

**THE ART OF
ADVOCACY
IN
INTERNATIONAL
ARBITRATION**

SECOND EDITION

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Chapter 10

WITNESS STATEMENTS AND EXPERT REPORTS

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I. Introduction

In the context of international arbitration, it could well be argued that written advocacy is advanced primarily through the written submissions containing argument, namely the submissions that identify the relevant legal principles, explain why those particular principles are applicable in the circumstances, and apply those principles to the facts that have been established (or are to be established) through the evidentiary phase of the arbitration. Mark Friedman addressed this type – the archetype – of written advocacy in an earlier chapter of this book. Understandably, that is likely the most common perception in relation to written advocacy in an international arbitration. A written submission containing argument – a brief or memorial – is certainly the vehicle through which a lawyer can most visibly and directly practice his or her written advocacy. After all, in the written sphere, what could be more characteristic of the advocate than the vision of the skilled and experienced practitioner pulling together all of the strands of the case – law and fact – into a compelling brief that is well-organized, logical and going to the essence of the issues at the heart of the dispute? To that extent, pre- or post- hearing briefs are to written advocacy what the opening statement or closing argument are to oral advocacy.

As Guillermo Aguilar Alvarez aptly demonstrates in his introductory chapter on written advocacy, however, the brief is only one of several components that make a party's written case convincing. If the brief is the recipe that guides the Tribunal to the

conclusions that are sought by the advocate, its success depends on the ingredients, namely law and fact. The advocate finds the law as it exists, be it in the legal codes or statutes promulgated by a jurisdiction's legislative body in the judgments written by its judges and magistrates, and sometimes even in general principles. In this respect, not all legal systems are equal. They differ in their sophistication, particularly in commercial law. They also differ in the clarity and quality of expression of their legislation or court judgments. While in most commercial or contractual contexts parties should exercise their prerogative to choose an applicable law well before a dispute arises, based, in part, on the quality of that legal system, the advocate dealing with a case can rarely influence the choice of law, still less the clarity of the applicable legal principles and rules as expressed in the primary source material.

From a certain perspective, the same is true of facts: the material events have already occurred by the time the lawyers get involved. If the events have occurred, one might ask, how could the facts of the case not be in the same category as the law – namely something that the lawyer simply must accept as a pre-packaged bundle? From this perspective, the lawyer cannot alter the course of events that occurred prior to his or her involvement in the case any more than the lawyer can alter or influence the applicable legal principles and rules.

There is, however, an important difference, from an advocacy perspective, between the legal principles and the facts with which the advocate must work in the written submissions. The difference stems from the fact that while legal principles and rules have already been reduced to written form by third parties prior to the commencement of the case,¹ the facts and any expert analysis of the facts have not. Prior to the commencement of the arbitration, the events that have given rise to the dispute exist merely as recollections in the memory of one or more individuals. While a significant documentary (and, increasingly, electronic) record also often exists in disputes that are commonly resolved by arbitration (such as disputes in the document-

¹ Not just any written form, either, but the formal and official form of statute, regulation or judgment.

intensive world of large-scale construction projects, commercial joint-ventures, etc.), more often than not that documentary record, just like individual recollections, is incomplete, inaccurate and perhaps even contradictory, and must be interpreted with the help of witness evidence. In other words, unlike law, the facts of a case do not exist in a convenient, formal, logical, and consistent written form.

This chapter deals with the advocacy that can be applied or exercised through the written submissions typically used in international arbitration to convey the facts of the case, and the expert investigation or analysis of those facts, namely witness statements and expert reports. As compared to the open and direct advocacy engaged in drafting briefs and memorials, or in presenting oral argument, this is the “invisible” written advocacy of international arbitration. Indeed, the less visible it is, the more effective it should be.

II. Witness Statements

A. Introduction

Witness statements have now become common place in international arbitration. Their prevalence in practice is illustrated by the provisions of the *IBA Rules on the Taking of Evidence in International Commercial Arbitration* (the “IBA Rules”) dealing with witnesses of fact.² This was not always so. A decade ago there were still some who questioned the utility of witness statements. In the late 1990s, Professor Pieter Sanders wrote:

Witness Statements may alleviate the hearing but, drawn up with the party or its legal advisors, the witness may be influenced in formulating his or her Statement which has to be signed and affirmed by him or her as being the truth. In my opinion, these Witness Statements, preceding the hearings of the witnesses in

² IBA Rules, Art. 4(4)-4(9). At the time of writing, revisions to the IBA Rules are being considered by the IBA’s Arbitration Committee. References in this chapter to the proposed revisions to the IBA Rules are to the revised Rules that were submitted for adoption by the IBA Council in May 2010.

person, are not in accordance with the expectations of many parties in an international arbitration.³

More recently, most practitioners have come to recognize the significant advantages of witness statements. For example, Michael Hwang has identified the following advantages of a witness statement:

- It saves considerable hearing time (usually the most expensive part of an international arbitration).
- It prevents the other party from being taken by surprise at the trial.
- It enables the opposing Counsel to prepare his cross-examination more efficiently, thus again reducing cross-examination time.
- It obviates the necessity for sterile arguments about whether questions asked of the witness are leading.
- It helps to define the issues for argument at the hearing more clearly, allowing the parties and the Tribunal a more focused examination of the matters in dispute.⁴

³ Pieter Sanders, *Quo Vadis Arbitration?: Sixty Years of Arbitration Practice* (Massachusetts: Kluwer Law International, 1999) at 262.

⁴ Michael Hwang, "Advocacy in International Commercial Arbitration: Singapore" in Doak Bishop, ed., *The Art of Advocacy in International Arbitration* (New York: Juris Publishing, 2004) 413 at 422. See also Laurent Levy, "Testimonies in the Contemporary Practice: Witness Statements and Cross Examination" in *Arbitral Procedure at the Dawn of the New Millennium: Reports of the International Colloquium of CEPANI, October 15, 2004* (Brussels: Bruylant, 2005) 107 at 113 (noting also that a witness statement "assists the parties and the arbitral tribunal in determining whether the testimony of a specific witness is necessary"). Hwang also notes (*ibid.*) that these advantages come at a price:

- It deprives cross-examining Counsel of the opportunity of seeing and hearing the witness give his oral testimony-in-chief, and therefore a valuable guide to deciding whether the words of the witness in evidence-in-chief are really the witness' own, or someone else putting words in the witness' mouth.
- It also deprives cross-examining Counsel and the Tribunal of a tool in determining the initial credibility of the witness in assessing the truthfulness or accuracy of the witness evidence-in-chief.

Witness statements are particularly helpful in large arbitrations or arbitrations that deal with complex issues, be they of a financial, technical or other nature, as they give all participants in the process sufficient time to study and understand the allegations and cross-allegations in advance of the hearing. In practice, witness statements are submitted by individuals of all rank and stripe. This follows from the general rule that any person may present evidence as a witness in an international arbitration, including a party or a party's officer, employee or other representative.⁵ Witness statements, while written, are not to be regarded as documentary evidence, but as a means of presenting testimony from witnesses of fact. The IBA Rules, at Art. 4(4)-(9), explain the mechanics of how the written statement typically fits into the process of taking evidence from a witness in an international arbitration. The IBA Rules provide, in relevant part:

4. The Arbitral Tribunal may order each Party to submit within a specified time to the Arbitral Tribunal and to the other Parties a written statement by each witness on whose testimony it relies, except for those witnesses whose testimony is sought pursuant to Article 4.10 (the "Witness Statement").⁶ [...]

[...]

7. Each witness who has submitted a Witness Statement shall appear for testimony at an Evidentiary Hearing, unless the Parties agree otherwise.
8. If a witness who has submitted a Witness Statement does not appear without a valid reason for testimony at an Evidentiary Hearing, except by agreement of the Parties, the Arbitral Tribunal shall disregard that Witness Statement unless, in exceptional circumstances, the Arbitral Tribunal determines otherwise.

⁵ IBA Rules, Art. 4(2).

⁶ Article 4.10 addresses the situation where a Party wishes to present evidence from a person who will not appear voluntarily. The preparation of a witness statement in such a situation is obviously not possible.

9. If the Parties agree that a witness who has submitted a Witness Statement does not need to appear for testimony at an Evidentiary Hearing, such an agreement shall not be considered to reflect an agreement as to the correctness of the content of the Witness Statement.

The idea is that a witness statement should be disregarded unless confirmed orally and, conversely, that a witness should not be heard unless he or she has previously submitted a witness statement. This is the spirit of the IBA Rules, and is a manifestation of the overriding principle expressed in the preamble of these rules that each party should be entitled to know reasonably in advance of any evidentiary hearing, the evidence on which the other parties rely. Witness statements have, accordingly, been referred to as a “prelude to oral testimony”⁷ or as “draft” testimony.⁸

Although a witness statement can technically be considered “draft” testimony, and as non-binding until it is confirmed by the witness at the hearing, this should by no means suggest that counsel and witness should not take utmost care in preparing the statement. First, the content of a witness statement (if it is sufficiently detailed) can and often does serve as a witness’s evidence-in-chief,⁹ and will influence the scope of questions at the hearing. Indeed, Art. 4(5)(b) of the IBA Rules provides that a witness statement’s description of the facts should be “full and detailed” and “sufficient to serve as that witness’s evidence in the matter in dispute.” Furthermore:

There may be uncontroversial witnesses whose entire testimony may be received in written form. These may include formal witnesses who depose to matters which are admitted by the other

⁷ Levy, *supra* note 4 at 117.

