CHAPTER 13

Witness Examination in International Arbitration – Best Practices Regarding Cross-Examination and Related Issues

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A main feature of international arbitration is the arbitral tribunal's discretion to decide on most procedural issues that may arise during the proceedings. When deciding on such procedural issues, the arbitral tribunal usually turns to what constitutes best practice. However, what constitutes best practice is not always entirely clear, and it is therefore of interest to examine it so as to provide some degree of clarity. In this chapter, best practice is examined and evaluated in relation to what is often the main event of an oral hearing – witness examination.

The following issues are discussed: (i) whether an arbitral tribunal should allow and/or mandate written witness statements, (ii) the evidentiary weight of written witness statements when the witness does not attend the oral hearing, (iii) how direct examination ought to be conducted when written witness statements have been used, (iv) admissibility of questions during cross-examination, (v) whether to allow new evidence during cross-examination to prove a witness is lying, (vi) how digital hearings affect cross-examination, and (vii) issues of witness sequestration, including how digital hearings affect the possibility for sequestration.

§13.01 INTRODUCTION

In international arbitration, parties normally only agree on a broad procedural framework. In the absence of a detailed and uniform procedural framework, many aspects of the arbitral process will be subject to the discretion of the arbitral tribunal. In an international setting, deciding on procedural issues can be a challenging task. The arbitral tribunal is often faced with having to reconcile differing cultural backgrounds and approaches to procedural issues in a manner that is considered reasonable by both parties, and concurrently conforms to best international practice.

This becomes particularly clear in relation to witness examination. Different legal systems take (sometimes considerably) different approaches when dealing with witnesses as evidence. Consequently, parties from different legal backgrounds will have differing attitudes towards witness examination. For example, lawyers from common law backgrounds will generally underline the importance of cross-examination, whereas lawyers from civil law backgrounds often take a more sceptical attitude towards it.[1] As witness hearings often constitute the main events in a hearing, it is of interest to examine best practice in this area. Best practice ought to reconcile the different attitudes towards witness examination. As witness examinations generally are costly and time-consuming events, best practice ought to balance the interest in conducting an efficient arbitration against the parties' right to present their cases.

In this chapter, we examine best practice in international arbitration for some common procedural issues related to witness examination. Initially, the concept 'best practice' is discussed in brief (§13.02), before going into specific issues. The rest of the chapter deals with issues related to witness statements (§13.03), direct examination (§13.04), cross-examination (§13.05), and witness sequestration (§13.06). The chapter ends with some concluding remarks (§13.07).

§13.02 SOME REMARKS ABOUT THE CONCEPT 'BEST PRACTICE'

Before we look at what solutions to common procedural issues are, or ought to be considered, best practice, a few words should be said about the concept 'best practice'. In our opinion, best practice can be described as: an existing practice that arbitrators and arbitration litigators as a collective consider most prudent. However, it is much more difficult to say exactly what practices the collective agrees upon. As practitioners come from different legal backgrounds around the world, many different opinions are expressed. However, the trend in international arbitration has been towards developing an international set of standards that try to bridge the gap between different legal cultures.[2] Therefore, in the authors' opinion, it is possible to 'nail down' what constitutes best practice in specific situations, with at least a certain degree of precision.

For the purposes of this chapter, we have used the following definition of what constitutes best practice as a working method. We suggest that 'best practice' is comprised of two components:

(i) Common practice, i.e., prevailing solutions that most arbitral tribunals will apply to certain problems.
(ii) Rationality, i.e., the solution that is purported to be best practice must have a rational justification.

1. Gary B. Born, *International Commercial Arbitration* (3d ed., Kluwer Law International 2021), 2453-2454.
2. *See* Klaus Peter Berger, *Common Law vs. Civil Law in International Arbitration: The Beginning or the End?*, Journal of International Arbitration, Volume 36, Issue 3, 295, 295-298 (2019).

It can be argued that common practice tends to be rational as the practice became common due to the rationality generally convincing arbitrators to apply the solution. However, it is important to not simply accept *common* practice as *best* practice, as alternative solutions may be more rational.

It is of course not always simple to ascertain what is the prevailing practice. Rationality may also prove a problem as it is seldom the case that one alternative solution to a procedural issue is obviously the most rational one. Therefore, what constitutes best practice must be evaluated on an ongoing basis, both in terms of what is common practice, and in terms of the rationality of the common practice. In a sense, best practice will evolve over time.

That being said, for issues on evidence, the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration have a widespread acceptance and can thus be taken to be an expression of what constitutes best practice.[3] We frequently cite these rules in this chapter. However, so as to meet the requirements of our definition, we will also assess the rules to determine their rationality.

