements may alert witnesses for their words more powerfully than orality.

For all these reasons, unless the tribunal doubts the version of the facts stated by witnesses due to the lack of consistency when confronting them against other testimonies or if a particular written testimony seems to be outside the factual frame given by the majority of witnesses, in the author's opinion witnesses are unlikely to share any further information besides what has been already disclosed in written statements. And so, written statements should be individually analysed and balanced with other evidence in order to correctly perceive whether oral examination is relevant and material for the final decision.

## **V. CONCLUSION**

Arbitrators can be seen as a type of personalised procedural code. When choosing arbitration instead of strict evidentiary rules, parties opt to have professionals tailoring measures which already contain a discretionary input exercised on a case by case basis. Even limited by principles of parties' autonomy and "due process", such personalisation of proceedings involves a good element of discretion.

The emblematic advantages appointed to written witness statements relate essentially to the fact that they provide for a guidance that permits tribunals and parties to better plan the oral examination at the hearings stage. In turn, circumstances such as the possibility of witnesses' statements having been written by lawyers or with their assistance contribute to the assumption that witnesses should appear before the tribunal in order to evaluate the trustworthiness of their testimony.

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<sup>67</sup> *Ibid.*, 349.

<sup>68</sup> Article 4.5(d) and (e) of IBA Rules request that each witness statement to contain the witness's declaration of truth followed by his signature.

In this author's view, the interplay between written witness statements and oral examination raises an inevitable issue: the general absence of guidance for tribunals to assess the evidentiary need of oral examination after written statements have been submitted.

Multiple interconnected factors such as, strategies of the parties, legal and professional background of the arbitrators, contingencies of "due process", seeking of compromise throughout proceedings and belief in orality as a more trustworthy mean to examine witnesses may frame different approaches by tribunals to justify the existence of oral examination. However, the point is that, regardless all these factors, tribunals have a main aim to follow: the efficient discovery of the facts in order to issue a just award. The proceedings constitute a mean to reach such objective.

If it is true that parties' autonomy plays a very important role in determining the conduction of procedures, it is also needless to say the nature of arbitration gives to the tribunal the command of proceedings, even though tribunals are likely to find compromise with parties.

By choosing arbitration parties not only accept the wide discretion of arbitrators, they plan to have it. Thus, arbitrators are in charge of making use of the powers available towards a more efficient discover of the truth, including by abdicating the traditional techniques imported from litigation and having the courage to cease with some already established international arbitration standards<sup>69</sup> in favour of the most flexible and efficient path.

The role of witnesses is not questioned in this work rather what is challenged is the standardization of their utilisation. The submission of written witness statements do not need to be always followed by oral examination because it may not serve the individual case, even when the appearance of a witness is requested by the opponent party.

Moreover, the effectiveness of oral examination in evaluating the credibility of witnesses is criticisable, since no one can be recognised by having special abilities to understand who is telling the truth or lying before tribunals. If the allegation that witnesses may have assistance of lawyers to write their statements justifies the request for witnesses' presence at the hearings, what can be said if cross-examination is also pre-prepared between witnesses and counsels?

To sum up, one can argue that written witness statements may contribute more to enhance the efficiency of arbitral proceedings than it has been considered. Reasons for oral examination taking place in arbitral proceedings should be measured on a case by case basis instead of becoming a

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<sup>69</sup> It is suggested that the utilisation of written witness statements followed by oral examination creates a balance between civil and common law legal systems does not mean that such method has to be verified in every single dispute.

standard. The barring of witnesses' appearance at evidentiary hearings should not be deemed as any other rejection of evidence, since tribunals still retain the discretion to evaluate the written statements previously submitted. It is, thus, when pondering to reject oral examination that the interplay between written witness statements and oral examination becomes even clearer.