RELAUNCHING THE DEBATE ON THE USE OF WITNESS STATEMENTS IN ARBITRATION

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Resumen: El debate sobre las declaraciones escritas se ha relanzado en Portugal ante una reciente propuesta legislativa para modificar el Código de Procedimiento Civil portugués. En una jurisdicción en la que la forma oral de testigos ha generalmente prevalecido sobre el recurso a las declaraciones testificales, la propuesta de ley sugiere ahora que las declaraciones escritas pueden ser una solución positiva desde el punto de vista de la eficiencia en tiempo y costes. Sin embargo, esto llega en un momento en el que el uso de las declaraciones escritas está siendo cada vez más cuestionado en el contexto del arbitraje internacional, y muchos afirman que la forma estandarizada y a menudo acrítica en la que se utilizan puede constituir en realidad un obstáculo para la eficiencia. Algunos afirman incluso que las declaraciones escritas, aunque originalmente se concibieron para aumentar la eficiencia en la producción de pruebas, pueden ser a veces una pérdida de tiempo. La cuestión que se plantea es si existen otras formas de producción de la prueba testifical que

Abstract: The debate on witness statements has been relaunched in Portugal in face of a recent Draft Law1 that proposes the amendment of the Portuguese Code of Civil Procedure. In a jurisdiction where the oral form of testimony has, in general, prevailed over the recourse to witness statements, said Draft Law now suggests that witness statements may be a positive solution from the perspective of time and cost efficiency. This comes, however, at a time where the use of witness statements is being increasingly questioned in the context of international arbitration, with many claiming that the standardised and often acritical manner in which they are used may actually constitute an obstacle to efficiency. Some would even argue that witness statements, while originally envisioned to increase efficiency in the production of evidence, may sometimes be a waste of time. The question that follows is, then, whether there are other forms of production of witness evidence that could be suitable alternatives to the widespread solution of having witness.

puedan ser alternativas adecuadas a la solución generalizada de que las declaraciones escritas seguidas de un interrogatorio. Este artículo pretende ofrecer una visión general de los diferentes modelos alternativos para la producción de la prueba testifical que se siguen en varias jurisdicciones, y discutir los aspectos positivos y negativos de cada solución, en particular cuando se aplica al arbitraje.

Palabras clave: Arbitraje; Prueba; Declaración de un testigo; Contrainterrogatorio; Oralidad.

statements followed by cross examination. This article purports to provide an overview of the different alternative models for the production of witness evidence being followed in various jurisdictions, and to discuss the positive and negative aspects of each solution, in particular when applied to arbitration.

Keywords: Arbitration; Evidence; Witness Statement; Cross-examination; Orality.

I. THE DEBATE

One cannot write about arbitration without referring to its flexibility. Indeed, arbitration offers the parties a unique opportunity to define the rules applicable to their dispute, without imposing excessively restrictive limits on their creative freedom. One can even say that arbitration emerges, precisely, out of the acceptance that there are no rules generally adequate for every dispute. The power to define the rules is, thus, vested in the parties, who are better placed to choose them in accordance with their best interests.

This creative freedom afforded to the parties in arbitration is particularly relevant in the context of international disputes, since the parties, their lawyers, and the arbitrators often come from different legal backgrounds. The parties, and, in the absence of party-agreement, the arbitrators, can thus make the most of such variety of legal backgrounds and experiences and opt for the solutions that combine the best practices of each of the jurisdictions at play.

Notwithstanding this, it so happens, that, in more and more cases, the users of arbitration seem to have forgotten the flexibility that arbitration so distinctively offers and have rather started to act in «autopilot»[1]. Indeed, it is increasingly common for arbitrations to follow a standardised procedure, that

1. See Global Arbitration Review, «You would be shocked»: a fireside chat with Toby Landau, in *Global Arbitration Review*, 2021, available at https://globalarbitrationreview.com/you-would-be-shocked-fireside-chat-toby-landau.

is not necessarily better or even appropriate, but which the parties and their counsel chose solely because it is common practice.

One of the main illustrations of this phenomenon of standardization in international arbitration is the acritical use of written witness statements, usually followed by the cross-examination of the witness at the hearing[2]. Indeed, parties invariably tend to choose this model of witness evidence, even where that is not the model followed by courts in their home jurisdictions. Thus, in international arbitration, we see German lawyers submitting witness statements and French lawyers cross examining witnesses, even if in their national judicial proceedings that would be, in principle, inconceivable.

In consequence, written witness statements and cross-examination are, contemporarily, two characterizing features of international arbitration.

Written witness statements are a form of testimony, which contrasts with the oral form of testimony. Hence, written witness statements consist of a form of producing testimonial evidence. Cross-examination, on the other hand, is a way of testing the value of such testimonial evidence, independently of its written or oral form. Written witness statements and cross-examination are, therefore, two independent features, which do not necessarily have to be combined. Thus, it may be the case that the parties submit the testimony of their witnesses in writing, but do not have or do not make use of their right to cross-examine a witness and vice versa. Despite that, in arbitral proceedings, the submission of written witness statements followed by cross-examination has undoubtedly become common practice.

Nevertheless, with every standardised practice comes dissatisfaction. Indeed, we have recently witnessed a growing dissatisfaction regarding the standardised use of written witness statements in arbitration, which are considered, by some, as one of international arbitration's main problems[3].

Among the criticisms to the use of witness statements, cost and time are

2. See Queen Mary, University of London/White and Case, *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*, 2012, available at https://arbitration.qmul.ac.uk/media/arbitration/docs/2012_International_Arbitration_Survey.pdf, p. 3: «In a significant majority of arbitrations (87%), fact witness evidence is offered by exchange of witness statements, together with either direct examination at the hearing (48%) or limited or no direct examination at the hearing (39%). 59% of respondents believe that the use of fact witness statements as a substitute for direct examination at the hearing is generally effective».
3. See, for example, Shore, L., «Three Evidentiary Problems in International Arbitration: Producing the Adverse Document, Listening to the Document that does not Speak for Itself, and Seeing the Witness through her Written Statement», in *German Arbitration Journal*, vol. 2, issue 2, 2004), pp. 76-80.

the most predominantly referred. This is, in fact, quite contradictory, given that witness statements were originally used precisely to narrow the production of witness evidence to the core issues and to shorten the overall length of proceedings. Critics state, however, that instead of saving time, this method of presentation of witness evidence represents a heavy expense to the parties' pockets, being, in certain instances, completely unnecessary.

