breaches its international obligations in relation to an international commercial arbitration. Outside of such a system the prospects of effective enforcement of the international obligations of the State proclaimed by the Saipem award are largely illusory. Needless to say, even the most efficient system for the protection of arbitration-related rights may be of little help if the debtor is broke or does not have assets susceptible to enforcement, perhaps because of the shield of sovereign immunity from execution which is left untouched even by the ICSID Convention.

All said, despite the significant boost that the rights of parties to arbitration have received from the Saipem award, the fact remains that parties considering arbitration are well advised to exercise the utmost care in the choice of the seat of the arbitration if they have any leeway.

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**Sense and Nonsense of Written Witness Statements**

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**Contents**

I. Introduction

II. Sense of Written Witness Statements
   A. Efficiency of the (evidentiary) procedure
   B. Reduction of costs
   C. Reliability of witness evidence
   D. Content of witness testimony

III. Nonsense of Written Witness Statements
   A. Ghost writing
   B. Inefficient efforts
   C. Hidden additional pleadings
   D. Cross-examination

IV. Down-Sizing the Purpose of Written Witness Statements
   A. Core purposes
   B. Interrogation of witnesses
   C. Preparation of the witness hearing
   D. Consequences for the witness hearing

V. Conclusions

I. Introduction

Submitting written witness statements may be regarded as standard in international arbitral proceedings nowadays. The common perception is that these statements permit both the arbitral tribunal and the parties to prepare for the witness hearing more selectively and in a shorter time.

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and therefore tend to be more cost effective\(^2\). This is in particular true if the written witness statements alone contain sufficient information, so that the oral examination of many witnesses will neither be necessary from the viewpoint of the arbitral tribunal nor required by the opposing party\(^3\).

Many modern institutional arbitration rules explicitly provide for the possibility to submit witness evidence in the written form\(^4\). Art. 4 (4) of the IBA Rules on the Taking of Evidence in International Commercial Arbitration expressly allows the arbitral tribunal to require that each party, within a specified time, submit to the arbitral tribunal and to the other parties a written statement by each witness on whose testimony it relies.

Although it is standard to obtain written witness statements, we submit that the arbitral tribunal should neither order nor allow them without due consideration\(^5\). In particular, a serious preparation of written witness statements, especially if they are intended to fully replace the witnesses' direct examination, may involve a lot of time and effort and thus create substantial costs for the parties\(^6\). This may outweigh the cost efficiency advantages of having written witness statements. This is especially the case if an arbitral tribunal requires that only persons who submit a written witness statement may be heard as witnesses.

In the first two chapters, the sense and the nonsense of written witness statements as they are usually encountered in standard arbitral proceedings shall be examined. Thereafter, we shall examine which features of written witness statements need to be maintained for the purpose of efficiency and how this could be done. Finally, we will scrutinize how the solution proposed inhere will impact on the witness hearing.

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\(^2\) Wirth, p. 14; Nater-Bass, Art. 25 N 21; PILS (Basel)-Schneider, Art. 184 N 24; Lévy, p. 96; Berger/Kellerhal, p. 431-432 N 1222; Craig/Park/Paulsson, p. 433; Bühler/Dorgan, p. 12 et seq; Schlaepfer, p. 65 et seq; Griffin, p. 26; IBA Working Party, p. 27; Oetiker, p. 254.

\(^3\) Craig/Park/Paulsson, p. 434; Knof, pp. 64 and 71; Wirth, p. 14; Nater-Bass, Art. 25 N 21; Griffin, p. 26; Tallierico/Behrendt, pp. 299-300; IBA Working Party, p. 27; Oetiker, p. 254; Giersberger/Voser, p. 217.

\(^4\) E.g., Art. 25(5) Swiss Rules; Art. 20(3) LCIA Rules; Art. 54 WIPO Rules.

\(^5\) IBA Working Party, p. 27; Oetiker, p. 255; Shore, p. 79.

\(^6\) Wirth, p. 14; Oetiker, p. 255.

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II. Sense of Written Witness Statements

A. Efficiency of the (evidentiary) procedure

A feature that is commonly attributed to written witness statements is the (evidentiary) procedure's increased efficiency. On the one hand, that efficiency increase is because written witness statements allow the arbitral tribunal and counsel for the parties to prepare for the witness hearing\(^7\). On the other hand, written witness statements are said to allow the arbitral tribunal and counsel to limit the issues to be addressed, and possibly also the number of witnesses to be heard, at the evidentiary hearing\(^8\). Knowing what a witness will testify (and what not) allows counsel to better select the witnesses they want to offer to the arbitral tribunal.

