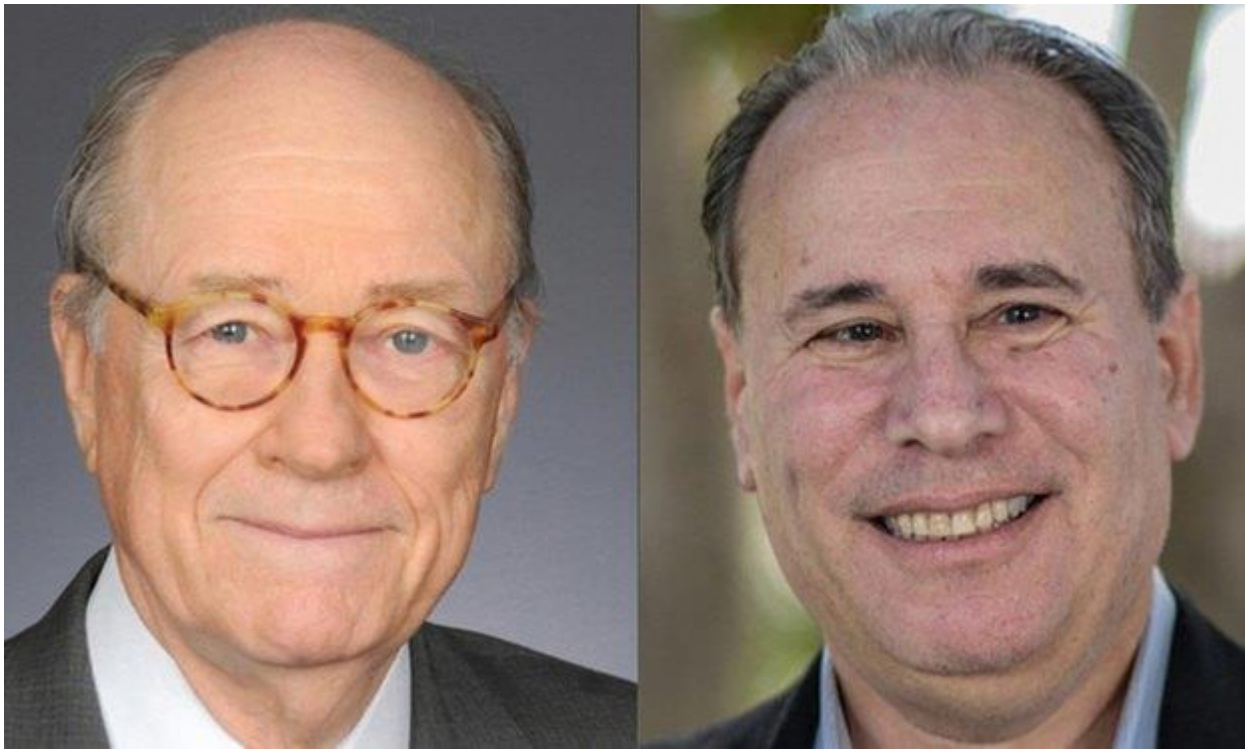
New York Law Journal

Bury That Witness Statement: Direct and Cross-Examination in International Arbitration

In this edition of their International Litigation column, Lawrence W. Newman and David Zaslowsky examine the common practice in international arbitration of presenting direct witness testimony though witness statements provided in advance of the oral hearing. They consider the effect such written evidence may have, or not have, on arbitral tribunals when there is no live cross-examination of the witness at the hearing before the tribunal. Is there a way in such circumstances for the witness to testify in person after all?

By **Lawrence W. Newman and David Zaslowsky** | July 22, 2021 at 12:00 PM



A distinguishing characteristic of international arbitration hearings is that witness testimony is most often presented in writing in advance of the hearing, with the result that the witness portion of evidentiary hearings invariably consists almost entirely of cross-examination of fact and expert witnesses. There are advantages to presenting testimony in writing in advance, principally in reducing the time spent by arbitrators, counsel and others in hearings, with resultant savings in costs and time, as well as affording time for participants to prepare without having to try to anticipate last-minute testimonial surprises.