The discontentment grows when one realises that the tendency is for witness testimony to be losing importance as a means of proof. Even though no general affirmations can be made on this, some ascertain that tribunals generally do not trust witness testimony, namely as a result of the recent scientific findings about the easy manipulation of human memory. Accordingly, instead of relying on the testimonial evidence adduced, tribunals prefer to base their decision on the documents submitted by the parties.

On the other hand, however, there are, of course, certain advantages to the use of witness statements. For instance, in Portugal, the already mentioned Draft Law considered that witness statements promote efficiency. Efficiency was, indeed, the main reason cited to justify the legislative proposal to amend certain provisions of the Portuguese Code of Civil Procedure that relate to witness evidence[4]. This development is particularly interesting coming from the Portuguese Government, as there has always been, from the part of certain Portuguese jurists, a great resistance against witness testimony being provided in writing. That has been mainly justified by the importance of one of the fundamental principles of Portuguese procedural law known as the principle of immediacy (*princípio da imediação*), pursuant to which there should be a direct contact between the judge and the evidence produced. Thus, in Portugal, the general rule is that witness evidence is provided in oral form, during the final hearing on the merits, while witness statements, being the exception, are only possible in very restricted cases, namely where it is impossible for the witness to be present in court, such as in cases of serious illness, and is always subject to the agreement of the parties and to the authorization of the court.

The Draft Law now seemingly suggests a different model, acknowledging that witness statements may be beneficial to shorten the length of the proceedings. Consequently, inspired by the French and American models, the Draft Law proposes a change to the Code of Civil Procedure, that purports to not only eliminate the need for serious impossibility of the witness to ground the production of witness evidence in the form of a witness sta-

4. Explanatory Memorandum, Draft Law 92/XIV/2, entered into Parliament on 10 May 2021, available at www.parlamento.pt.

tement, but also dispenses with the need for the court's permission[5]. Accordingly, if this legislative alteration is ever approved, witness statements will be allowed under Portuguese Law whenever there is the agreement of the parties to that effect, or when the witness has knowledge of the facts by virtue of his or her functions[6].

Nonetheless, in a jurisdiction where witness testimony is particularly valued for the intrinsic spontaneity of every oral act, this solution is not necessarily consensual. As some state, the value of witness testimony is to have a story being told directly to judge, who can then draw its conclusions as to the credibility of the witness, as well as the veracity and plausibility of what the witness tells. The good assessment of the facts thus depends on the direct contact between the judge and the witnesses, in accordance with the highly regarded principle of immediacy. In this view, several voices, particularly those of the judges themselves, have contested this proposed amendment, arguing that the «assessment of a witness's testimony goes beyond verbal language, with non-verbal language assuming essential importance in assessing the testimony and forming the court's conviction»[7].

With this in mind, we must therefore ask ourselves whether we should continue to use witness statements in arbitration. It turns out, however, that such an enquiry will, in principle, inevitably lead to the answer: *it depends*. What may be suitable for a dispute, may not be suitable for another.

There are several models of use of witness statements, ranging from excessively limiting their use, to making them the rule. All these solutions have underlying and legitimate reasons that should be considered by the parties when defining the arbitral procedure. This article aims, precisely, to providing the users of arbitration with an overview of some of the available models of production of witness evidence, highlighting the advantages and disadvantages of each of them.

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5. Explanatory Memorandum..., *Ibid.*
6. See the proposal to alter art. 518 of the Portuguese Code of Civil Procedure under Draft Law 92/XIV/2, entered into Parliament on 10 May 2021, available at www.parlamento.pt.
7. Portuguese Judges' Trade Union Association, *Opinion on Draft Law 92/XIV/2.ª*, Mira, C., Cardoso, P. and Filipe Magalhães, V., Gabinete de Estudos e Observatório dos Tribunais, 2021, p. 19, available at www.parlamento.pt, (free translation); See also Dias, C. «Proposta de lei 92/XIV/2 – alterações ao CPC – Uma incontrolável vontade de regressar ao passado ou uma atrapalhação consciente do passo em frente?», in *Observatório Almedina*, 2021, available at https://observatorio.almedina.net/index.php/2021/08/30/proposta-de-lei-92-xiv-2-alteracoes-ao-cpc-uma-incontrolavel-vontade-de-regressar-ao-passado-ou-uma-atrapalhacao-consciente-do-passo-em-frente/.

II. PRELIMINARY REMARKS: THE VALUE OF WITNESS EVIDENCE IN ARBITRATION

Prior to reflecting on the adequateness of witness statements in arbitration, it is worth adducing a few preliminary remarks on the value of witness evidence more generally. Witness evidence has always been, in arbitration, a form of evidence of undisputable importance. Together with documentary evidence, witness testimony has often been deemed as a key in proving a party's case.

The truthfulness of recollections and the easy manipulation of memory have, however, clearly become hot topics in international arbitration, attracting the attention of certain practitioners who now raise doubts about the value of witness evidence. As a result, some critics argue that witness evidence in the current moulds is mostly a waste of time, and that notion is further reinforced by the fact that, in arbitral awards, one rarely finds references to witness testimony in the tribunals' finding and ultimately notices the irrelevance that such testimonial evidence had to the tribunals' conclusions. Thus, the usefulness of testimonial evidence is, in some cases, relatively limited, yet it can be one of the main causes for the prolongation of the proceedings.

The doubts raised by some as to the usefulness of testimonial evidence are, indeed, of great importance.

On the one hand, some say this form of evidence is unreliable because, as we all know, people forget things and our memory tends weaken with time. There is also a certain level of revisionism in how people tend to remember, often seeking to fill the holes of a certain narrative in a way that provides it coherence and moral comfort as to their role in it. This recognition is of particular relevance in the context of commercial disputes, where, as opposed to criminal cases, witnesses are generally called to testify about everyday facts, which are, consequently, not necessarily memorable[8]. For example, signing documents, holding meetings, paying bills are daily acts of every businessman but are also typically within the scope of the disputed facts that witnesses are often required to testify about.