⁸ Pierre-Yves Tschanz, “Advocacy in International Commercial Arbitration: Switzerland” in Doak Bishop, ed., *The Art of Advocacy in International Arbitration* (New York: Juris Publishing, 2004) 195 at 225.

⁹ David W. Rivkin, “Procedural Issues to Consider” in Rufus V. Rhoades, Daniel M. Kolkey & Richard Chernick, eds., *Practitioner’s Handbook on International Arbitration and Mediation*, 2d (New York: JurisNet, LLC, 2007) 133 at 152.

party, or other witnesses of substance where the other party considers the evidence to be immaterial or irrelevant to the matters in issue. In all such cases, where the opposing party elects not to cross-examine the witness on his witness statement or affidavit, that evidence will be received without the need for a physical appearance by the maker of the statement or affidavit.¹⁰

Second, decision-makers can begin forming opinions about a case at an early stage, and first impressions (even on paper) are therefore important.

Third, in time-controlled arbitrations, the rules will allow the respondent to choose who from the claimant's list of witnesses is actually to be heard in the hearing, and vice versa. As John Tackaberry has cautioned, if the practitioner has "under proofed" his witness, the risk exists that the other side does not call that witness and whatever oral evidence he might have given beyond the content of his statement will not be heard by the Tribunal. Indeed, the other side may recognize that not all of the evidence which that witness could give is in the statement and, as a result, decide not to call the witness for cross-examination in order to seek to keep that evidence out of the hearing.¹¹

Finally, a witness statement will provide predictability to the party tendering the evidence in that it will (and fairly so if the witness statement has been adequately prepared) "box" the witness into the stated version of his or her testimony.

There are therefore very good reasons to prepare the witness statement with care. In the next section, we address the issue of counsel's involvement in the preparation of witness statements, before turning to the heart of the topic, namely what constitutes effective advocacy with witness statements.

¹⁰ Hwang, *supra* note 4 at 431.

¹¹ John Tackaberry, "Practical Considerations for Conducting the Hearing" in Rufus V. Rhoades, Daniel M. Kolkey & Richard Chernick, eds., *Practitioner's Handbook on International Arbitration and Mediation*, 2d (New York: JurisNet, LLC, 2007) 155 at 174-175.

B. Involvement of Counsel in the Preparation of Witness Statements

It is now generally accepted in the field of international arbitration that it is proper for counsel to interview witnesses or potential witnesses,¹² and to assist in the preparation of a witness statement. The IBA Rules provide:

It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses.¹³

Similarly, the LCIA Rules (at Article 20.6) expressly permit it, subject to “the mandatory provisions of any applicable law.” In a recent article, Peter Schlosser noted that he found no indications or obstacles in the ethical rules of the Bar of any civil law country that would prevent a lawyer from preparing a witness in an arbitration.¹⁴ This is a relatively recent shift, as explained by Bernard Hanotiau:

Until a few years ago, however, members of the Bar in various civil law countries were prohibited from having direct contact with a potential witness. In other words, preparing a witness was strictly forbidden and any one who breached the rule would incur disciplinary sanctions. Recently, the rule has been relaxed in international cases to avoid putting civil law lawyers at a disadvantage with English barristers or American attorneys.¹⁵

¹² Michael Bühler & Carroll Dorgan, “Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbitration – Novel or Tested Standards?” (2000) 17:1 J. Int’l Arb. 3 at 11, and sources cited at footnote 38. See also Levy, *supra* note 4 at 112 (noting that it is generally accepted “that counsel may liaise with witnesses and prepare the hearing with them”).

¹³ The revised IBA Rules propose to add to Art. 4(3) “and to discuss their prospective testimony with them.”

¹⁴ Peter F. Schlosser, “Generalizable Approaches to Agreements with Experts and Witnesses Acting in Arbitration and International Litigation” in Gerald Asken *et al.*, eds., *Global Reflections on International Law, Commerce and Dispute Resolution* (Paris: ICC Publishing, 2005) 775 at 780-781.

¹⁵ Bernard Hanotiau, “The Conduct of the Hearings” in Lawrence W. Newman & Richard D. Hill, eds., *The Leading Arbitrators’ Guide to International*

Notwithstanding these changes, Hanotiau notes that “a certain number of civil law advocates are still unwilling to interview their witnesses and refuse therefore to submit witness statements.”

While the rules on counsel’s involvement in the preparation of witness statements have undoubtedly been relaxed in recent years, there are obvious limits on the practice, as noted by various authors. Redfern and Hunter illustrate the point as follows:

For example, it would be gross misconduct for a lawyer to try to persuade a fact witness to tell a story that both the lawyer and the witness in question knew to be untrue, and to prepare the witness to make the story sound as credible as possible.

[...]

The role of counsel should be to assist witnesses in developing the confidence and clarity of thought required to testify truthfully and effectively based upon their own knowledge or recollection of the facts.¹⁶

Bernard Hanotiau expresses the limits in the following terms:

In any case, the lawyers have the ethical duty to avoid attempts to induce the witness to make false testimony. Witness preparation should not become witness manipulation. The starting point for any witness preparation is to remind the witness to tell the truth. Moreover, the witness who has been “over-prepared” may quickly lose credibility in the eyes of the Arbitral Tribunal.¹⁷

Some codes of professional conduct address counsel’s contact with witnesses in international arbitration and include specific

Arbitration, 2d (Huntington: Juris Publishing, 2008) 359 at 365 [Hanotiau, “Hearings”].

¹⁶ Alan Redfern *et al.*, *Law and Practice of International Commercial Arbitration* (London: Sweet & Maxwell, 2004) at 207.

¹⁷ Bernard Hanotiau, “Civil Law and Common Law Procedural Traditions in International Arbitration: Who Has Crossed the Bridge?” in *Arbitral Procedure at the Dawn of the New Millennium: Reports of the International Colloquium of CEPANI, October 15, 2004* (Brussels: Bruylant, 2005) 83 at 92 [Hanotiau, “Procedural Traditions”].

directives. For example, Section 16 of the Professional Rules of the Dutch-speaking Brussels Bar provides:

In his contacts with the witness, the lawyer will in all circumstances take into consideration the appropriate prudence, decency and integrity. He will strictly refrain from influencing the witness or from inciting him to deviate from the truth.¹⁸

The reality is that counsel are often very involved in the drafting of witness statements, and visibly so. For example, it is typical that the final version of the witness statement will be filed with the witness's signature on a final signature page transmitted by fax or in a format different from the body of the statement, highlighting that counsel and the witness are in different locations (which is quite common) and that the final version of the substantive part of the witness statement came from counsel, not from the witness. Another clue as to counsel's involvement in witness statement preparation is when a witness who is not fluent in the language of the arbitration submits a statement in that language that is perfectly correct and even sophisticated in style. In some cases, the witness even includes a declaration that counsel assisted in the preparation of the statement.

As explained in the next section, the good advocate need not hide the fact that he was involved in the preparation of a witness statement. Rather, the good advocate should make it easy for the Tribunal to forget about counsel's involvement, allowing the voice of the witness to come through the document.

C. Effective Advocacy with Witness Statements

(1) Basic Form and Content Guidelines

Article 4(5) of the IBA Rules provides useful guidance on the basic form and content of witness statements. Article 4(5) provides that witness statements should contain:

¹⁸ As quoted in Bühler & Dorgan, *supra* note 12 at footnote 67.

- (a) the full name and address of the witness, his or her present and past relationship (if any) with any of the parties, and a description of his or her background, qualifications, training and experience, if such a description may be relevant and material to the dispute or to the contents of the statement;
- (b) a full and detailed description of the facts, and the source of the witness's information as to those facts, sufficient to serve as that witness's evidence in the matter in dispute;
- (c) an affirmation of the truth of the statement; and
- (d) the signature of the witness and its date and place.

According to Bühler and Dorgan, other points to consider when preparing written witness statements include the following:

- The text of the witness statement may be in narrative form. Depending upon the nature of the information contained in the statement, it may be more convenient to present it in some other form, such as a listing of relevant events by way of "bullet points" drafted in "telegraphic" style. It is helpful where each paragraph in a witness statement is limited, as far as possible, to a distinct portion of the subject, and then numbered separately. It facilitates references to specific passages in the witness statement, which assists the tribunal and the parties, in particular at the hearing.
- Excessive length of the witness statement should be avoided, as well as needless repetition. ...¹⁹

For rebuttal witness statements, the content should be restricted to material that is responsive to matters contained in another party's witness statement or expert report. Article 4(6) of the IBA Rules provides:

If Witness Statements are submitted, any Party may, within the time ordered by the Arbitral Tribunal, submit to the Arbitral Tribunal and to the other Parties revised or additional Witness

¹⁹ Bühler & Dorgan, *supra* note 12 at 13-14.