Obviously, if written witness statements increase the efficiency of evidentiary proceedings, the question arises: compared to what? Certainly, the use of written witness statements, in particular if they substitute for direct (oral) examination, increase the efficiency compared to the direct, cross, re-direct and re-cross examination of numerous witnesses over weeks and weeks in state court proceedings in some jurisdictions. However, if we compare a witness hearing in standard international arbitral proceedings with written witness statements to a witness hearing before a Swiss state court, the gain in efficiency will be usually negligible if not negative. Hence, although it is true that written witness statements increase the efficiency of evidentiary procedure providing for cross-examination, this does not necessarily mean that such procedure is generally efficient.

B. Reduction of costs

A matter that is closely linked to efficiency is costs. Lengthy witness hearings with armadas of counsel and party representatives attending are an important cost factor in arbitral proceedings. Any means for shortening such hearings will therefore lead to a reduction of costs.

In general, written witness statements will reduce the length of witness hearings for two reasons:

\(^7\) Lévy, p. 96; Schlaepfer, p. 65.

\(^8\) Schlaepfer, p. 65.
First, written witness statements allow the arbitral tribunal and the counsel for the parties to assess the relevance of a witness' testimony in advance and to exclude irrelevant testimonies from the hearing. Unfortunately, many arbitral tribunals tend to be reluctant not to hear a certain witness who a party wants to cross-examine, even though, in the arbitral tribunal's view, the testimony of this witness will probably be irrelevant. As a consequence, although the written witness statements would in principle allow avoiding irrelevant oral testimonies, the average relevance of testimonies in arbitral proceedings is often quite low.

Second, if the written witness statement substitutes for the direct examination, and thus the witness hearing can begin with the cross-examination, the hearing itself will be substantially shortened.

Still, it must be borne in mind that the drafting of written witness statements, especially if they fully substitute for direct examination and therefore must give a detailed and full description of the facts, may cause substantial costs. This may undo the cost reductions associated with the shortening of the witness hearing.

C. Reliability of witness evidence

Many litigators from civil law jurisdictions do not regard witnesses as a reliable source of evidence. This seems mainly due to a substantial lack of predictability because of the inquisitorial system (in which the parties do not have control over the witness examination) and the prohibition, or at least substantial restrictions, for counsel contacting witnesses before the witness hearing. Clearly, the drafting of written witness statements and the examination techniques related thereto circumvent both issues. Witness evidence therefore becomes much more reliable.

However, the possibility to better «control» the witness also has a downside. It somehow creates an expectation that witnesses must be manageable. As a consequence, most witnesses in arbitral proceedings are closely related to one of the parties or are themselves parties to the proceedings. Truly independent witnesses are not very often seen. This qualifies the advantage of increased reliability of witness evidence since it will be - on average - of lower «quality» (in terms of independence). It will often not serve to adduce new facts, but only to assist the arbitral tribunal in understanding the documentary evidence submitted in the context of the real circumstances of the case and give an impression of the protagonists of the case, their relationships, and the differences of their perceptions.

D. Content of witness testimony

The preparation of written witness statements tends to increase the quality of the testimony: When preparing his or her witness statement, each witness needs to recall the facts on which to testify. This allows the witness to testify in a clearer and more focused manner, be it in the written statement or in oral examination. This is particularly striking when compared to situations in which counsel are not allowed to have contact with witnesses before the hearing: in such setting, the witnesses will not know what their testimony is exactly about. Therefore, they have no chance to refresh their memories and will often need to admit that they do not, or not in detail, recollect the facts that they are asked about.

III. Nonsense of Written Witness Statements

A. Ghost writing

Arbitral tribunals often encounter written witness statements that were, in a fairly obvious manner, drafted or substantially edited by counsel. On some occasions, the arbitral tribunal may even find that, to a large extent, the descriptions of the relevant facts contained in different written witness statements are identical and use exactly the same language. The arbitral tribunal may also find that the witness statements contain wording that is identical to parts of the briefs submitted by the parties. Obviously, the credibility of such witness statements will be limited compared to witness statements genuinely originating from the witnesses, unless

9 LÉVY, p. 96; SCHLEIFER, p. 65.

11 SCHNEIDER, A.2.
12 LÉVY, p. 97; OETIKER, p. 256; DERAINS, Témoins, p. 230; SHORE, p. 79.
these statements are accompanied by supporting documentary evidence.