Furthermore, scientific studies have undoubtedly showed how the memory is easily manipulated. Interactions between colleagues, conversations with counsel and document analysis can easily distort the way one remembers certain facts. Wishful thinking and unconscious bias are also important factors of memory misrepresentation. Even the way a question is posed can influence the witness's recollection of the facts[9].

8. See Global Arbitration Review, «You would be shocked»..., *cit.* (fn 1), (ref. 2).
9. See ICC Commission Report, *The Accuracy of Fact Witness Memory in International Ar-*

So, should we just abandon witness evidence?

To begin to answer this question, the ICC Commission Report on «The Accuracy of Fact Witness Memory in International Arbitration» is good starting point of great use[10]. While referring to impressive scientific discoveries that clearly show how the human memory is moldable, the Report allows us to conclude, however, that witness evidence can still matter in certain situations.

Pursuant to the ICC Report, witness testimony is generally aimed at (i) proving facts; (ii) explaining documents; (iii) providing context and telling a story; (iv) providing technical explanations[11]. Consequently, «fact witness testimony is not only about memory»[12]. Witness testimony may be very useful, for instance, in setting the background of the dispute and in coloring the many documents submitted to the tribunal, thereby not necessarily requiring the witness to remember with razor-sharp accuracy the facts. Witness evidence can, hence, be merely about storytelling[13]. Moreover, as opposed to documents, which do not speak, witnesses have the potential to «bring the case alive»[14], and to give a face to the facts.

In sum, despite the findings on the easy manipulation and distortion of memory, the overarching conclusion seems to be that witness evidence is here to stay. Nevertheless, it is of extreme relevance for the parties and the arbitral tribunal to be aware of these issues, so that they can discern if, in each specific case, the witness evidence will contribute positively to the discovery of the truth. The fact that witness evidence is generally used in arbitration does not make it mandatory.

Having drawn these preliminary remarks, we shall move to the central issue that concerns us: witness statements and cross examination in international arbitration.

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bitration, online publication date in November 2020, available at https://iccwbo.org/content/uploads/sites/3/2020/11/icc-arbitration-adr-commission-report-on-accuracy-fact-witness-memory-international-arbitration-english-version.pdf; see also Practical Law Dispute Resolution, *Credibility of oral witnesses*, in *Practical Law Dispute Resolution*, Thomson Reuters, 2022.

10. See ICC Commission Report, *The Accuracy of Fact Witness Memory in International Arbitration...*, *ibid.*
11. See ICC Commission Report, *The Accuracy of Fact Witness Memory in International Arbitration...*, *ibid.*, pp. 17-19.
12. See ICC Commission Report, *The Accuracy of Fact Witness Memory in International Arbitration cit. ibid.*, p. 16.
13. See Kirby, J., «*Witness Preparation: Memory and Storytelling*», in *Journal of International Arbitration*, vol. 28, issue 4, 2011, pp. 401-406.
14. Kirby, J., *ibid.,* p. 404.

III. THE WIDE ACCEPTANCE OF WRITTEN WITNESS STATEMENTS IN ARBITRAL RULES

As previously mentioned, there is a standardised practice in international arbitration concerning the production of witness evidence: witness statements, to be possibly followed by cross-examination of the witness if a hearing is held. Indeed, parties invariably opt for a procedure consisting of the two following stages: (1) the production of witness statements, that may be presented with the written submissions, or exchanged between the parties at a later stage; (2) followed by the oral testimony of the witness, which is normally subject to cross-examination by the opposing counsel, although, in certain cases, there is both direct and cross-examination.

As stated at the outset of this article, we should remember, however, that parties are given wide-ranging flexibility in choosing the appropriate rules to their dispute. So why do parties keep choosing the same model? Well, one can ascertain that it has simply become common practice, which is reflected in modern arbitral rules. In fact, under most of the modern arbitral rules, the use of witness statements is admitted, being also generally conditioned on the availability of the witness to be cross-examined[15].

So, for instance, under the LCIA Arbitration Rules, «[s]ubject to any order otherwise by the Arbitral Tribunal, the testimony of a witness may be presented by a party in written form, either as a signed statement or like document»[16] and «[t]he Arbitral Tribunal and any party may request that a witness, on whose written testimony another party relies, should attend for oral questioning at a hearing before the Arbitral Tribunal»[17].

Similarly, the ICC Arbitration Rules establish that «[t]he arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means»[18] and «may decide the case solely on the documents submitted by the parties unless any of the parties requests a hearing»[19]. Moreover, the tribunal «may decide to hear witnesses, experts appointed by the parties or any other person, in the presence of the parties, or in their absence provided they have been duly summoned»[20].

15. See Tallerico, T., Behrendt, J., «The Use of Bifurcation and Direct Testimony Witness Statements in International Commercial Arbitration Proceedings», in *Journal of International Arbitration*, vol. 20, issue 3, 2003, pp. 295-305.
16. LCIA Arbitration Rules (2020), art. 20 (3).
17. LCIA Arbitration Rules (2020), art. 20 (5).
18. ICC Arbitration Rules (2021), art. 25 (1).
19. ICC Arbitration Rules (2021), art. 25 (5).
20. ICC Arbitration Rules (2021), art. 25 (2).

In what concerns soft law, under the UNCITRAL Arbitration Rules, «statements by witnesses, including expert witnesses, may be presented in writing and signed by them»[21].

Also, the IBA Rules on the Taking of Evidence, typically referred as the main guidelines on witness statements, are clearly in line with this model, establishing that «[t]he Arbitral Tribunal may order each Party to submit within a specified time to the Arbitral Tribunal and to the other Parties Witness Statements by each witness on whose testimony it intends to rely»[22], and, pursuant to its article 8 (1), each party may request the appearance of the witness at the hearing. Nonetheless, «[t]he Arbitral Tribunal may limit or exclude any question to, answer by or appearance of a witness, if it considers such question, answer or appearance to be irrelevant, immaterial, unreasonably burdensome, duplicative or otherwise covered by a reason for objection»[23].

Finally, the Prague Rules also establish that «[t]he arbitral tribunal may also, if it deems it appropriate, itself invite a party to submit a written witness statement of a particular witness before the hearing»[24] and that, «if a party insists on calling a witness whose witness statement has been submitted by the other party, as a general rule, the arbitral tribunal should call the witness to testify at the hearing, unless there are good reasons not to do so»[25].