Statements, including statements from persons not previously named as witnesses, so long as any such revisions or additions only respond to matters contained in another Party's Witness Statement or Expert Report and such matters have not been previously presented in the arbitration.

In the Introduction to this part, we listed the advantages of witness statements, as explained by Michael Hwang. Michael Hwang also notes that in order to obtain the various advantages offered by a witness statement, the statement must be in terms of exactly what the witness would say if he were giving oral evidence-in-chief in court proceedings.²⁰ This suggests that a "full and detailed" statement is best. Indeed, as Hwang points out, the witness may not be allowed to add further oral evidence at the hearing, unless:

- he wishes to correct an error or ambiguity in the statement or affidavit;
- he wishes to elaborate on some small matter of detail; or
- he wishes to respond to some statement made in the opposing witness statements or affidavits which he had not seen at the time his own statement or affidavit was filed.²¹

A "full and detailed" statement may not be required in all cases, however. According to Doak Bishop, there are three types of witness statements:

- a simple statement, listing general topics of the witness's testimony;
- a statement containing a full and detailed testimony of the witness; and
- a statement that adopts an intermediate approach, identifying key points of a witness's testimony without all of the relevant facts and details.²²

²⁰ Hwang, *supra* note 4 at 423.

²¹ *Ibid.*

The same author goes on to advise:

Which of these types of witness statements to provide is a strategic decision for counsel, but it is a decision that must be made in a manner that meets the requirements and expectations of the tribunal. Since it is relatively easy to determine, counsel should ask the panel at the preliminary hearing which of these types of witness statements is preferred and then comply with the panel's directions in this regard.²³

Given the range of possibilities as to what level of detail to provide in a witness statement, what is therefore important is for all counsel to know and understand the "rules of engagement" at the outset, so that each side benefits from a level playing field.²⁴

Having reviewed the basic guidelines for the form and content of a witness statement, we turn now to address each element of the witness statement in greater detail.

(2) Identification of the Witness

As suggested by Article 4(5)(a) of the IBA Rules, the witness statement should provide:

- the full name and address of the witness,
- his or her present and past relationship (if any) with any of the parties, and
- a description of his or her background, qualifications, training and experience, if such a description may be relevant and material to the dispute or to the contents of the statement.

²² Doak Bishop, "Advocacy from the Arbitrator's Perspective" in Doak Bishop, ed., *The Art of Advocacy in International Arbitration* (New York: Juris Publishing, 2004) 441 at 476.

²³ *Ibid.*

²⁴ Levy, *supra* note 4 at 112.

Some suggest that it is also useful to attach a picture of the witness to the witness statement, so that arbitrators can more easily recall the oral testimony of a witness in reviewing a statement after the hearing.

The identification of the witness presupposes the selection of that individual as an appropriate or necessary witness. As we saw earlier, it is now generally accepted in international arbitration that any individual may testify, including a party or party representative. In selecting a witness, the good advocate will already be thinking of the impact that witness might have on the Tribunal in comparison to other possible or necessary witnesses, and how the various subject matters to be covered in evidence should be “allocated” to the different witnesses that are available to the party. The advocate needs to consider that certain individuals are under his client’s control (e.g., a party’s existing employees), and thus will likely testify voluntarily, while other individuals (e.g., a party’s former employees) may refuse to testify or dispose of less time to prepare a witness statement setting out their evidence.

(3) Description of the Facts: Telling the Story

The description of the facts to which the witness is prepared to attest is the core of the witness statement, and the part that presents a challenge for the advocate. The advocate can be of great assistance to the witness, but the advocacy that he or she exercises through the witness statement should be “invisible.” Its aim should be to allow the witness to discover and amplify the witness’s own voice, and not to bury the witness’s story under layers of “facts” constructed by an overzealous lawyer.

a. Getting Started: Preparing the First Draft

To start, counsel should avoid presenting a suggested draft of the statement to the witness. Doing so heightens the risk that the witness will assume that it is acceptable or even expected that he or she adopt the lawyer’s version of events. Recall that the witness is typically a stranger to legal proceedings of any kind, let alone proceedings at the

international level. It may not dawn on the witness that he or she must be actively involved in preparing the witness statement, and thus should challenge inaccuracies or untruths in any version prepared by the lawyer.

Having the witness adopt someone else's version of the events, apart from raising ethical issues, poses obvious problems for counsel at the hearing. A written statement delivered by a witness is, in principle, always subject to testing at a hearing, where the statement must be presented (in direct testimony) and/or defended (in cross-examination) by the witness himself or herself. If the written statement, as the precursor to the oral testimony, is not delivered in the witness's own voice, then counsel has taken a big risk. At the hearing, the witness may attempt to follow the script of the written statement, adopting as his or her own the story presented therein. A seasoned arbitrator, however, will likely pick up on the discrepancy, particularly when an experienced counsel challenges the script through cross-examination. It is also possible that the witness testifying orally at the hearing will start to tell his or her own story, precisely because it is what comes naturally, leaving exposed the discrepancies between the oral testimony and the "ill-fitting" written statement. Bühler and Dorgan are correct in cautioning that:

A witness statement should not simply repeat a party's pleadings, which sometimes occurs when counsel, rather than the witness, does the drafting. Counsel can legitimately assist the witness in the preparation of the statement to avoid lack of clarity, repetition and irrelevance; but the substance of the statement must come from the witness. A "lawyer's statement" will have little or no credibility.²⁵

In an ideal world, and the option is available in certain instances, counsel would ask the witness to prepare the first draft of his statement. In doing so, the lawyer should ask the witness to deliver a full and frank account of everything related to the dispute that the witness knows or about which he has information. This, however, is often not feasible or practical. For example, the witness may be

²⁵ Bühler & Dorgan, *supra* note 12 at 13-14.

extremely busy and unlikely to be able to deliver a draft within the required time period. The witness may also be intimidated or embarrassed by the prospect of having to draft a written statement. In all such cases, the lawyer should schedule a meeting with the witness and, through open, non-leading questions, ask the witness to describe the relevant events of which he has knowledge in as much detail as possible. Ideally, the meeting should be in person, and the lawyer should have a junior colleague or assistant present to take notes (in some cases, it might be helpful to audio-record the session). The notes (checked against the audio recording, if available) may then be used to prepare the first draft of a statement for the witness's review. It may be efficient for counsel to provide the witness, in advance of the meeting, with a list of topics to be discussed for possible inclusion in the witness's statement.

If counsel and witness speak the same language, all of this is relatively straightforward. If not, then translation and/or interpretation are required. In such cases, it is most efficient to have the witness (or local counsel who speaks the witness's language) prepare the first draft of her statement in her mother tongue, and to have it translated into the language of the arbitration. We discuss the particular challenges raised by language issues in the separate section on language, below.

Doak Bishop's commentary on witness statements in our view provides helpful guidance on what elements the witness should be requested to include in the first draft:

... they should fully develop the relevant background, the events, acts and omissions in dispute, any relevant conversations (being as precise as possible in relaying statements made), and the motivations of the witness. Motivations should not be neglected, although this is an area that the advocate may desire to save for the oral hearing. Even when motives are not directly relevant to the elements of a claim or defense, an arbitrator may want to know why the witness took a particular position, made a particular

statement or engaged in a particular act or omission. Supplying that information can create credibility and assist in persuasion.²⁶

b. Getting it Right: Completing a Comprehensive Draft

The first draft of the facts is the “raw material” of the statement. The quality of the first draft depends on many factors, and it can sometimes be very good. Even if it reads well, however, it is rarely a document that should be submitted to the Tribunal without considerably more work on the part of both the witness and the advocate. It is not the witness’s “best possible testimony,” and in certain cases is just plain awful! The first draft of a statement is often limited by a combination of one or more of the following common shortcomings of the witness: incomplete knowledge about, or initial misunderstanding of, certain events; poor memory or faulty recollection; and poor writing or communication skills, leading to difficulties in the witness’s “telling of the story.”

As Mark Baker has written: “a good advocate can work within ethical bounds to bring out the best possible testimony from any witness.”²⁷ In practical terms, this means assisting the witness with a second draft, and subsequent drafts. The work will typically involve follow-up meetings or conference calls to discuss the outstanding matters, and the exchange of marked-up drafts. The lawyer may wish to send a mark-up of the first draft with questions and comments, and request that the witness send back a second draft with answers and/or responsive comments. This “dialogue” should be sustained for as many rounds as it takes to get the testimony right.

What does it mean to get the testimony “right”?

First and foremost, it means *removing the errors and inconsistencies*. By the time witness statements are being prepared in a case, counsel should have a very strong command of the documentary record and of what each witness is testifying about. It

²⁶ Bishop, *supra* note 23 at 476-477.