Although the problem of low credibility with these overly edited written witness statements is well known among counsel, many sophisticated practitioners still make massive efforts at re-shaping witness statements. One reason for this might be that handling numerous witness statements becomes even more burdensome if the witnesses are asked to do the drafting themselves. Issues of timing, inability and language skills may arise. Reviewing witness statements genuinely drafted by the witnesses will take more time than reviewing just the amendments made by the witness to a proposed wording. Further, if they are drafted by the witnesses, it will be difficult, sometimes even impossible, to focus the witness statements on the pertinent issues and to avoid conflicting language between different witness statements. The latter issue may be of relevance also for strategic considerations: Witness statements drafted by the witnesses, but conflicting among themselves, may be less supportive to the outcome of a case than uniform but less credible witness statements.

Nevertheless, we submit that written witness statements should be, as far as practical, in the witness' own words. Hence, the witnesses should draft their witness statements themselves, or at least write the first draft. Counsel should refrain from editing the witness statements, in particular with regard to the choice of words and style.

B. Inefficient efforts

Arbitrators are often fairly reluctant to take a written witness statement into account as such, unless both the witness' and the statement's credibility have been tested during the evidentiary hearing or with other reliable evidence confirming the accuracy of the statement. They do not feel comfortable about not hearing from the witnesses regarding what these witnesses know about the case, but rather reading what counsel, who has drafted (or edited) the written witness statement, think the arbitral tribunal should know.

Efforts to increase the credibility of written witness statements by having them drafted mainly by the witnesses themselves or by disclosing the circumstances of the drafting will alleviate this problem. But we assert that they will not be able to eliminate it. This may turn a tool, which is meant to be efficient, into a rather ineffective means of convincing arbitral tribunals.

The somehow general suspicion regarding the credibility of written witness statements is, among other things, due to the arbitral tribunal and counsel for the counterparty not being aware of the actual circumstances in which the witness statement was drafted. This goes against the principles both of directness and of adversarial proceedings. If it is not possible or appropriate to have the statements drafted by the witnesses themselves as proposed above, this troublesome issue may be circumvented by disclosing those circumstances. Such disclosure may come from the witness signing off, e.g., on the following wording: «This Witness Statement was written after a discussion I had in Zurich with the Counsel of law firm X representing party A. This Witness Statement was drafted on the basis of a recording of our discussion and was thereafter submitted to me in draft form. I was invited to read it carefully and to amend it if necessary. I confirm that it correctly reflects my recollection of the events described therein». One can also go a step further and append the witness statement with a written declaration by the parties' legal representative who procured the statement. The declaration would include his or her name and professional qualification and information about how, when, and where the statement was prepared, including a statement of time spent by witness and representative respectively.

The issue of low credibility is accentuated if the written witness statements are intended to substitute fully for the direct examination of the witnesses. In this scenario, the parties usually may not request hearing

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14 VEEDE'r, p. 444; SCHLAEPFFER, p. 73; OETIKER, p. 256.
15 VEEDE'r, p. 445; SCHLAEPFFER, pp. 68 et seq.; OETIKER, p. 256.
16 LÉVY, p. 97; SCHLAEPFFER, p. 69; OETIKER, p. 256.
17 SCHLAEPFFER, p. 73; TALLERICO/BEHREN'T, pp. 302-303.
18 SCHNEIDER, B.9.
19 SCHLAEPFFER, p. 73.
20 LÉVY, pp. 96-97.
21 This wording is taken from a presentation by HAROLD FREY at the AIJA Zurich Arbitration Conference 2009. The wording obviously depends on how the statement was actually drafted in the concrete case.
22 VEEDE'r, p. 448.
their own witnesses, the cross-examination of whom was waived by the opposing party\textsuperscript{23}. This means that the party submitting the witness statement has no control over the appearance of its own witnesses at the evidentiary hearing\textsuperscript{24}.

