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PREMi ADR SPOTLIGHT: Confidently eliminate depositions in arbitration through use of written witness statements

By Jerome Rock

Arbitration is proven to be more efficient and cost effective than conventional judicial litigation. Because Arbitration is consensual, it is flexible and easily adapted to the particular needs of each case. Arbitration offers a range of tools, such as agreements to shorten schedules, limit discovery, enforce deadlines, and streamline evidentiary

hearings, which can make it a preferred choice for resolving business disputes.

While the parties acknowledge the flexibility of the arbitration process and commit to improve its efficiency and cost effectiveness, there nonetheless exists a deep-seated reluctance to vary from the conventional pre-trial discovery practice of judicial proceedings; specifically, the oral examination of a witness under oath, commonly referred to as a pre-hearing deposition.

This article suggests that when the parties agree to use Written Witness Statements for those witnesses under their control, as a replacement for the oral direct testimony of those witnesses at the evidentiary Hearing, counsel can confidently eliminate the need for pre-hearing depositions of many witnesses. Cost reduction is an obvious direct result and benefit, and as will be explained, the effectiveness of both the pre-hearing discovery process as well as the evidentiary hearing will be improved.

We begin with some background on Written Witness Statements. Presenting the evidence through Written Witness Statements is the standard practice in International Arbitration and is an emerging trend in domestic arbitrations. The following section is a primer for those unaccustomed to the practice and describes some of the features, benefits, and challenges of using Written Witness Statements as a vehicle for introducing direct witness testimony as evidence at the Arbitration Hearing.

Perhaps the biggest difference between conventional litigation/arbitration practice and using Written Witness Statements involves the timing or scheduling of the legal effort, or the shall we say, the billable hours. What that means is that the legal effort in preparing the Written Witness Statement is upfront, or front loaded at the beginning of the case. The effort involved in preparing (and rehearsing) witnesses to testify, as well as preparing for cross examination for witness who are expected to testify at a Hearing, is typically focused near the latter stages of the proceeding.

Reversing the order of activity makes the actual testimony (in the form of the Written Witness Statements) available much earlier in the process. This is an advantage to both sides; the issues are brought into clear focus early, eliminating the need for wide-ranging and often wasteful tangential discovery. Under most conditions, the total effort, although expended earlier, will be less than the total time expended under conventional practice.

Written Witness Statements are used to present the direct testimony of those witnesses that are under the control of that party. This applies to those witnesses presented by the Claimant, as well as witnesses offered by the Respondent to support the defense. Since Witness Statements are only available for those witnesses that a party controls, some witnesses may still be presented by direct examination at the Hearing.

The format for the Witness Statement can be as an Affidavit, or more commonly, as a Narrative, following the Question (by lawyer) and Answer (by witness) structure which is standard for in-person direct examination. The witness is expected to state facts within their personal knowledge and establish the necessary foundation for reference to documents or other information referenced in their testimony, following the chronological sequence of events. When finalizing the Written Witness Statement, the attorney is therefore confident that the complete, well organized, coherent testimony of the witness is available to enter as the record. The Witness Statements are affirmed

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under oath by the witness and ready to be submitted as direct evidence at time of the Hearing.

Since the Witness Statement is available electronically, any documents or exhibits referenced within the Written Witness Statements can be incorporated into the electronic file using Hyperlinking. This feature is not only efficient, and keeps the testimony organized, but it greatly improves the ease of use of the Statements for later reference by the arbitrator.

At the Hearing, counsel introduces the witness with several introductory or background questions and answers, asks the witness to affirm the Oath and accuracy of the Written Witness Statement, then moves to introduce the Written Statement as the evidence.

Unless otherwise agreed, all witnesses providing Written Witness Statements must appear at the Hearing (in person, or by video conference, if agreed) and be available for cross examination. At the conclusion of cross examination, typical redirect follows.

The use of Written Narrative Witness Statements directly reduces the length of the Hearing compared to the hours or days of Hearing that would otherwise be required to introduce the direct testimony of witnesses under the conventional oral format. This means the parties will have the benefit of cost savings due to fewer Hearing days, which in complex cases can amount to thousands of dollars for each Hearing day.

In those situations where transcripts are not requested, the Witness Statements and the arbitrator's hearing notes from the cross examination provide a valuable resource to the arbitrator in preparing the award.

With this background in place, the next step is to understand the dynamics involved in adopting the use of the Written Witness Statements for a particular case. For example, if using the Commercial or Construction Industry Arbitration Rules and Mediation Procedures of the American Arbitration Association, the Rules pertaining to the Preliminary Hearing, specifically the Preliminary Hearing P-1 and the P-2 Checklist guide the effort. The P-2 Checklist lists options or topics that the parties and the arbitrator should address at the Preliminary Hearing. Of particular note to this discussion is Section xii (a) of the Checklist which provides:
(xii) whether, according to a schedule set by the arbitrator, the parties will:

(a) Identify all witnesses, the subject matter of their anticipated testimonies, exchange written witness statements, and determine whether written witness statements will replace direct testimony at the hearing.