²⁷ C. Mark Baker, “Advocacy in International Arbitration” in Lawrence W. Newman & Richard D. Hill, eds., *The Leading Arbitrators’ Guide to International Arbitration*, 2d (Huntington: Juris Publishing, 2008) 381 at 395.

is counsel's responsibility to challenge each witness on internal inconsistencies in his or her testimony, as well as on inconsistencies between his or her testimony and both (i) the testimony of each other witness and (ii) the documents in the record.

Counsel should also ensure that, as part of the witness's testimony, the witness is *referring to key documents*, whether the document is relevant to a factual issue in dispute, or to issues of credibility. Documents should be leveraged, bearing in mind that arbitrators tend to give greater weight to contemporaneous documents than to uncorroborated witness testimony.²⁸ This question is further addressed below.

Getting the testimony right also means *addressing the difficult facts*²⁹ – the “inconvenient truths.” These will invariably surface in the arbitration, and it is better for a witness to get ahead of them in the statement, rather than being forced to deal with them for the first time on cross-examination.

Another way of perfecting the testimony is *reviewing the opponent's submissions*, including the allegations in its pleadings and especially the evidence adduced by the other side in support of its position. Where a witness is preparing a statement in support of the respondent's submission, and the claimant has already submitted witness statements in support of its position, this step will be crucial. In preparing a responsive statement, counsel should be asking his witness what he or she has to say about what the other side claims, and what the other side's witnesses have declared. After all, at the hearing and in deliberations, the Tribunal will be focusing on the confrontation of the opposing claims and the evidence and arguments presented in support of each. A witness's testimony is most material – and potentially most effective – when it directly supports a party's position and opposes the other side's position, so long as the opposition is limited to facts and falls short of engaging

²⁸ Redfern *et al.*, *supra* note 16 at 298, 308.

²⁹ James L. Loftis, “Advocacy of Private Disputes before International Claims Resolution Bodies” in Doak Bishop, ed., *The Art of Advocacy in International Arbitration* (New York: Juris Publishing, 2004) 39 at 73.

the witness in argument. Such crucial evidence must be carefully reviewed with the witness, to ensure that it is as solid as possible.

By effectively communicating the questions and comments arising out of the various areas addressed above, the good advocate will be leading the witness on a journey of rediscovery, providing documents and other materials to refresh the witness's recollection. This involves being efficient and diplomatic, and avoiding a process that becomes overly burdensome, time-consuming, or just plain unpleasant. Counsel must do his or her best to maintain a good relationship with witnesses throughout the process, using tried and true techniques to keep them on side, such as timely notification of relevant dates in the arbitration and preparation process, timeliness in the delivery of the lawyer's own work product, and respectful communication that favours humility (and, where appropriate, even humour) over hubris.

Finally, counsel should be aware of the risk that lawyer's communications to a witness who is not a client of the lawyer could be subject to discovery, although the risk in an international arbitration is much lower than it is in litigation, given the usually much narrower scope of discovery allowed under the applicable rules and/or by the Tribunal. In her book *The Attorney-Client Privilege and the Work-Product Doctrine*, Edna Selan Epstein addresses the issue in the context of witness preparation in U.S. litigation:

Deposition questions regarding witness preparation often raise issues involving the work-product protection. Although the rule does not explicitly apply to questions that seek to discover a lawyer's statements made to the witness during preparation to testify, the principles enunciated in *Hickman*³⁰ are nonetheless invoked to protect a lawyer's intangible work product as it may be reflected in conversations the lawyer has with a witness who is not a client of the lawyer. If a witness is instructed not to testify about certain matters in the course of the deposition, courts will review

³⁰ *Hickman v. Taylor*, 329 U.S. 495 (1947).

the questions asked and sort out those areas of inquiry that are protected as opinion work product from those that are not.³¹

c. Making it Better: Polishing the Final Draft

Once a comprehensive draft has been completed, the work is not yet done. The testimony is now “right”, but it may not yet be the “best possible” testimony.

A first consideration that goes beyond the strict facts being related by the witness is whether the witness’ story is properly sequenced. The usual way to tell a story is chronologically, but blind adherence to chronological order should be avoided, and other ways considered. For example, depending on the matter in dispute, a travelling salesman’s story may well be easier to follow organized by sales territory (“During the year, I returned to Calgary twice, resulting in sales of ... During the same period, I was in Vancouver five times, resulting in sales of ...”) rather than in the strict order in which sales were made (“In January, I sold ... in Calgary. I then flew to Vancouver ...”). Hwang notes that “Where a number of separate issues are involved, chronological narrative can be divided into different sections according to issue.”³²

A related question is organization through headings and sub-headings. In a longer statement, sections should be clearly identified by short descriptive headings, and longer sections further sub-divided by descriptive sub-headings. The headings and sub-headings, collected in a table of contents at the beginning of the statement, give the Tribunal a helpful summary-at-a-glance of what is otherwise a long statement.

Beyond sequence is the question of “back story”. Is there sufficient background information to make the key evidence stand out? Although such information is not essential, it can make all the difference for the Tribunal’s understanding of the case.

³¹ Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine*, 3d ed. (Chicago: American Bar Association, 1997) at 382.

³² Hwang, *supra* note 4 at 424.

Conversely, is there too much non-essential information in the witness statement clouding the important facts, or too much unnecessary detail confusing the message? It is important, once the comprehensive draft has been completed, to examine critically whether even whole parts of the testimony are really required. For example, perhaps another witness is already covering certain elements that could therefore be dropped from a witness's statement, and replaced with a sentence of the following kind: "I have read paragraphs 75-90 of Mr. Smith's statement, and I am in full agreement with his description of the trade show, which I attended with him."

A related consideration is the need to protect the witness on cross-examination. Perhaps not surprisingly, this concern is voiced most effectively by American practitioners, especially those who also do trial work in the courts. For example, Doak Bishop writes:

A carefully crafted witness statement should also anticipate the attacks and cross-examination of the opposing party and the questions of the arbitrators. Thinking through the testimony to ensure that it has the proper level of detail and consistency is important for it to be ultimately persuasive.³³

Similarly, Mark Baker advises:

When drafting the statement, it is important for the witness to limit his or her testimony to important issues and not stray beyond the facts necessary to develop the party's case. This would help ensure that the witness does not unnecessarily open too many doors for opposing counsel on cross examination. The advantages of fully developing testimony must be balanced with the risks associated with providing more opportunities for the cross examination on various issues.³⁴

Finally, in reviewing the comprehensive draft, the good advocate should ask herself whether the testimony is not only "right", but also

³³ Bishop, *supra* note 23 at 476-477.

³⁴ Baker, *supra* note 27 at 393.

accessible to the Tribunal? Is there jargon that can be converted into plain language? Are there long descriptions that can be replaced with a map or diagram? Would a glossary of key technical terms, abbreviations and/or acronyms be helpful? How about a list of all individuals mentioned in the statement, together with their respective titles, job descriptions and the dates during which they held any given position, where the statement relays facts relating to complex internal dynamics at a company?

d. Staying within Ethical Bounds

Assisting the witness with the development of the statement from first draft to polished draft is the very essence of the “invisible” advocacy practiced by counsel in international arbitration. It is ethical as long as the final product remains a statement of the testimony of the witness, and not of testimony that has been made up by the lawyer for purposes of the arbitration.

To conclude this section with a metaphor, it is the witness who carries the tune, while the good advocate acts merely as sound engineer. The witness must not be asked to “synch” his testimony to counsel’s words, written to satisfy the demands of the case. Instead, counsel should use his toolkit of methods to bring clarity, definition, tone and volume to the witness’ voice. Such involvement by counsel is widely accepted in international arbitration.

In his article “Effective Witness Preparation for International Commercial Arbitration,” David Roney presents certain generally accepted ethical guidelines for counsel engaged in witness preparation, a process which, in many cases, involves the step of submitting written witness statements:

Counsel is entitled to review the case in detail with each of their own witnesses and to challenge any inconsistencies and point out any weaknesses in the evidence of the witness.

By contrast, counsel must not propose, either directly or indirectly, that a witness should tell a specific “story”. This is not only unethical, it is also invariably counterproductive. A witness who is coached to recount a specific story will not be credible and, in all

likelihood, this story will not hold up under questioning from opposing counsel or the arbitral tribunal.³⁵

Laurent Levy goes so far as to say that:

The arbitrators would not actually benefit from a statement, which a witness drafted on his own. The help of counsel in drafting the witness statement enables the witness to focus on the relevant issues, which in turn proves a useful tool for the arbitrators.³⁶

Michael Schneider touched on this point when he eloquently contrasted authenticity with accessibility during an ITA workshop on arbitral advocacy. He said:

This discussion raises a question about authenticity in witness statements. I don't think there is a need for authenticity, because what counsel is doing is translating into a form that is accessible to the Tribunal what the witness, in substance, has to say. I think it is perfectly all right to reformulate what the witness had said because it has a different function. So, I think sometimes we are overestimating this question of authenticity. But then you can put at the end of the witness statement: 'this witness statement has been discussed with my counsel who drafted it and I confirm that it is my testimony'.³⁷

(4) Documents and Evidentiary Issues

Practitioners need not be too concerned with technical rules on the admissibility of evidence, including the documents attached to witness statements. Experienced international arbitrators, "whether they are from common law or civil law countries, tend to focus on

³⁵ David P. Roney, "Effective Witness Preparation for International Commercial Arbitration: A Practical Guide for Counsel" (2003) 20:1 J. Int'l Arb. 429 at 430.