C. Hidden additional pleadings

Written witness statements are quite often abused by the parties for introducing new factual allegations in the proceedings which were not made in the briefs. We submit that such hidden additional pleadings should not be allowed. The written witness statement is a means of evidence, which serves for establishing allegations made. It must be avoided that they resemble written pleadings\textsuperscript{25}.

Certain authors advocate a permissive attitude by arbitral tribunals in this respect\textsuperscript{26}. They maintain that arbitral tribunals should emphasise the search for a «correct» award rather than to rely on formal procedural rules. It is submitted that this approach may be followed without allowing the abuse of written witness statements, e.g., by allowing additional written submissions where actually necessary or appropriate.

D. Cross-examination

As stated above, a main advantage of written witness statements is that they can replace the (often lengthy) oral direct examination of witnesses. This means that the arbitral tribunal will never hear an oral account of the facts by the witness, but rather will see the witness only under challenge\textsuperscript{27}. The arbitrators will therefore often not hear the parts of a witness' testimony that are most relevant to the case, but only those parts that are most easily challengeable. In extreme cases, they will hear only on issues that are totally unrelated to the facts of the case and that concern exclusively the credibility of a witness. Further, cross-examination tends to make the witness an instrument of the examiner, which is used by counsel to present their party's case rather than as a source of information (and hence true evidence)\textsuperscript{28}. This is especially true if counsel put only closed questions to a witness. As a result, witness testimony often becomes an exercise of low efficiency, which consumes time and costs out of proportion with its contribution to the tribunal's understanding of the case\textsuperscript{29}.

IV. Down-Sizing the Purpose of Written Witness Statements

A. Core purposes

These few considerations show that submitting written witness statements has many advantages, but that its daily practice has rendered some of these advantages inoperative or has even turned them into disadvantages. The question therefore is whether the aspects leading to efficiency gains can be maintained while the inefficient aspects of written witness statements are avoided.

Efficiency gains are mainly due to (a) the possibility for counsel to interrogate (and to prepare) their party's witnesses before the hearing and (b) the possibility for the arbitral tribunal and the counterparty to prepare for the witness hearing on the basis of the information contained in the written witness statements.

B. Interrogation of witnesses

Quite obviously, allowing counsel to have contact with witnesses before the hearing does not necessarily require that the parties submit written witness statements. The efficiency gains related thereto - in particular the increased reliability of witness evidence and the better selection of witnesses to be heard - are obtained in any event if such contacts are admitted.

\textsuperscript{23} LÉVY, p. 101; critical: SCHLAEPFER, p. 71.
\textsuperscript{24} SCHLAEPFER, p. 71.
\textsuperscript{25} LÉVY, p. 99.
\textsuperscript{26} On pro and cons, see SCHÜRMANN, pp. 433 et seq.
\textsuperscript{27} SHORE, p. 79.
\textsuperscript{28} SCHNEIDER, B.5.
\textsuperscript{29} SCHNEIDER, B.10.
C. Preparation of the witness hearing

Hence, the issue comes down to which information in a written witness statement allows both the arbitral tribunal and the counterparty to properly prepare the witness hearing. We submit that it is the following:

- On which facts alleged in the briefs can the witness testify?
- Who is the witness?
- What will be the content of the witness’ testimony?
- What are the sources of the witness’ testimony?

1. Facts on which a witness can testify

In the briefs, each party alleges numerous facts and offers evidence to establish their veracity. In most cases, not all facts alleged by the parties will be actually relevant for the arbitral tribunal’s decision. Furthermore, many allegations will be sufficiently established earlier by documentary evidence so that no further witness evidence is needed.

In terms of efficiency, only witnesses who can testify on pertinent facts should be examined, and these witnesses should be examined only on pertinent facts. To allow the arbitral tribunal to decide which witnesses need to be heard and on which issues, the parties need to indicate as clearly as possible on which of the alleged facts a witness may testify. This requires that a link to the allegations in the briefs is made. However, a full account of the facts is not necessary for this purpose.

2. Identity of the witness

To perceive the relevance of witnesses and - if their testimony is relevant - to prepare the witness hearing, the arbitral tribunal must know the identity of a witness, the witness’ relationship to the parties, and the witness’ professional background. For this purpose, the parties should provide:

- the full name and address of the witness;
- his or her present and past relationship with any of the parties; and

3. Content of the testimony

The efficiency of the witness hearing may be further increased if the arbitral tribunal and the parties know what a witness will testify. For this purpose, a full account of the facts that the witness may state is not required. Rather, the content of a witness’ testimony must be indicated in a manner that allows the arbitral tribunal to understand whether a witness will be able to testify on the issues that are pertinent in the eyes of the arbitral tribunal.