There is, hence, a wide acceptance of written witness statements followed by cross examination in arbitral rules. The question that necessarily follows is, then, whether that always represents the ideal model.

IV. AN OVERVIEW OF THE DIFFERENT APPROACHES TO WRITTEN WITNESS STATEMENTS AND CROSS-EXAMINATION

Having set the background on the common arbitral practice, this article now explores four models of witness evidence that have been adopted in the civil procedure laws of different jurisdictions. The aim is to reflect on whether said models could be suitable alternatives to the production of witness evidence in arbitration in the current moulds. Our analysis will, thus, point out the positive and negative aspects that each model entails, particularly when

21. UNCITRAL Arbitration Rules (2013), art. 27 (2).
22. IBA Rules on the Taking of Evidence in International Arbitration (2020), art. 4 (4).
23. IBA Rules on the Taking of Evidence in International Arbitration (2020), art. 8 (3).
24. Prague Rules on the Efficient Conduct of Proceedings in International Arbitration (2018), art. 5 (5).
25. Prague Rules on the Efficient Conduct of Proceedings in International Arbitration (2018), art. 5 (7).

applied to arbitral proceedings, while emphasizing the factors that the parties should consider when defining the arbitral rules applicable to their dispute[26].

1. WITNESS STATEMENTS, FOLLOWED BY INTENSIVE CROSS-EXAMINATION

The subject matter of our analysis is the standard model most commonly followed in arbitration, which takes inspiration from the common law systems: written witness statements[27], which stand as evidence in chief, followed by oral cross-examination[28], if so required by the parties or determined by the tribunal. In certain cases, however, oral examination may serve as direct testimony[29].

As we can see, this «common law model» clearly attaches great importance to witness testimony, preliminary in a written form and, subsequently, in an oral form, with cross-examination being one of the key stages of the proceedings. Thus, at a preliminary stage of the proceedings, witness statements are exchanged between the parties, who may subsequently call for certain witnesses to stand in court for the purposes of cross-examination. The parties' right to question an adverse witness is, thus, duly protected, even though the scope of the questions made can, in certain jurisdictions, be limited to the content of the witness statement[30].

Finally, under this system, the leading role in the examination of the witness is assigned to the lawyers, who will ask the questions, with the court assuming a relatively passive role. This characteristic of the common law system reflects the generally known dichotomy between civil and common law systems, with the inquisitorial principle prevailing in the former and the adversarial principle prevailing in the latter. Accordingly, in civil law systems, and in what relates to witness evidence, lawyers tend to work «in the shadow» of the judge, while in common law countries lawyers are required to be extremely active and dynamic[31].

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26. With relevance to this analysis, see ICC Commission on Arbitration and ADR, *Effective Management of Arbitration – A Guide for In-House Counsel and Other Party Representatives*, 2018, available at https://iccwbo.org/publication/effective-management-of-arbitration-a-guide-for-in-house-counsel-and-other-party-representatives/.
27. Under UK Civil Procedure Rule 32 (4)(1) «A witness statement is a written statement signed by a person which contains the evidence which that person would be allowed to give orally»; see also «Practice Direction 32– Evidence», available at https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part32/pd_part32.
28. See UK Civil Procedure Rule 32 (5) (1 and 2) and 32 (7).
29. See UK Civil Procedure Rule 32 (5) (2).
30. See Risse, J., Baumann, A., «The Permissible Scope of Witness Testimony in Arbitral Hearings-Five Proposed Rules», in *Arbitration International*, vol. 37, issue 1, 2021, pp. 21-33.
31. See Martins, S., Saraiva, R., «Diferenças culturais na Arbitragem Internacional: um verdadeiro problema?» in Menezes Cordeiro, A. (coord.), *Arbitragem Comercial/ Estudos Co-*

This common law system was originally conceived in a time when only some were able to read. Accordingly, great focus was put on oral advocacy[32]. Nonetheless, with the Woolf Reform, the voluntary exchange of written witness statements was introduced[33]. As stated by Risse and Baumann, «[t]he concept stemmed from the idea that it would encourage a faster and fairer outcome of the case and, by eliminating the element of surprise, would allow parties to better understand and anticipate the strengths and weaknesses of their position»[34].

These are, indeed, some of the positive aspects usually referred when analysing the common law system[35]:

First, having already been presented with a witness statement, both the tribunal and the opposing counsel will be better equipped to examine a particular witness at a hearing. In fact, in the absence of this prior information on the content of a given testimony, questioning may end up being a *fishing* exercise in search of what the witness knows and does not know and, consequently, on what facts its testimony may be useful for. With the witness statement model, the questions posed to a witness will tend to be more relevant and appropriate to their knowledge of the facts, consequently contributing to a substantial reduction of the time spent in examining the witness.

Second, it is also clear that witness statements may be an effective way of avoiding surprises at a hearing. As we all know, in many proceedings, the arbitral tribunal and the opposing party are surprised by essential facts reported by the witnesses that have never been previously articulated nor discussed by the parties, consequently causing unforeseen delays in the proceedings.

Moreover, this model is usually justified as a way of speeding the proceedings, since, in some cases, the witness statement will eliminate the need for an evidentiary hearing. Nevertheless, even if a hearing takes place, witness statements will, in principle, replace direct oral examination, consequently reducing the time spent on endless lines of questioning.

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memorativos dos 30 anos do Centro de Arbitragem Comercial da Câmara de Comércio e Indústria Portuguesa, Almedina, 2019, pp. 997-1017; see also Breda Pessoa, F., «A Produção Probatória na Arbitragem», in *Revista Brasileira de Arbitragem*, vol. IV, issue 13, pp. 71-97.

32. See Wilberforce, L., «Written Briefs and Oral Advocacy», in *Arbitration International*, vol. 5, issue 4, 1989, pp. 348-351.
33. See Risse, J., Baumann, A., *op. cit.* (fn 30), p. 26.
34. *Ibidem*.
35. See Tallerico, T., Behrendt, J., *op. cit.* (fn 15); see also Harbst, R., «Chapter 7: Witness Statements», in *A Counsel's Guide to Examining and Preparing Witnesses in International Arbitration*, Kluwer Law International, 2015, pp. 67-68, stressing, however, in the following pages, the existence of abuses in the use witness statements.