³⁶ Levy, *supra* note 4 at 115.

³⁷ As quoted in "Advocacy with Witness Testimony" (2005) 21:4 Arb. Int'l 583 at 592.

establishing the facts necessary for the determination of the issues between the parties, and are reluctant to be limited by any rules of evidence that might prevent them from achieving this goal.”³⁸ This is consistent with Article 9(1) of the IBA Rules, which provides:

The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.

But as Hwang correctly notes:

Although the strict rules of evidence normally do not apply to arbitrations, some regard should be paid to those rules, as many of them are based on common sense. For example, while most Tribunals will consider hearsay evidence, they will also recognize that such evidence will be inconclusive and may even be unreliable.³⁹

As already mentioned, witness statements should incorporate references to contemporaneous documents, as evidence of contemporaneous documents will invariably be given greater weight than uncorroborated witness testimony.⁴⁰ The contemporaneous documents should be explained by the witness, and attached to the witness statement (if not already submitted separately).

Bühler and Dorgan write:

The witness should identify the documents he has been given when preparing the statement. The reference may be done in general fashion; it may also be appropriate to state when the witness saw a document for the first time. Where the witness refers to documents on record in the arbitration, it is convenient to include the appropriate exhibit references. Counsel for the parties generally supply the references.⁴¹

Hwang provides the following guidance:

³⁸ Redfern *et al.*, *supra* note 16 at 296.

³⁹ Hwang, *supra* note 4 at 424.

⁴⁰ See Redfern *et al.*, *supra* note 16 at 298, 308.

⁴¹ Bühler & Dorgan, *supra* note 12 at 13-14.

All relevant documents should be referred to in the body of the statement or affidavit so that those documents can be read and understood by the Tribunal in proper perspective and order.⁴²

(5) Language

The question of what language the statement should be prepared in is an important one. It is typical for at least some witnesses in an international arbitration not to be fluent or even functional in the language of the arbitration. In his commentary at the ITA, Gerald Aksen highlighted this problem, and offered his advice as to the best way to deal with it:

The biggest problem I have seen in witness statements is where the witnesses do not speak the language of the arbitration. If the lawyer prepares that written statement up front, he or she prepares it in the language of the arbitration, and then translates it back to the language of the witness who is testifying. That is not fair, because no one can do adequate translations, and the statement doesn't come out the way the witness would have made it. It is very difficult to deal with those kinds of settings. My advice always is to have the witness prepare his own statement in his own language. It is then translated into the language of the arbitration. There is a better chance that that will work out, certainly to the satisfaction of the witness, because you don't want your witness embarrassed at that moment.⁴³

Similar guidance is provided by the Commercial Courts Guide in England & Wales, from which arbitration practitioners may draw inspiration:

Fluency of witnesses

⁴² Hwang, *supra* note 4 at 424.

⁴³ As quoted in "Advocacy with Witness Testimony", *supra* note 38 at 589.

- H1.4 If a witness is not sufficiently fluent in English to give his evidence in English, the witness statement should be in the witness's own language and a translation provided.
- H1.5 If a witness is not fluent in English but can make himself understood in broken English and can understand written English, the statement need not be in his own words provided that these matters are indicated in the statement itself. It must however be written so as to express as accurately as possible the substance of his evidence.

The proposed revisions of the IBA Rules would require that witness statements include a statement as to the language in which the witness statement was originally prepared and the language in which the witness anticipates giving evidence at the evidentiary hearing.⁴⁴

(6) Affirmation of the Truth

The IBA Rules state that a witness statement should contain “an affirmation of the truth of the statement” by the witness.⁴⁵ In other words, the witness statement need not be sworn like an affidavit. Indeed, because the statement must normally be confirmed at the hearing, and does not stand alone as evidence unless accepted as such by the parties, one of the principal reasons for swearing an affidavit is not present.

It is good practice for the witness to distinguish between assertions made in the witness statement based on the witness's own knowledge, and those which are made on the basis of information or belief. In the latter case, the witness should give the source for any assertion made on information or belief.⁴⁶

⁴⁴ Revised IBA Rules, Art. 4(5)(c).

⁴⁵ IBA Rules, Art. 4(5)(c).

⁴⁶ See Art. 4(5)(b) of the IBA Rules.

III. Expert Reports

A. Introduction

Depending on the nature and subject-matter of the dispute in an international arbitration, evidence based on the documents and the testimony of witnesses of fact will not be sufficient to provide the Tribunal with a basis to come to a decision. For example, a manufacturing process may have come to a halt because of an alleged breakdown of a piece of equipment in the factory, while nobody who witnessed the breakdown really understands how or why the machine failed. In such cases, an expert may be required to investigate the causes of the failure, or to explain the significance of the circumstances surrounding the failure, or both. Another typical scenario in which an expert is required is the valuation of an asset or enterprise, for example in the context of a dispute between co-owners or shareholders or a dispute involving compensation for the destruction or expropriation of property. In such a case, the expert, having been provided with the factual financial data about the asset or enterprise, applies one or more methodologies to develop an opinion on “fair value” or “fair market value”, for example. Engineering and accounting, however, are only two of the more common fields among many more that are regularly encountered in international arbitration.

The role of an expert is conceived differently in civil law countries and common law countries, and each tradition has found a reflection in the practice of international arbitration. Bernard Hanotiau explains the difference as follows:

33. [...] In the countries of Roman law tradition, an expertise is a procedure in which the advice of one or several technical experts is requested by the Court. Moreover, experts are often appointed after the exchange of written submissions and the presentation of oral arguments. In fact, an expertise is often used to discover information that in common law systems would be obtained through discovery.

34. In common law systems, expert witnesses are not appointed by the Court. Like witnesses of fact, they are produced by the parties

to supply specialized information to the tribunal. Like witnesses of fact, they are examined and cross-examined by Counsel.⁴⁷

The IBA Rules accommodate both types of experts, namely “party-appointed experts” (Art. 5) and “Tribunal-appointed experts” (Art. 6). In each case, the expert’s report is said to be a means of evidence on certain “specific issues”.

Neither approach to expertise is wholly satisfactory, as has been noted by several practitioners. John Tackaberry makes the following observations:

To begin, we reiterate that many civil law panels regard the evidence of experts retained and paid by the parties as irremediably tainted. And with some justice, perhaps. Equally, a panel appointed expert is also unsatisfactory in some respects. For example, unless the Panel itself includes someone who is expert in the same field, it may be that the expert’s conclusions will be very difficult to challenge effectively. And the expert does not have the same incentive to question and reconsider his or her own views as would be the case if he or she had to deal with the views of someone else in the same field on the same topic.⁴⁸

Martin Hunter is similarly ambivalent:

The main disadvantage of the common law system is that the expert “evidence” presented to the arbitral tribunal is “bought” by the party presenting it. The party in question simply would not present the testimony to the tribunal if the expert’s opinion was unfavourable to its case. The civil law system suffers from the disadvantage that the parties (or their advocates) tend to think that their disputes will be decided by the tribunal-appointed expert, rather than by the arbitral tribunal that was appointed by the parties to resolve it.⁴⁹

⁴⁷ Hanotiau, “Procedural Traditions,” *supra* note 17 at 92-93.

⁴⁸ Tackaberry, *supra* note 11 at 181.

⁴⁹ Martin Hunter, “Expert Conferencing and New Methods” in Albert Jan Van Den Berg, ed., *International Arbitration 2006: Back to Basics?* (The Netherlands: Kluwer Law International, 2007) 820 at 820-821.

This text is not the place to dwell on the differences in the two approaches to expert evidence in international arbitration, or even to argue in favour of one approach over another. In this chapter, we are dealing necessarily with expert reports prepared by party-appointed experts, since counsel has no direct written advocacy role with respect to the expert report prepared by a Tribunal-appointed expert.⁵⁰ As mentioned below, however, in some cases, there is both a Tribunal-appointed expert and party-appointed experts, in which event the existence of a Tribunal-appointed expert can be a relevant consideration in the advocacy exercised through the reports of the party-appointed experts.

B. Involvement of Counsel

(1) Involvement of Counsel in the Selection of an Expert

In international arbitration, just as in domestic legal proceedings, counsel is typically involved in the selection of the expert, and for good reason: a party's choice of expert is crucial in a case requiring technical or specialized knowledge, and a lawyer's experience from prior dealings and interactions with experts can be of great assistance to a party making such a choice.

What should a party and its counsel look for in an expert? Naturally, the kind of expert that should be retained depends on the facts and circumstances of the particular case, and the issues for which the expert is required. However, there are certain common characteristics shared by effective experts in any field and for any case. An effective expert:

- has a comfortable command of the specialized knowledge and/or techniques that are specific to the expert's field of expertise;

⁵⁰ The revised IBA Rules propose an expanded description of the required content of expert reports, including reports by Tribunal-appointed experts; see Art. 6(4) of the revised IBA Rules.