For example, Party A makes the following allegation: «When Mr X and Ms Y consented orally to the proposal of Party A on behalf of Party B, Mr S, Mr T and Ms U were connected to the meeting room by telephone». Party A names Mr G as witness. If Mr S’ presence is relevant for the outcome of the case, it is important to understand whether Mr G will confirm this allegation (or whether his testimony refers rather to the presence of Mr T and/or Ms U). However, at the preparatory stage, it is not important to know further details of Mr G’s possible testimony, e.g., whether he will state at what time Mr S exactly joined the meeting by telephone, at what exact time he left, etc.

4. Sources of the witness’ testimony

To fully perceive the scope of a witness’ testimony, it is important to understand on what sources the witness bases the statements.

In this respect, the parties should first indicate whether or not the testimony will be based on documents. Second, they should make clear whether or not the witness had a direct perception of the facts that he or she will testify on.

If the testimony will be based on documents, they should be identified and, to the extent they have not yet been introduced in the proceedings, made available before the witness hearing (subject to any procedural re-

39 See Art. 4(5)(a) of the IBA Rules on the Taking of Evidence in International Commercial Arbitration.
strictions on the presentation of additional documents). Further, the parties should clarify whether the witness’ testimony will be limited to the content of the documents or whether he or she will be able to give additional information.

5. Form of submission

All of this information may be submitted in the form of a written witness statement, which was drafted by the witness or by counsel as is common today. Drafting by counsel will not jeopardize the credibility of the statement since it will not stand as evidence, but the witness will be heard orally if his or her testimony is relevant (see Section IV.D below).

However, the submissions need not stem (seemingly) from the witness and bear his or her signature. Rather, the information required may also be conveyed in submissions made by the parties which would be filed after the exchange of the written briefs and in preparation of the witness hearing.

D. Consequences for the witness hearing

If the approach proposed here is followed and the purpose of written witness statements is downsized as described Sections IV.A to IV.C, this would have a direct impact on the witness hearing. Since the written witness statement (or rather the document submitted by the parties) would not give an account of the facts as perceived by the witness, the witness statements could not be regarded as a source of evidence if the respective witness were not heard orally. All the rules which determine whether a written witness statement stands if the witness does not testify orally (see, e.g., Art. 4(8) and (9) of the IBA Rules on the Taking of Evidence in International Commercial Arbitration) would become obsolete. Instead, the arbitral tribunal would have a duty to summon all witnesses offered by the parties the testimony of whom it regards relevant.

This will have a triplicate effect: First, all relevant testimony must be made orally. Second, the arbitral tribunal is in a position to avoid irrelevant testimonies. Third, the parties will get a rather clear perception of what the arbitral tribunal regards as relevant in the case from both the selection and the examination of the witnesses. This may further increase the value of the post-hearing briefs.

The approach proposed here has no influence on whether witnesses are, in the first place, examined by counsel or by the arbitral tribunal. However, it is more supportive to the inquisitorial method, i.e., examination by the arbitral tribunal, than common written witness statements.

V. Conclusions

Requiring the submission of written witness statements in international arbitral proceedings makes a lot of sense. In particular, substantial gains in efficiency may be obtained. However, the practice of both arbitral tribunals and party counsel has led to certain features that – as is submitted here – must be regarded as nonsense.

Both arbitrators and party representatives have an interest in searching for approaches to witness evidence that maintain the positive aspects of the method prevailing currently, while avoiding its downsides.

We submit that the downsizing of the purpose of written witness statements may be a viable approach. In this respect, the information given to the arbitral tribunal – either in statements stemming from the witnesses or submissions drafted by counsel – should be reduced to only what is needed to achieve efficiency. It is submitted that this would constitute information on the facts on which a witness will testify, the identity of the witness, and the content and sources of a witness’ testimony.

There may be other possible and viable approaches for avoiding the negative aspects of the standard method practised these days. Which method an arbitral tribunal applies is not so important. Rather, what seems important is that arbitral tribunals and party representatives, instead of merely applying the standard procedure uncritically, evaluate in each case and very carefully which is the most rewarding approach.