Third, even though this is not necessarily the case, the content of the written witness statement will limit the scope of cross-examination, thus highly reducing the number of questions that, in the event of a hearing, can be raised by the opposing counsel.

Fourth, in terms of time and costs, there is yet another relevant advantage of this model in the context of international arbitration, as it avoids unnecessary travels of all those intervening in the proceedings, particularly if such travel, hotel accommodation and other expenses are borne by the parties.

In addition, one can also state that witness statements produce a deterrent effect, in that the witness, knowing that it may be cross-examined, will limit its testimony to what it is undoubtedly certain of[36]. Having in mind that the opposing counsel has probably studied every word of the witness statement down to the finest detail and has certainly spent several hours looking for contradictions and falsehoods to uncover the witness in front of the tribunal, one may be more reluctant to tell a story that it does not fully remember, or to omit details that may be discovered by the opposing party and brough to the questioning. The witness will, thus, be more reluctant to lie, omit or distort the facts it is called to testify about.

Finally, there is yet another advantage that is noteworthy. As previously referred, as opposed to certain civil law countries, the common law system quite clearly enhances the powers of the lawyers and, hence, of the parties. Indeed, under this system, the examination is, in principle, chiefly conducted by counsel, who will, consequently, have the power to, by way of the questions posed, highlight certain facts helpful to their cause, to omit certain questions which answers may damage their arguments and to discredit the witness in front of the judge. Hence, a positive aspect of the common law model is that it gives great power to the parties in the production of testimonial evidence.

It happens, however, that this so-called time-efficient system has not proven so efficient, namely for the following two reasons.

First, because the parties almost always require the presence of the adverse witnesses at the evidentiary hearing for cross examination. Indeed, as mentioned, one of the main (at least theoretical) advantages of the common law system is avoiding the need to hear the witness lively, consequently saving time and cost. It so happens, however, that witnesses are generally required to be present at the hearing so that they can be cross examined. And that is obvious. The reluctancy of the other party to have an adverse testimony wri-

36. See Cansado Carvalho, F., Carrera, I., «A prova testemunhal na arbitragem», in Cordeiro, A. (coord.), *Arbitragem Comercial/ Estudos Comemorativos dos 30 anos do Centro de Arbitragem Comercial da Câmara de Comércio e Indústria Portuguesa*, Almedina, 2019, p. 355.

tten down in a piece of paper, duly registered, without subjecting it to examination, is easily understandable. In consequence, hearings will generally have to be held, time will still have to be spent and costs will still be incurred. This assuming, of course, that the parties did not agree, *a prior* i, that hearings would always take place, for both direct and cross examination. In that case, the efficiency of this system is, indeed, questionable.

As a result, under this system inspired in the common law model, the parties will most likely have to support, not only the costs associated with the preparation of witness statements, but also those associated with the evidentiary hearing. Suddenly, arbitration becomes very expensive.

The current arbitral standard has, in addition, been confronted with a second major criticism, related to the preliminary note made above. In fact, in many instances, lawyers are the ones preparing and, inclusively, drafting the witness statements for their witnesses, with the witnesses then reviewing, revising and ultimately adhering to the statements prepared for them, thereby creating a legitimate distrust in the story told in said statements. Consequently, arbitrators, particularly those with a civil law background, may tend to give less weight to this means of proof. As referred in the UNCITRAL Notes on Organizing Arbitral Proceedings, «such practice, which implies interviewing the witness by the party presenting the testimony, is not known in all parts of the world and, moreover, that some practitioners disapprove of it on the ground that such contacts between the party and the witness may compromise the credibility of the testimony and are therefore improper»[37]. Parties must, thus, be aware that arbitral tribunals will not necessarily weight witness statements as they would if the direct testimony of the witness was presented orally.

Furthermore, this practice of having lawyers drafting witness statements can also cause inefficiency. As mentioned by some, «[a] written statement, prepared together with the lawyer, is not equivalent to direct oral testimony at the hearing and the written statement is often not that of the witness, but of his lawyer putting words in his mouth. The risk is that the written witness statement becomes an act of pleading»[38]. In fact, if witness statements are used by the parties as a cumulative form of pleading, this may be not only counterproductive, but also unnecessary.

37. UNCITRAL, *Notes on Organizing Arbitral Proceedings*, 2012, paragraph 61, p. 22, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-notes-e.pdf; see also Miranda, D., «A Produção da Prova Testemunhal na Arbitragem à Luz da Flexibilidade e da Previsibilidade na Prática Internacional», in *Revista Brasileira de Arbitragem*, vol. X, issue 38, 2013, pp. 30-45.
38. Hakan Ludvig Jarvin, S., Nguyen, C., «III.3.1 Witness Statements-Introductory Comments», in *Compendium of International Commercial Arbitration Forms: Letters, Procedural Instructions, Briefs and Other Documents*, Kluwer Law International, 2017, p. 371.

In light of the above-mentioned aspects, some authors refer that witness statements are, in principle, beneficial in complex cases with plenty of facts and documents[39]. In these cases, a preliminary document such as a statement written by the witness will be of great use, particularly for the tribunal, in structuring and organizing the relevant documents and facts for the hearing. Furthermore, it promotes efficiency, by clearly reducing the scope and length of oral examination. One should wonder, however, if we need witness statements to achieve that purpose. For instance, providing the tribunal with a list containing the identification of the witnesses and facts from the submissions on which the witness would be called to testify, would serve the same purpose just as well[40].

In contrast, in small cases, with very few witnesses, we may argue that this model is not suitable, since witness statements will, in general, not be of great use, particularly assuming that the parties will always request cross-examination.

In sum, the parties are called to weight the advantages of having witness statements followed by cross examination with the setbacks that this model necessary entails. There are always, however, other models to be considered.

This takes us to the next section.

2. WITNESS STATEMENTS, WITHOUT CROSS-EXAMINATION

Very different from the common law approach, there is the «French model»: «witness statements not followed by the cross-examination of the witness».