- is well-known and respected in his field, with significant publications to his credit in his area of expertise;
- is able to maintain his independence and objectivity – and thus his credibility – while effectively advancing the position being put forward by a party and its advocate;
- is professional and thus committed to devoting to the preparation of his report and cross-examination sufficient time to ensure that the opinion is credible, and presented in clear and accessible terms; and
- has strong communication skills, and particularly the ability to explain complex matters in simple language, and in discrete steps; and the ability to respond effectively to questions from a cross-examiner, or member of the Tribunal (the ideal expert is thus fluent or fully functional in the language of the arbitration).

Dushyant Dave suggests that counsel consider the following battery of questions and factors in selecting an expert:

- How many times has the expert acted as consultant?
- In how many cases has the expert actually testified?
- Were the issues in previous cases similar to the issues in the case before the tribunal?
- Has the expert expressed views to the contrary, at any time in publications or testimony, on the subject upon which he is now expected to opine?
- Has the expert ever been employed by the opposing party or counsel?
- Has the expert been repeatedly engaged by the law firm or the counsel representing the party?
- Is the expert going to be available for cross-examination on the future dates that may be fixed by the tribunal? Has the expert disclosed unused material or any contrary tests or

opinions (even if carried out by someone else) of which he/she is aware?

- It would be greatly helpful to remember the principles set out by the US Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*⁵¹ and *Kumho Tire*⁵² while choosing an expert because it must be clear that his testimony will constitute “scientific knowledge” or “technical and other specialized knowledge” required to assist the tribunal in reaching the ultimate conclusion.
- To know the exact nature of the dispute to be decided in Arbitration and whether the expert is indeed proficient in the particular subject. For example, in a dispute involving chemical technology it would be unwise to choose an expert from the field of civil engineering.⁵³

Doak Bishop advises, for his part, that

[w]hen expert evidence is to be used, the expert should be carefully selected for his credentials and expertise on the specific issue requiring expert evidence. Nothing can substitute for the necessary expertise in an expert witness, although expertise alone may not be sufficient. The expert witness must also be able to articulate his opinions and reasons both in writing and orally, and to have sufficient mental agility and character to withstand cross-examination.

⁵¹ 509 U.S. 579 (1993) (in this decision, the U.S. Supreme Court established that, in any case in the federal courts involving expert scientific testimony, the trial judge must determine whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts at issue).

⁵² *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (expanding the *Daubert* test of reliability and relevancy to all expert testimony based on “technical” or “other specialized” knowledge).

⁵³ Dushyant Dave, “Contemporary Practice in the Conduct of Proceedings: Techniques for Eliciting Expert Testimony – How Party Appointed Experts Can Be Made Most Useful” in Albert Jan Van Den Berg, ed., *International Arbitration 2006: Back to Basics?* (The Netherlands: Kluwer Law International, 2007) 813 at 815.

For these reasons, it is wise for counsel to consult other lawyers that have worked with the expert candidate being considered in order to get a first-hand impression of how effective the expert was in an actual arbitration setting, and in dealing with the pressures of cross-examination, witness conferencing and questioning from members of the Tribunal.

(2) Involvement of Counsel in the Preparation of the Expert Report

Once the expert is selected, his or her tasks include: educating a party's counsel on the specific issues for which the expert has been retained; gathering and/or observing the raw data and information that requires processing, explanation or analysis; analyzing the data and information by application of various methodologies or models; and preparing a report setting out and explaining the expert's opinions and conclusions. In an ideal world, the expert would always craft the perfect expert report. In reality, many experts do prepare excellent reports. In that regard, many experts have an advantage over witnesses of fact in that they are professionally trained and experienced in drafting their written testimony.

At the same time, it is not uncommon for an expert to both need and welcome the assistance of counsel in the preparation of an expert report. It has been pointed out that, in international arbitration, "[b]ecause communication between a party and its expert remain undisclosed, expert testimony and reports may be the result of extensive collaboration."⁵⁴ By contrast, in some jurisdictions, counsel involved in litigation are justifiably cautious in engaging in extensive collaboration with an expert because the expert may be required to disclose the nature of the collaboration during discovery.⁵⁵ This could

⁵⁴ Dana H. Freyer, "Assessing Expert Evidence" in Lawrence W. Newman & Richard D. Hill, eds., *The Leading Arbitrators' Guide to International Arbitration*, 2d (Huntington: Juris Publishing, 2008) 429 at 431, citing Rachel Kent, *Expert Witnesses in Arbitration and Litigation Proceedings*, www.transnational-dispute-management.com (June 2007) 4:3 at 2.

⁵⁵ For example, in the U.S., the Federal Rules of Civil Procedure provide that a

result in the revelation of sensitive discussions between counsel and expert concerning counsel's strategy or counsel's assessment of the case. Even in an international arbitration, counsel should be cautious, and confirm what rules and obligations are likely to apply to the disclosure of communications between counsel and expert in their particular case.

C. Effective Advocacy with Expert Reports

(1) Basic Form and Content Guidelines

According to Article 5(2) of the IBA Rules, an expert report prepared by a party-appointed expert should contain:

- (a) the full name and address of the Party-Appointed Expert, his or her present and past relationship (if any) with any of the Parties, and a description of his or her background, qualifications, training and experience;
- (b) a statement of the facts on which he or she is basing his or her opinions and conclusions;

party "may depose any person who has been identified as an expert whose opinions may be presented at trial" (Rule 26(b)(4)(A)) and, in exceptional circumstances, may "by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial" (Rule 26(b)(4)(B)). Similarly, Part 35.10 of the Civil Procedure Rules of England sets out the rules governing disclosure of information by experts, including as follows:

- (3) The expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written.
- (4) The instructions referred to in paragraph (3) shall not be privileged against disclosure [...]

By contrast, in Quebec, for example, the general rule is that communication between counsel and expert, whether oral or written, is protected by the privilege of "professional secrecy" (see *Poulin v. Prat*, [1994] R.D.J. 301 (C.A.)).

- (c) his or her expert opinions and conclusions, including a description of the method, evidence and information used in arriving at the conclusions;
- (d) an affirmation of the truth of the Expert Report; and
- (e) the signature of the Party-Appointed Expert and its date and place.⁵⁶

Article 5(3) of the IBA Rules provide:

The Arbitral Tribunal in its discretion may order that any Party-Appointed Experts who have submitted Expert Reports on the same or related issues meet and confer on such issues. At such meeting, the Party-Appointed Experts shall attempt to reach agreement on those issues as to which they had differences of opinion in their Expert Reports, and they shall record in writing any such issues on which they reach agreement.

In the revised IBA Rules, it is contemplated that such a meeting may be ordered by the Tribunal even before the party-appointed experts have submitted their reports in order to identify areas of disagreement and assist in focusing the expert reports.⁵⁷ This would obviously need to be reflected in the expert report.

(2) Expert's Qualifications, Training and Experience

Undoubtedly, the credibility of the expert's opinion begins with the Tribunal's perception that the expert witness has the qualifications, training and experience necessary to understand the

⁵⁶ The revised IBA Rules propose to replace the language of paragraph (d) with the following: "an affirmation of his or her genuine belief in the opinion expressed in the Expert Report", and to add a paragraph dealing with the language in which the report was prepared. Another proposed addition reads as follows: "if the Expert Report has been signed by more than one person, an attribution of the entirety or specific parts of the Expert Report to each author." Reports signed by more than one persons are discussed later in this chapter.

⁵⁷ See Art. 5(4) of the revised IBA Rules.

specific issues that he or she is considering, and to be in a position to advise the Tribunal on those issues. As mentioned earlier, it is crucial, at the stage of selecting an expert, that an individual with the proper qualifications, training and experience is identified and chosen.

Having made the right choice, however, it is just as important that the report communicate the specifics of the expert's background to the Tribunal. This is typically done by including, as the first exhibit to the expert report, a detailed *curriculum vitae*, listing the expert's educational background, publications, conferences, and prior engagements as a consulting or testifying expert. This information will likely have been carefully vetted during the selection process. Counsel should review it again carefully before it is included in the expert report, since any aspect of the expert's background will be fertile territory for cross-examination by opposing counsel. Indeed, one approach to discrediting an expert is to highlight weaknesses in his or her background, or occasions on which the expert took a somewhat different approach to the issue as compared to the approach taken in the expert report.

(3) Expert's Independence and Objectivity

The IBA Rules provide that the expert should disclose in the expert report "his or her present or past relationship (if any) with any of the Parties." An expert's independence is perhaps the most important determinant of his or her credibility in the eyes of the Tribunal. For this purpose, a mere formal statement of independence is insufficient. In every aspect of the expert's work, including in the expert report, party-appointed experts must maintain their independence and objectivity, and avoid crossing the line from effective expertise to acting as advocates for a party. As Mark Baker has written:

[...] The expert, while presenting a position that benefits the advocate's client, must be – and come across as – unyieldingly scrupulous and trustworthy. The arbitrators will not be swayed, or

amused, by an expert who clearly has shed his or her professional integrity for a large sum of money.⁵⁸

Some would question whether this is a realistic expectation. Vera Van Houtte has written:

An expert witness' position is generally described as one holding the middle between that of a witness of fact and that of the parties' counsel.