Following this path at the Preliminary Hearing will lead to the discussion with the arbitrator on the desirability of Written Witness Statements in the context of the case specifics.

Now, let's look at a case specific scenario suggesting the suitability of Written Witness Statements, and keeping to the theme of this article, observe how the need for pre-hearing depositions of witnesses can be eliminated.

Written Witness Statements are particularly suited to situations where:

1. the Claimant is confident with the available documentation and controls the likely evidence to be presented at Hearing.

2. Counsel does not anticipate the need for any additional third-party information necessary to present its case.

3. Counsel may well consider their case suitable for summary disposition.

On an agreed schedule established at the Preliminary Hearing, the Written Witness Statements of those witnesses under the direct control of the Claimant are provided to the Respondent early, well before the Hearing date. The timing for the exchange of Written Narrative Witness Statements is important. Some attorneys will attempt to keep their witness testimony as vague as possible, perhaps holding "dry powder" for a surprise to be disclosed only when they present their witness at the Hearing. This is the type of risk that attorneys site when requesting broad oral deposition pre-hearing discovery. Changing this schedule requires some adjustment. When the exchange of the Written Witness Statements is set early in the discovery process, the trial strategy is adjusted in ways that promote efficiency and economy and eliminate any advantage of dilatory practices. Both parties' benefit.

From the Respondent's perspective, the focus of the Claim set forth in the Written Witness Statement should be clear and unambiguous. There should be little anxiety about the vagueness of notice or alternative pleadings or the uncertainty of how a witness will testify at the Hearing. The Respondent is not dealing with a moving target, which avoids the need to delve into peripheral topics to avoid surprise testimony at the Hearing. The Written Witness Statement is the testimony. The Respondent has adequate time to evaluate their strategy for cross examination and prepare for rebuttal witnesses.

At this juncture, there would not be any advantage for a Respondent to conduct a pre-hearing deposition of the Claimant's Witness.

The process continues on the agreed schedule from the Preliminary Hearing. The Respondent prepares Written Witness Statements for those defense witnesses under its direct control having the benefit of the prior review of the Claimant's Witness Statements. The expected content of the Respondent's Written Witness Statements will likewise be in focus with the issues clearly delineated.

At this point, the Claimant then has the same opportunity to assess strategy for its cross examination of that defense Witness at the Hearing and can prepare for rebuttal witnesses as appropriate. Having the luxury of extended time to prepare for cross-examination is itself a significant benefit to the use of the Written Witness Statement.

Again, if the Claimant anticipates the testimony of that Respondent witness well in advance of the Hearing, there is little advantage to be gained by deposing that witness beforehand.

The process continues for all of Claimant's witnesses, and all of Respondent's witnesses. If a counterclaim is asserted, separate schedules with be set for the orderly exchange of Witness Statements relating to the counterclaim.

The logistics of all discovery efforts and schedules that sequence document production

and the preparation and exchange of Written Witness Statements will be discussed and agreed at the Preliminary Hearing. Procedures can be established for contingencies such as updating or supplementing Witness Statements based on relevant events after their submission (including live supplemental testimony at the Hearing). Although the practical need for the pre-Hearing oral deposition of witnesses may be eliminated, parties new to Written Witness Statements may feel compelled to reserve the prerogative to depose those witnesses, which can be provided upon good cause shown, and approval of the arbitrator.

Conclusion

Planning for arbitration using Written Witness Statements requires a certain commitment to get the facts, the testimony on the record, as soon as practicable, so the other side can react with the same commitment to candor and efficiency. Reducing the cost of Pre-Hearing discovery, without sacrificing the quality of the legal effort is one objective that can be achieved by the timely exchange of Witness Statements. As one important feature, this practice eliminates the need for the pre-hearing oral deposition of certain witnesses. One recent case started with the request to depose eleven expected witnesses. Written Witness Statements were adopted, eliminating the depositions entirely. These decisions are based on sound logic and come with an easily measurable cost impact.

Although controlling discovery costs may be a motivating factor to consider the use of Written Witness Statements, there are additional tangible benefits to the process:

• Provides an early focus to the claims and issues;

• Eliminates peripheral discovery;

• Reduces the time from filing the Demand to Hearing;

• Reduces the time and length of the Hearing;

• Creates a solid record of the testimony for the arbitrator, with the arbitrator's notes focused on cross-examination. With Hyperlinking, more useful than a transcript;

• Well suited for Video Conferencing.

In the journey to improve the quality, efficiency, and cost effectiveness of arbitration as a preferred method to resolve business disputes, the best practices of international arbitration should be incorporated in the domestic arbitration tool kit. Replacing the direct testimony of witness at the Hearing with Written Witness Statements, exchanged in a timely manner, is a time-tested approach that deserves consideration by all arbitration practitioners.

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