Contrary to the common law model, the French Civil Procedure Code establishes a system in which, in principle, witness evidence is not given much weight, there being a clear preference for documental proof. As explained by Elsing and Townsend, «[t]he common law tends to be sceptical that the sun has risen unless a witness can be found to testify under oath that he saw it do

39. See Cansado Carvalho, F., Carrera, I., «A prova testemunhal na arbitragem», *cit.* (fn 36).
40. See UNCITRAL, *Notes on Organizing Arbitral Proceedings..., cit.* (fn 37), para. 60, p. 21: «To the extent the applicable arbitration rules do not deal with the matter, the arbitral tribunal may wish to require that each party give advance notice to the arbitral tribunal and the other party or parties of any witness it intends to present. As to the content of the notice, the following is an example of what might be required, in addition to the names and addresses of the witnesses: (a) the subject upon which the witnesses will testify; (b) the language in which the witnesses will testify; and (c) the nature of the relationship with any of the parties, qualifications and experience of the witnesses if and to the extent these are relevant to the dispute or the testimony, and how the witnesses learned about the facts on which they will testify».

so. The civil law believes that the best evidence comes from documents»[41]. Thus, if witness testimonies are admitted, these will generally be provided in a written form, even though the oral form is also an option. The distrust in oral evidence is, however, a main characteristic of the French legal system, so that evidentiary hearings rarely take place[42].

The theory behind the French model seems to be, in line with the already mentioned critics, that witnesses' memory is defective, thus not deserving much attention from the court. One can state, therefore, that the rule, under French law, is no witness evidence in commercial disputes.

It may be, however, that the court determines the need for witness evidence in commercial cases. In that circumstance, witnesses will generally testify in writing. These statements will be produced in the course of the proceedings, similarly to any other supporting documents[43]. Pursuant to the French Civil Procedure Code, such witness statement «must state the surname, the first name, the date and place of birth, the domicile and the occupation of the affiant as well as, if necessary, his family relationship or affinity with the parties, his relation of subordination towards them, his relation of collaboration or his common interests with them» and «The affidavit must be written, dated and signed by the affiant in his own hand»[44].

From the quoted article, it seems that an important comparison can be drawn with the previous analysed model: while it seems generally accepted under the common law system that lawyers will have some degree of influence in the preparation and drafting of witness statements[45]. French law, however, clearly states that the witness must write the affidavit by him or herself[46]. This article of the French Civil Procedure Code, thus, reflects the aforementioned distrust that French practitioners seem to share in relation to witness evidence, that even when admitted, must be intensively restricted and regulated, so as to avoid memory misrepresentation and undue influences on the testimony.

41. Elsing, S., Townsend, J., «Bridging the Common Law-Civil Law Divide in Arbitration», in *Arbitration International*, vol. 18, issue 1, 2002, p. 62.
42. See Debevoise & Plimpton LLP, «10 things U.S. Litigators should know about court litigation in France», Debevoise & Plimpton, 2017, p. 28.
43. *Ibidem*.
44. French Code of Civil Procedure, art. 202.
45. See «Practice Direction 32-Evidence»..., *cit.* (ref. 28): «The affidavit must, if practicable, be in the deponent's own words»; See IBA Rules on Taking Evidence (2020), art. 4 (3), mainly inspired in common law solutions: «It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them».
46. See also French Code of Civil Procedure, art. 201: «The affidavits must be made by persons who meet the requirements to be heard as witnesses».

The fear of witness manipulation is also reflected in the powers conferred to the court. In fact, under French law, the court has the power to conduct the questioning of the witness, with no intervention from the lawyers[47]. Thus, if the Court determines the need for a hearing, the parties will have no right to cross-examine the witness, putting the court on the centre of the questioning. Hence, the court, under French law, is given the power to decide whether it deems relevant to hear a witness and, if so, it will be the court making the interrogatory. In theory, this model makes sense. If the judge is the one deciding, then it is only natural that it is the one examining the witnesses.

Would this be a good solution for arbitration?

Considering its advantages, this seems to be a faster method than the common law approach. Indeed, witness evidence will generally be submitted in writing beforehand, avoiding costs associated with hearings. And in contrary to common law systems, hearings do rarely occur. Additionally, due to the strict requirements concerning witness statements above-mentioned, lawyers will generally not be allowed to intervene in the preparation of witness statements, thereby also saving time and costs.

Additionally, in the event of a hearing, it will tend to be remarkably reduced. This is so because the tribunal will most likely conduct the inquiry in way of obtaining the answers exclusively on facts that were not fully clarified by the parties' submissions and in the documental evidence presented. In consequence, this model avoids lengthy interrogations by lawyers, who, not knowing what is in the arbitrators' minds, necessarily need to establish every point of their argument. Additionally, of course, the French model will save the time that counsels usually spend on direct and cross-examination preparation.

Nevertheless, this system may be considered by some, particularly those with a common law background, as having two drastic flaws.

The first one is that if witnesses are generally not heard, then their witness statements may not be, at all, contested. That is why cross-examination is so relevant. In fact, for a common law practitioner, the value of a witness statement will in most cases depend on the ability of the witness to maintain its version of the story «under fire»[48]. Hence, if the witness is not heard, their witness statement may be false or may misrepresent the truth, without being tested.

However, even if a hearing takes place, there is a second concern, which is the absence of a party's right to question an adverse witness. In fact, the ba-

47. French Code of Civil Procedure, art. 214.
48. See Tallerico, T., Behrendt, J. *op. cit.* (fn 15).

sic critic that can be addressed to this type of method is the lack of protection given to the adversarial principle, one of the most elementary guarantees of due process.

In this sense, one may infer that the tribunal's powers, if this solution was adopted in arbitration, would be too wide. If the central role is played by the arbitrators, who interrogate the witnesses mostly alone, the parties' right to establish their case will be disregarded. This is particularly so because the lawyer is generally better equipped to confront an adverse witness with the truth of the facts and to discredit it, whereas the arbitral tribunal, being generally limited to what has been articulated by the parties in their submissions, may not be aware of other facts which, during the hearing, could be relevant to question the witness about.

This issue is, however, supposedly resolved under French law, being established that «The judge, if he deems it proper, ask (on behalf of the parties) the questions that the parties have submitted to him after the examination of the witness»[49].

Transposing this to arbitration, it seems, therefore, that this may be a non-issue if one trusts that the arbitral tribunal will adopt a flexible approach on this regard. Thus, it can be stated that the application of this model to arbitration will depend on the parties' willingness to trust the tribunal, as it requires a higher degree of confidence that the tribunal will make the right questions and admit the relevant ones submitted by the parties[50].