Although he is expected to be impartial and objective when submitting an expert report, experience has shown that the desired objectivity often fails (hence the expression "hired gun").⁵⁹

Doak Bishop, for his part, recommends that

[a]n expert, both in his written report and in any oral testimony, should emphasize his independence and credibility. Merely saying it obviously is not enough. The report must show it. The methodology used should show it. The instructions to the expert should also show it. The expert should be able to say and show that the methodology used and the opinions reached would be no different if he were hired by the opposing party.⁶⁰ (Emphasis added.)

Thus, for example, the credibility of a quantum expert may be enhanced if she explains in her report that she has carefully considered an element of the damages claimed by the party that has retained her but, contrary to her conclusions for the other elements of the claim, has determined that, although well-founded, this particular element of the claim does not give rise to any significant damages.

⁵⁸ Baker, *supra* note 27 at 394.

⁵⁹ Vera Van Houtte, "Party-Appointed Experts and Tribunal-Appointed Experts" in *Arbitral Procedure at the Dawn of the New Millennium: Reports of the International Colloquium of CEPANI, October 15, 2004* (Brussels: Bruylant, 2005) 135 at 136.

⁶⁰ Bishop, *supra* note 23 at 466.

(4) The Substantive Content of the Expert's Opinion

Just as the description of the facts is the core of the fact witness's statement, the expert's opinion is the core of the expert report. After all, the expert's opinion on the specific issue relevant to the dispute is the very reason for which the expert was retained. The objective must be to present the opinion in the most credible and convincing way. It is obviously entirely insufficient for an expert simply to formulate the conclusion that he or she has drawn in the case. No Tribunal will find that an expert's educational and professional background, and formal independence from the retaining party, are sufficient bases for the credibility of that opinion.

No matter how impressive the expert, his or her conclusion must be built up step by step, working through (a) the underlying facts and assumptions, (b) the available methodologies, (c) an explanation for the expert's choice of one or more such methodologies, and (d) the application of the chosen methodology(ies) to the facts and assumptions of the case. In other words, as Doak Bishop has pointed out:

What is most persuasive about expert reports and testimony is not the opinions themselves; arbitrators will assume the expert would not be sponsored by a party unless his ultimate opinion was helpful to the party's case. What is most persuasive about an expert is twofold: (1) the expert's credibility; and (2) the support for the opinion—the supporting evidence, reasoning[,] and methodology. In working with an expert, the advocate should emphasize these areas.

...

The evidence supporting the conclusions should be carefully marshaled to demonstrate that it logically leads to the deductions drawn from it. The reasoning of the expert should be stated step-by-step, again logically leading to the inferences drawn. The methodology should be standard and well accepted for the issues involved. Each of these matters should be detailed in the expert's

report, along with any assumptions employed. The assumptions should also be shown to be standard, whenever possible.⁶¹

Where more than one expert has authored a single report, it is advisable for the respective experts to identify for which particular parts of the report each is responsible.⁶² This allows the Tribunal to match the particular expertise of each expert to the identified subject matter, and thus assists the Tribunal in evaluating the evidence. It also signals to everyone involved in the arbitration how the subject matter will most likely be divided among the multiple expert witnesses for purposes of direct oral testimony and cross-examination.

Proper support for the expert's opinion, convincingly explained, also maximizes the chances that the expert's report will stand up to the opposing expert. In a typical case, each side has reputable experts taking opposite positions on the relevant issues.⁶³ The Tribunal will therefore evaluate an expert report "not only on its face value, but also in view of the opposing expert testimony, if any."⁶⁴

"Witness conferencing", which consists of the simultaneous joint hearing of expert witnesses (and sometimes fact witnesses), is becoming increasingly prevalent, for the simple reason that it is effective. Experience shows that an expert's testimony is often best tested not by opposing counsel, but by the opposing expert.⁶⁵ In witness conferencing, "[t]he debate takes place among informed and specialized witnesses; it is expert knowledge versus expert knowledge

⁶¹ *Ibid.*

⁶² Art. 5(2)(i) of the revised IBA Rules provides that if the expert report has been signed by more than one person, it should contain "an attribution of the entirety of specific parts of the Expert Report to each author."

⁶³ This explains why some have defined an expert, only half-jokingly, as "a person who differs in opinion with his colleague." See Sanders, *supra* note 3 at 264, recalling this definition from his days at Leiden Law Faculty.

⁶⁴ Van Houtte, *supra* note 56 at 153.

⁶⁵ Indeed, as Van Houtte explains: "the competence and impartiality of a party-appointed expert may often be tested only by the other party's expert." See Van Houtte, *supra* note 56 at 150.

and no longer the lawyer's questioning technique versus the witnesses' expert knowledge."⁶⁶

While reviewing an expert's draft report, counsel should therefore keep the opposing expert in mind. This means carefully reviewing any expert report already submitted by the opposing party, and ensuring that the draft report under review addresses any weaknesses or shortcomings in the other side's report in a methodical and scientific way. If the party-appointed experts are submitting simultaneous reports, it means being aware of the positions that the opposing expert is likely to adopt, and ensuring that one's own expert is well positioned for the anticipated confrontation of experts. Similarly, in cases where the Tribunal has appointed its own expert, and the party-appointed experts must therefore convince the Tribunal-appointed expert, counsel must ensure that the party-appointed expert engages the issues in her report in a way that will connect with the approach likely to be taken by the Tribunal-appointed expert (as disclosed, for example, in his earlier writings or by the comments he may have made during an initial meeting with the parties).

In cross-examination, good counsel will rarely choose to go head-to-head with a competent expert in his or her area of expertise. Instead, counsel will exploit weaknesses in the facts and assumptions underpinning the expert's opinion. In reviewing an expert's draft report, counsel should therefore carefully check that the facts stated in the report are aligned with the record (i.e., the fact witness statements and documents being submitted along with the expert report), and that the expert's assumptions are reasonable and properly justified.

Beyond the reasonability of the underlying assumptions, and the consistency of the underlying factual record, it is the clarity of the reasoning of the expert that determines whether or not the Tribunal will accept his opinion. It is thus essential that the Tribunal be able to follow each step in the expert's logic and reasoning. This is particularly challenging when an expert is presenting complex technical evidence. In such cases, "the good advocate should not

⁶⁶ Hanotiau, "Hearings", *supra* note 15 at 377.

throw the arbitrator into the deep end of the pool without swimming lessons.”⁶⁷ In the words of Doak Bishop:

In complex cases, the advocate should define – and even provide a written legend to the arbitrators defining – the technical terms used by the experts. Photographs, diagrams and demonstrative evidence should be used to illustrate technical terms and processes so the Panel can visualize them. Once the arbitrators visualize the concepts, verbal descriptions can be understood and can refine them. But the advocate should provide sufficient background in the experts’ reports, pre-hearing memorials, opening statements, and the early moments of the experts’ oral testimony, slowly building the arbitrators’ knowledge and understanding, before honing in on the disputed points. An alternative approach is to proceed immediately to the disputed points, pausing then to provide background on each technical point sufficient to fully understand it before moving to the next.⁶⁸

The expert opinion is the core element of an expert report, and it is the expert’s evidence on that point on which the Tribunal and the opposing expert will focus. It is ineffective and likely to undermine the expert’s credibility for him or her to adopt an opinion that he/she cannot sincerely and convincingly defend. Counsel should therefore avoid seeking to twist an expert’s opinion so that it responds in all respects to the client’s wishes. Instead, as discussed, good counsel should work with the expert to ensure that his or her reasoning is solid, and that the report is written as clearly as possible.

(5) The Special Case of Legal Experts

Special considerations apply to legal experts, where again the different traditions of the civil law and common law are relevant to

⁶⁷ Doak Bishop, “Advocacy in International Commercial Arbitration: United States” in Doak Bishop, ed., *The Art of Advocacy in International Arbitration* (New York: Juris Publishing, 2004) 309 at 337.

⁶⁸ *Ibid.* at 337-338.

understanding how the practice in international arbitration has evolved in this respect. Hanotiau explains as follows:

Anglo-Saxon practice treats issues of “foreign” law as matters of fact, to be proved by appropriate evidence. It therefore envisages expert testimony. In civil law, “*la Cour sait le droit*”: the Court is supposed to know the law. In international arbitration, the Arbitral Tribunal will often include at least one member familiar with the “foreign” applicable law. Many tribunals will therefore instruct the parties to argue their points of law as part of the legal argument. In this context, they will sometimes submit expert legal testimony or affidavits.⁶⁹

Redfern and Hunter echo this practice:

It takes only a brief moment of reflection to appreciate that the convenient fiction that “foreign law is fact” does not work in the context of an international arbitration.

(...)