The ordinary practice with respect to witness statements is that parties receiving witness statements may elect or decline to cross-examine the witness, as may tribunal members. When, however, there is no oral examination of the witness before the tribunal, questions may arise as to the extent of the impact on the tribunal of the witness statement itself in the absence of any physical appearance of the witness at a hearing or any discussion of the content of the witness statement before the arbitrators.

We previously dealt, in an **article in this column** in May 2008, with witness statements, focusing on a tactic that could be used by parties receiving a witness statement—simply treating it as if it did not exist in the hope that the

tribunal would pay little attention to it. We suggested that tribunals might anticipate such possibility by informing the parties, prior to the evidentiary hearing, as to what their attitude would be with respect to the treatment of unopposed witness statements.

Thereafter, in 2010, the International Bar Association amended its Rules on the Taking of Evidence in International Arbitration to provide as follows:

Within the time ordered by the Arbitral Tribunal each Party shall inform the Arbitral Tribunal and the other Parties of the witnesses whose appearance it requests. Each witness (which term includes for purposes of this Article, witnesses of fact and experts) should, subject to Article 8.3 [providing that the "Arbitral Tribunal shall at all times have complete control of the Evidentiary Hearing"] appear for testimony at the Evidentiary Hearing if such person's appearance has been requested by any Party or by the Arbitral Tribunal.

This provision is supplemented by Article 4.8, which states as follows:

If the appearance of a witness has not been requested pursuant to Article 8.1, none of the other parties shall be deemed to have agreed to the correctness of the content of the Witness Statement.

These provisions are in contrast to Article 4.7 of the IBA Rules, which deals with the situation in which a witness "whose appearance has been requested pursuant to Article 8.1 fails without valid reasons to appear for testimony at an Evidentiary Hearing." In such case, the arbitral tribunal is to "disregard any Witness Statement related to that Evidentiary Hearing by the witness unless in exceptional circumstances, the Arbitral Tribunal decides otherwise." Article 4.8, in providing that parties other than the party presenting the witness statement are not "deemed" to have agreed to the content of the statements if they do not cross-examine assures those parties that not cross-examining the witness does not constitute a waiver with respect to the content of the witness statement. The Rules thus make inapplicable the still-extant rule in English courts of *Browne v. Dunn*, a century-old English case that provides that an advocate's failure directly to challenge a witness on cross-examination on a point in dispute means that the advocate tacitly accepts what the witness said on the point during evidence in chief. *Browne v. Dunn [1893] 6 R 67.H.L.* In the absence of such a rule, as under the IBA Rule*s,* a lawyer opposing a witness statement may, without cross-examining the witness, challenge the content of the witness statement by, among other things, referring the tribunal to the testimony of other witnesses, documentary evidence and more generally by presenting arguments on the credibility of the testimony in the witness statement.

Nevertheless, there is a practical effect of the eschewal of cross-examining a witness on his or written statement that has been discussed by numerous commentators. For example, in an analysis of Articles 4.8 and 8.1 in a treatise titled *The IBA Rules on the Taking of Evidence in International Arbitration, A Guide* (Cambridge University Press 2013), author Peter Ashford refers to "an issue that continues to give rise to controversy regarding whether in proceedings in which witness statements have been submitted, a party can effectively prevent the appearance of a witness presented by the opposite party by simply waiving the cross-examination of that witness." The author responds, "Since Article 8.1 provides that since *each* party can request a witness to appear the party that initially presented a given witness statement should be able to call him or her to testify at the evidentiary hearing even if the other party has waived cross-examination of that witness." (emphasis in original). Ashford's treatise points out that an important reason a party that presented an un-cross-examined witness statement may want to have its witness also testify orally is because such a party "may have a strong interest in the personal appearance of the witness in the hopes that words spoken live to the tribunal will make a more forceful impression than words written in a witness statement prepared in circumstances outside the tribunal's control."