In sum, even though the adversarial principle is, evidently, not as protected under the French model as it is under the common law model, the application of this system to arbitration would not necessarily undermine the parties' rights, since their questions, if relevant, may generally be admitted by the tribunal. Nonetheless, if the arbitral tribunal does not adopt a flexible approach on this question, it is arguable that this system may, in the name of efficiency, sacrifice the discovery of the material truth. It is, thus, for the parties to weight the benefits of this system, bearing this risk in mind.

In this view, it is arguable that the French system may be appropriate, for instance, in cases where the documentary evidence presented to the court is strong and witnesses are merely required to «colour the documents» or to

49. French Code of Civil Procedure, art. 214.
50. Global Arbitration Review, «You would be shocked»..., *cit.* (fn 1), Toby Laudau supporting that tribunals should have more power: «I play with the idea that parties should agree at the beginning of an arbitration to be battered by the tribunal. They should be able to sign up to say, "we agree that in the course of this process the tribunal will be entitled to cut us off if necessary, to ask pointed questions, to give us directions as to what we should be doing or not doing"».

locate the court in the time and space of its making. Witnesses will testify in writing and hearings will be avoided. It may not be so, however, if witness evidence is key in proving the rights of the parties.

In any case, there are still two other models worth pondering.

3. NO WITNESS STATEMENTS, NO CROSS-EXAMINATION

«No witness statements and no cross-examination» is, in general terms, the model followed in several countries of the civil law system, namely Germany and Switzerland.

Under this model, witness testimony is oral. Thus, as opposed to the French model, where witness evidence, if any, is generally provided in written, this «other» civil law system attaches great importance to orality. The two models converge, however, as regards the powers of the court to question the witness, as in both these models there is no cross –examination. The parties' right is generally reduced to merely asking questions after the judge's interrogation of the witness, and with previous permission of the court.

Thus, under German law, «[t]he presiding judge may permit the parties to directly address questions to the witness and is to grant this permission to their counsel upon the latter's request»[51]. Pursuant to Swiss law, «[t]he court shall question each witness individually with no other witnesses present; the foregoing is subject to the provisions on confrontation»[52], but «[t]he parties may request that additional questions be put to the witness, or, with the consent of the court, they may themselves ask such questions»[53].

Furthermore, under German law, the scope of the witness testimony will not be determined by a previous witness statement, but rather by a «list» with the names of the witnesses and the facts regarding which they are to be examined[54].

Is this a good solution for arbitration?

From the pure point of view of time and costs, this can be a good solution for the parties. In fact, this model was recently proposed by Risse, as one of «ten drastic proposals for saving time and cost in arbitral proceedings»[55]. In the author's view, the «gold standard» of international arbitration, consisting of the introduction of the witnesses to the tribunal through a witness's

51. German Code of Civil Procedure, art. 397 (2).
52. Swiss Code of Civil Procedure, art. 171 (2).
53. Swiss Code of Civil Procedure, art. 173.
54. See German Code of Civil Procedure, art. 373.
55. Risse, J., «Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings», in *Arbitration International*, vol. 29, issue 3, 2013, pp. 453-466.

statement, is not efficient. The later is based on three main reasons that have already been mentioned: first, for the time spent by lawyers in the preparation of the witness statements; second, because the witness will mostly ever be required to attend the hearing; third, because «it is relatively rare to read in arbitral awards that a certain testimony of a witness was crucial for the outcome of a case»[56]. Hence, by abolishing witness statements, this system promotes efficiency.

On the other hand, by replacing them with a «list» of names and facts concerning each witness deposition, one can justifiably defend that this system also reduces the time of hearings and allows the tribunal to prepare for what is coming. Indeed, if the tribunal is aware of the facts that a certain witness is called to testify about, the questions raised will necessarily be focused on said disputed facts, avoiding long interrogations. Moreover, as the scope of the testimony is, in principle, limited, surprises are likely to be scant.

Furthermore, by giving high value to orality, this model is usually the best way of safeguarding the spontaneity and truthfulness of the witness testimony. Thus, and even if preparing witnesses can be allowed in certain jurisdictions, lawyers will be unable to control the answers given by the witness, as opposed to common law systems, where witness statements give them such margin. This model can, thus, be the most favourable to the discovery of the truth. The judge is in direct contact with the production of the proof; in fact he is the one making the questions, thereby enabling him to ascertain the credibility, reliability and plausibility of the witness testimony.

There are, however, shortcomings in this system, which can, in part, also be noticed in the French model.

First, the concerns related to the protection given to the adversarial principle, already mentioned when analysing the French model, are also applicable to this model, and that is not totally unjustified. Indeed, even if the parties are allowed by the tribunal to question the witness, the number and scope of such questions will tend to be, by definition, very narrow. Otherwise, the rationale that largely justifies this whole model –saving time– no longer applies. Thus, if the parties decide to apply this system to their arbitration proceedings, they must be aware that they may be conditioning the discovery of the material truth in the name of the efficiency of the process. This does not have to happen, however. Nevertheless, it is certainly a factor to be considered.

In addition, it must not be forgotten that, as opposed to judicial proceedings, the parties are the ones *paying* the arbitrators. If arbitrators now had to assume further mandates, of such importance furthermore, arbitrations would

56. Risse, J., «Ten Drastic Proposals»..., *Ibid.*, p. 459.

likely become more expensive. Parties should, thus, reflect on whether they rather spend *more* on lawyers' fees and associated costs or whether, for the sake of speed, prefer to confer to the arbitrators the power of questioning witnesses.

Also, it is not certain that arbitrators, particularly with a common law background, would be comfortable with this solution. Indeed, empowering arbitrators with the task of questioning the witness, without supporting document containing the entire statement of the witness, requires arbitrators to play a decisive role in the testing of the facts. It is, therefore, a matter to be discussed with the chosen arbitrators, as they may feel reluctant to take over the questioning.

Finally, it is also arguable that the application of this system in arbitration would boost the number of challenges. If arbitrators assume the command over the interrogation of the witnesses, then the treatment given to each party's witnesses, for instance in terms of tone and friendliness, the content of questions posed, and the time taken with each witness could easily allow the losing party to raise doubts on the tribunal's impartiality. Very easily, indeed, a party would have grounds to argue that the tribunal was biased, having acted in disrespect for the parties' right to fair and equal treatment. Considering this, it is not clear whether arbitrators would be comfortable with this solution.