In practice, the international arbitration community has solved this dilemma in a pragmatic and efficient way. In the twenty-first century, in almost all international arbitrations, “law” is treated as “law”. Each party usually has a duly qualified lawyer, often an academic, from the relevant jurisdiction in its team of counsel. Written expert opinions on disputed issues of the applicable law will be submitted with the memorials (with replies if necessary), and the relevant counsel from each team are ready to answer questions from the tribunal and to make oral submissions by reference to legal authorities from the relevant jurisdiction.⁷⁰

El-Kosheri makes the distinction between three situations in relation to the use of a legal expert in international arbitration. In his view, the decision whether to use a legal expert on a disputed question of law hinges on whether the question is governed by:

⁶⁹ Hanotiau, “Procedural Traditions,” *supra* note 17 at 96.

⁷⁰ Redfern *et al.*, *supra* note 16 at 410, paras. 6.170, 6.172.

- (a) international law;
- (b) the rules of a particular domestic legal system; or
- (c) usages of trade, *lex mercatoria*, *lex petroli*, or another similar code applicable to a specific industry or association.⁷¹

When dealing with matters of international law, El Koshari opines that a Tribunal is expected to know the law and therefore parties should not be required to produce expert legal opinions.⁷² El Koshari suggests that a similar situation exists in the third category, as arbitrators hearing international commercial cases are usually familiar with frequently raised issues pertaining to trade usages or particular transactions.

According to El-Koshari, the position may be different, however, when the rules applicable to an issue in dispute are legislative provisions or established jurisprudence of a given domestic legal system. On certain issues, the applicable rules may differ substantially from one jurisdiction to another, such as in relation to prescription, importing and exporting rules and regulations, the convertibility of local currency, etc. For cases in which such issues are material, El-Koshari's view is that it may indeed be important to present expert evidence of the applicable rules.

In the authors' experience, there seems to be a trend away from recourse to expert opinion evidence on legal issues in international arbitration in favour of counsel simply arguing the point. This may reflect a realization that too often legal experts called upon to testify become advocates for the party's position and that, accordingly, it is

⁷¹ Ahmed S. El-Koshari, "The Different Types of Experts with Special Emphasis on Legal Experts (*Jura Novit Curia*)" in Albert Jan Van Den Berg, ed., *International Arbitration 2006: Back to Basics?* (The Netherlands: Kluwer Law International, 2007) 797 at 798.

⁷² Prof. James Crawford explains that, in his view, "it is usually unhelpful for expert testimony to be produced on the very questions of international law which an international tribunal has to decide". See James Crawford, "Advocacy Before the International Court of Justice and Other International Tribunals in State-to-State Cases" in Doak Bishop, ed., *The Art of Advocacy in International Arbitration* (New York: Juris Publishing, 2004) 11 at 32.

best for them to address the Tribunal as part of the party's counsel team, rather than as expert witnesses. There are cases, however, where expert opinion evidence on legal issues may be helpful to the Tribunal. One example would be when the nature of a legal issue is such that the Tribunal needs to be informed through expert evidence about the very legal framework within which the issue arises. For example, in a dispute arising out of a joint-venture agreement governed by English law, it may be advisable to inform the Tribunal through expert evidence about the tax regime of the host state in which the joint venture has invested, if the issue is the tax treatment of certain expenditures to be borne by the joint venture. In such a case, the members of the Tribunal may draw assistance from evidence about the tax regime of the host state in order to understand the parties' respective positions and be in a position to resolve the issue. This situation assumes that no member of the Tribunal is trained or qualified as a tax lawyer of the host state.

The strategy is far more difficult to establish for an advocate if one of the arbitrators knows the law applicable to the relevant issue. Indeed, it is impossible to simplify the matter into a neat set of guidelines. This was well illustrated by Prof. Gabrielle Kaufmann-Kohler in the luncheon address she delivered at the workshop on arbitral advocacy organized by the ITA in June 2004, entitled "The Arbitrator and the Law: Does He/She Know It? How? And a Few More Questions".⁷³ On that occasion, Prof. Kaufman-Kohler opined that there existed no well-settled arbitration practice on the issue of whether applicable law is like a fact that needs to be proven, or rather a subject that the arbitrator can or must research him or herself.⁷⁴ As a result, arbitrators from different legal traditions or with contrasting experiences from prior cases may have dissimilar assumptions about what elements of the law need to be proven.⁷⁵ In light of this, how should counsel approach the issue? Prof. Kaufman-Kohler's reflections on this topic are helpful, and reproduced here in the same

⁷³ Reproduced in (2005) 21:4 Arb. Int'l 631.

⁷⁴ *Ibid.* at 636.

⁷⁵ *Ibid.* at 632.

spirit in which they were originally offered, namely in the hope “that they may contribute to better case management and advocacy”:⁷⁶

What about the advocate’s perspective? What should his or her strategy be? How does he/she best educate the arbitrator? The answer is typically a lawyer’s answer: it all depends. On what does it depend?

Before going into this issue, a threshold question needs to be addressed: should a party appoint an arbitrator who knows the applicable law? Not necessarily.

Other factors may prevail: professionalism, case management skills, experience, availability, knowledge of the trade or the industry. Knowledge of the applicable law may, however, play a more prominent role when outcome turns on a very technical legal issue.

After the appointment, on what considerations does the advocate’s strategy depend? Three factors must be taken into account:

- Does the arbitration involve a lot of complex legal issues?
- Does a member of the tribunal have knowledge of the governing law? If so, who? The Chair? One of the co-arbitrators? The one you have appointed or the other one? If it is the other one, can he or she be expected to give competent and reliable input on the applicable law to the Chair?
- Do the arbitrators come from legal cultures where the law must be proven, or will they consider that they have control over the law (*iura novit arbiter*), or will they be used to a mixed approach like the one adopted in the procedural rule set forth earlier?

Counsel’s choice will then depend on the combination of these factors. My purpose is not to give a cookbook recipe; it would be useless, because it would necessarily be oversimplistic. Let me just highlight a few thoughts:

- First, if there are a number of complex legal issues and the Chair comes from a legal culture where the law must be

⁷⁶ *Ibid.* at 638.

proven, it is advisable to file an opinion by a legal expert and, depending on the case, offer his or her oral testimony as well.

- Further, if no one on the Tribunal, or possibly only the co-arbitrators, but not the Chair, have expertise in the applicable law, it will often be advisable to tender legal evidence.
- But one should not file a legal opinion in an arbitration where the Chair comes from a country in which he or she expects to have control over the law and is an authority in the field. For instance, do not submit an opinion to a Swiss contract law professor in which one of his colleagues purports to teach him about how to construe a contract. He may resent being given lessons and be negatively influenced, or simply ignore the opinion. If proof of the law is sometimes insufficient, it can also be overdone. As always, the best rule is to use reasonable judgment.
- By contrast, when the case raises a very technical issue of law which is not settled, it may make sense to produce legal evidence even if the arbitrators know the legal system at issue, provided it is given by someone whose authority they are likely to recognize.
- Moreover, whether you offer legal evidence or not, you should make sure that the arbitrators have easy access to the necessary legal materials, court decisions, excerpts from treatises, cases, together with translations – good translations; legal translation is an art in [and] of itself, which does require attention because it can make a significant difference.
- Finally, whenever you have doubts on the expectations of the arbitrator about proof of the substantive law, it is best to raise them at the initial procedural hearing.⁷⁷

In all cases in which the advocate decides to present evidence of the applicable law through an expert, the legal expert should enlighten the Tribunal on the applicable rules, but avoid expressing

⁷⁷ *Ibid.* at 636-638.

an opinion on how those rules should apply to the specific facts and circumstances of the case:

Legal experts are supposed to provide the tribunal with opinions on the legal issues arising in the arbitration. In principle, the legal experts provide general opinions on the issues rather than specific conclusions regarding the specific circumstances of the case.⁷⁸

IV. Conclusion

In the Introduction, we noted that the facts of a case, together with the applicable law, are the ingredients with which counsel must work in pulling together the argument in support of his or her client's position. The facts and the law are the ingredients of any legal recipe, and the outcome of a lawyer's argument will, in the end, depend greatly on those ingredients. In this chapter, we have explored the advocacy that counsel can deploy in the "development" of some of those ingredients, namely the written statements prepared by witnesses of fact and the written reports prepared by expert witnesses. We have noted that such advocacy is most effective when it is "invisible", and merely serves to clarify and amplify the voice of the fact witness or expert witness. A final, overarching point to make is that the "flavours" being advanced in the legal recipe must have a basis in the ingredients. Accordingly, counsel should always keep in mind the broad themes of his or her client's case – the theory of the case being advanced on behalf of that party – and, to the extent possible, seek to ensure that those themes are also reflected in, and advanced by, all witness statements and expert reports.

⁷⁸ Kap-You (Kevin) Kim & John P. Bang, "Commentary on Using Legal Experts in International Arbitration" in Albert Jan Van Den Berg, ed., *International Arbitration 2006: Back to Basics?* (The Netherlands: Kluwer Law International, 2007) 779 at 784.