Commentators have generally agreed that oral testimony has a greater impact on a tribunal than does a writing. Without cross-examination (and of course their own questioning), tribunal members may have difficulty in sorting out the extent to which witnesses in their statements are speaking from their experience or were unduly assisted by counsel. Other commentators have also expressed concern about the diminished impact on arbitral tribunals of

witness statements without oral testimony. Prof. Jeffrey Waincymer of Monash University, in his treatise, *Procedure and Evidence in International Arbitration* (Kluwer 2012), pp. 898, 914, expresses concern that "written statements may also be unhelpful where a more nuanced dialogue with the tribunal will be necessary," that "some busy arbitrators might not have properly read the witness statements" and that a "short oral outline can ensure they better understand the case being made." Moreover, there are commentators who have more generally emphasised the importance of ways of learning other than through reading: "Studies also demonstrate that most lawyers are auditory learners. They tend to remember things better when they listen to them." Mark Cymrot and Paul Levine, *Going First Makes a Difference: Decision-Making Dynamics in Arbitration*, The Transnational Dispute Management Journal (TDM 6, 2015).

Although the IBA Rules were previously construed by commentators to permit the possibility of such oral testimony, there was recently expressed, according to the Commentary of the Task Force that undertook the 2020 review of the Rules, "some uncertainty that was reported in the public consultation process about whether, when a witness statement is to stand as direct testimony but the other party chooses not to cross-examine, the party that presented the witness may nevertheless call the witness to give evidence at the hearing." The Commentary goes on to say that the applicable article was revised to "make clear that the tribunal may allow such further direct testimony."

Thus, the IBA rule permits a tribunal to allow oral testimony by a witness whose written statement has been unchallenged through cross. Under what circumstances is the proponent of an unexamined witness statement likely to be permitted by a tribunal to have its witness testify orally? The Commentary suggests that a tribunal might authorize such additional testimony under fairly limited circumstances, observing that, although "having the witness statement stand entirely in lieu of direct testimony provides an incentive for witness statements to be comprehensive and will in general shorten the hearing … even where the witness statement stands as direct testimony, tribunals may find it useful to hear some direct oral testimony, for example to address new allegations or new developments that may have arisen since the submission of the witness statement." The Commentary goes on to state that, if the tribunal "anticipates permitting such supplemental oral direct, the matter is usually addressed in a procedural direction early in the arbitration." Commentary, p. 27. This suggestion hearkens back to the one we made in our 2008 article, although we were not specific as to the circumstances under which a tribunal might permit oral testimony.

How realistic is it that the party presenting a witness statement may, in the face of unwillingness on the part of the opposing party to cross-examine a witness, nonetheless present the witness live at a hearing before the tribunal? Although the Commentary suggests that such testimony might be appropriate where there have been "new allegations or new developments" and not to reinforce points already made in the witness statement, a tribunal which has, under the IBA Rules, "complete control" of the proceedings, may nevertheless be reluctant to permit the proponent party to call its own witness in what might seem to be an attempt to get a second bite of the apple. Such a second presentation would invariably invite cross-examination on any new oral testimony, at least to the extent that it differs from what was presented in the witness statement. Such an ancillary process could be regarded as being contrary to one of the essential goals of the use of witness statements—savings in time and costs.

Although there is anecdotal evidence that both fact and expert witnesses have frequently not been called for cross-examination on their written statements or reports, there is less evidence that arbitral tribunals have permitted parties to respond by presenting witness testimony orally as well. A 2015 review of a number of published rulings in investment arbitration tribunals (far more likely than commercial arbitration cases to have procedural rules publicly available) sheds some light on how arbitrators have dealt with requests for oral testimony by un-cross-examined witnesses. A common response among tribunals was, unsurprisingly, to consider such requests on their individual merits, with limitations on the scope of any such testimony with special consideration given to treating parties equally. See Andrea Menaker and Noor L. Davies, *The Direct Examination of Witnesses and Experts Not*

Called for Cross-Examination: Balancing Efficiency and Fairness, BCDR International Arbitration Review (June 2015).

Although tribunals or parties might raise the issue of cross-examination early in proceedings, it might be brushed aside as premature or theoretical. It could, however, be worthwhile for the views of the parties and the tribunal to be elicited early on as to how the failure to cross-examine might be dealt with. At a minimum, parties could glean from the attitudes expressed, or not expressed, some guidance as to how they might most effectively draft their witness statements and as to how they might deal most effectively with witness statements and expert reports with which they may be presented.

There still remains what Ashford's treatise alluded to as "an issue that sometimes gives rise to controversy"—not having a witness statement addressed orally at a hearing may often mean that the witness statement may be buried in a pile of other documents presented to the tribunal, especially when the tribunal has not been persuaded to permit oral testimony of the unchallenged witness.

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