In sum, it can be argued that this model is suitable for cases where witness evidence is relevant, but the parties still want a speedy procedure. If the tribunal is the one conducting the interrogations and witness statements are not required, that is more likely to happen. Nonetheless, if the party's claim is based largely on testimonial evidence, to which the party attaches greater importance than time and cost, then this may not be the best method.

4. NO WITNESS STATEMENTS, ORAL DIRECT AND CROSS-EXAMINATION

Last, but not least, there is the current Portuguese model: «no witness statements and oral direct and cross-examination».

In line with the above-mentioned model, under Portuguese law, witness testimony is also, by definition, an oral act. However, the two models are distinct in what concerns the powers conferred to the court on the questioning of the witness. Indeed, pursuant to Portuguese Procedural Law and in contrast with the civil law models previously analysed, witnesses are directly interrogated, followed by potential requests for clarifications from the opposing counsel. In what concerns the limits of said clarifications, these must, in principle, be within the scope of the direct oral examination.

Hence, as opposed to what is known as the civil law system, in Portugal the parties have the right to examine their witnesses orally and directly and to cross examine the other parties' witnesses, even though the scope of the cross-examination is generally limited to mere clarifications. Consequently, courts are not, in general, active in the interrogatory of witnesses, even though it may request further clarifications from them. Furthermore, the court may also rule on impertinent, suggestive, tricky or vexatious questions posed by the lawyers[57].

The Portuguese rules on witness evidence are founded on the well-established principles of immediacy, orality and of concentration of evidence production in the final hearing. The idea supporting these principles is that the testimony of a witness encompasses not only verbal language, but also nonverbal language, thus having greater value if directly produced in front of the judge. The judge should, thus, be able to evaluate and assess the credibility of every piece of evidence that is presented to the court and, in what concerns, witness evidence, the only way of doing that is if the witness is questioned in front of the court's eyes. The Portuguese system is, hence, based on the idea that the greater the distance between the court and the evidence, the less value it brings to the case.

For that reason, witness statements are rare. Except for other two situations not relevant to the present discussion, witness statements are only admissible in case of impossibility or serious difficulty in attending court, with the agreement of the parties and need authorization of the court. The requirements are, thus, strict, as oral witness statements are preferred.

In face of this, the Portuguese model is similar to the common law system in what concerns the parties' ability to question the witnesses and having, in that regard, a higher degree of power over witness evidence production; but, in contrast, Portuguese law does not recognise the benefits of witness statements, preferring evidence that is produced in front of the judge, thus being more closely to the German and Swiss systems in that regard.

Consequently, the Portuguese system conjugates the advantages of each of these systems: no time is wasted in preparing witness statements; the adversarial principle is protected; and the spontaneity of the witness testimony is secured.

Nonetheless, at the same time, this model also combines the disadvantages of the models it is influenced on, in particular in terms of cost and time inefficiency, since all witness evidence is generally in an oral form. Hearings will, thus, represent a central stage of the proceedings.

57. Portuguese Code of Civil Procedure, art. 516.

Not everything is lost, however. In fact, the Portuguese system can be beneficial in disputes where there are few documents and the parties' case rests heavily on witness evidence. In those cases, hearings would always be needed, as the parties are likely to want their witnesses heard by the tribunal. Furthermore, witness statements would probably be, in those circumstances, a pure waste of time, as their main advantage concerning the organization of the documents will not be useful. Finally, if the parties are extremely dependent on witness evidence for the success of their arguments, this system allows them to conduct the inquiry of the witnesses, ask the questions they deem relevant and obtain at least some of the answers they need. All of this in front of the tribunal, which will settle the matter in the end.

It is arguable, however, that the Portuguese model is not the best model for handling witness evidence in complex cases, as it necessarily entails lengthy hearings and questioning of witnesses.

Bearing that in mind, the already mentioned Draft Law has proposed a more flexible approach to written witness statements, deemed as a solution to reduce the length of the proceedings. Under the proposal, witness statements are admissible when there is the agreement of the parties or when the witness has knowledge of the facts as a result of the exercise of his functions. The court and the parties reserve, however, their right to ask for the renewal of the testimony in a hearing[58].

This new system, if adopted, will approximate the Portuguese model to the standard arbitral practice. Will this be a good solution? Again, *it depends*.

V. CONCLUSIONS

The current common practice of parties producing witness statements in arbitration has, with no doubt, several advantages. In some cases, it can be a way to save time, by avoiding the need for a hearing, and in some cases, it has the benefit of giving the opportunity to the court and the opposing party to access the breath of direct knowledge possessed by the witness, if such a hearing is to be held. In such cases, the length of the hearings will tend to be shorter, as direct oral examination is avoided and the scope of cross-examination may be limited to the four corners of the witness statements already on record. In certain arbitrations proceedings, however, this may not be the most suitable model of producing witness evidence and the parties should always ponder other methods.

58. Draft Law 92/XIV/2 entered into Parliament on 10 May 2021, available at www.parlamento.pt.

On the one hand, the Parties should reflect on the weight they want to give to witness evidence. If their case is strongly supported by documents, and if witness evidence is merely required to storytelling or to colour said documents, then maybe, following the French approach and solely having witness statements could be a good option.

On the other hand, however, considering that witness evidence is relevant for the success of the parties' case, but time and cost are also crucial factors to be ensured, following the German and Swiss approach may be a suitable option. No time would be lost in witness statements, and arbitral tribunals would conduct witness examination, while the parties would subsequently be able to present its questions. Thus, if the parties trust that arbitral tribunals will, in advance of the hearing, read the dossiers and get to know the case in detail, then giving the power to question witnesses to the arbitrators, may also be a way of avoiding the lengthy interrogatories typically made by lawyers.

Nevertheless, there is still a fourth option. If the parties deem it essential due to the specific facts of the case, to have its lawyers examining the witnesses, then maybe the Portuguese model may be the appropriate choice. Indeed, no time will be lost in preparing witness statements, and the parties will maintain the possibility to present their evidence in front of the tribunal and question any adverse witness evidence that is submitted by the opposing counsel.

There are several options, but their suitability will depend on the arbitral dispute at stake. It is, therefore, on the parties will, in accordance with their best interest, to tailor the procedure in order to best solve their dispute, even if this means departing from standardised procedural practice in international arbitration.