§13.03 WRITTEN WITNESS STATEMENTS

[A] Allowing Written Witness Statements

When relying on evidence from a fact witness, it is common practice in international arbitration to present witness testimony in the form of a written witness statement.[4] The witness statement often replaces the direct oral examination. According to the IBA Rules on the Taking of Evidence, the statement should contain:

> [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.[5]

The witness statement is provided in advance of the oral hearing to both the arbitral tribunal and the other party.[6] Notwithstanding the common use of written witness statements, a party may oppose the use of witness statements, and request to hear the witnesses orally. There may be several reasons for such a request. The party may be principally opposed to witness statements, as they deprive witnesses of their

3. Berger, *supra* n. 2, at 302-303. It is stated in the Foreword to the IBA Rules on the Taking of Evidence in International Arbitration 2020: 'Since their issuance in 1999, the IBA Rules on the Taking of Evidence in International Commercial Arbitration have gained wide acceptance within the international arbitral community.'
4. Born, *supra* n. 1, at 2423-2424; Blackaby Nigel, Constantine Partasides, Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration* (6th ed., Oxford University Press 2015), 390; Roman Mikhailovich Khodykin, Carol Mulcahy, Nicholas Hugo & Martin Fletcher, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration* (Oxford University Press 2019), 7.60.
5. Article 4.5(b).
6. Born, *supra* n. 1, at 2423.

'day in court'.[7] Alternatively, the party may consider that an oral testimony may be advantageous for strategic reasons. Perhaps the party's witnesses are skilled orators, whereas the other party's witnesses are assumed to be less well spoken.

If the parties are not in agreement as to the use of witness statements, the arbitral tribunal must decide whether they should be allowed. It is the authors' opinion that best practice in international cases is that the tribunal should allow witness statements.[8] As mentioned above, the use of witness statements is widespread in international arbitration.[9] In the authors' view, the predominant use of witness statements is prompted by the fact that witness statements provide *greater efficiency* and contribute to a *fair process*.

With regard to efficiency, witness statements drastically shorten the direct examination, as the witness generally only needs to confirm that the facts provided in the written statement are correct.[10]

Witness statements also contribute to a fair process as they often provide parties with detailed information about the other side's evidence.[11] Due to the use of witness statements, the parties can better prepare their counterarguments and decide how the witness should best be examined.[12] This is of course much more difficult without witness statements.[13] Another benefit of each party being provided with information about the other party's evidence in advance is that the parties' presentations of their respective cases generally become more succinct, which also furthers efficiency.[14]

Witness statements have been criticized for being an inferior alternative to hearing the witness' factual observations orally. As the party's counsel often assists in drafting the statement, questions might be raised about how genuine the witness statement is.[15] While this is a legitimate concern, it should be noted that the criticism is just as applicable to an oral examination of a witness who has been prepared by counsel.[16] We consider that the above-mentioned benefits of witness statements

7. Cf. Born, *supra* n. 1, at 2425.
8. This view is supported by Born, *see* Born *supra* n. 1, at 2425, and Lindskog, *see* Stefan Lindskog, *Skiljeförfarande: en kommentar* (3rd ed., Norstedts Juridik 2020), 732-733. Lindskog notes that, in international arbitral proceedings, the arbitral tribunal as a rule should allow witness statements, even if one of the parties protests.
9. Born, *supra* n. 1, at 2423-2424. Blackaby, et al., *supra* n. 4 at 390. Both the IBA Rules on the Taking of Evidence and the Prague Rules have provisions on witness statements, *see* Articles 4.4-5 and 5.3-8, respectively.
10. Born, *supra* n. 1, at 2425. Article 8.5 of the IBA Rules on the Taking of Evidence provides that the witness statement can serve as the witness' direct testimony. *See also* the Commentary on the 2020 IBA Rules on the Taking of Evidence, at 18.
11. Cf. the Preamble to the IBA Rules on the Taking of Evidence, paras 1 and 3.
12. *See* the Commentary on the 2020 IBA Rules on the Taking of Evidence, at 18.
13. Khodykin et al., *supra* n. 4, at 7.64.
14. In the Commentary on the 2020 IBA Rules on the Taking of Evidence, at 18 it is noted that the written statements also benefit the tribunal, as it is 'in a better position to appreciate the testimony and put its own questions to the witness'.
15. Born, *supra* n. 1, at 2425. As Khodykin et al. notes, some critics make the point that witness statements are simply a vehicle for the counsel to make further submissions, *see* Khodykin et al., *supra* n. 4, at 7.67.
16. Born, *supra* n. 1, at 2425. However, Blackaby, et al. note that experienced arbitrators may see through overly prepared witnesses, *see* Blackaby, et al., *supra* n. 4 at 392. Therefore, oral examination might be a better alternative if one only considers the issue of genuineness.

outweigh the drawbacks. We also note that the fact that the other party has access to the witness statement prior to the hearing means that the party can better prepare a cross-examination by which potential issues of genuineness can be brought to light.

[B] Mandating Written Witness Statements

If one party opposes written witness statements, an arbitral tribunal should, in general, nevertheless allow witness statements. It has been suggested that, even though it is best practice for the arbitral tribunal to *allow* witness statements, the arbitral tribunal should not, in general, *mandate* that a party who opposes witness statements must hand in a witness statement for a witness to be heard during the oral hearing.[17] We submit that this cannot be considered best practice. Instead, the arbitral tribunal should in general mandate that a witness statement must be submitted for a witness to be heard. Otherwise, the above-mentioned benefits of witness statements would be undercut. A party will likely not hand in a witness statement if it knows that the counterparty will refrain from doing likewise, as this would provide the counterparty the opportunity to better prepare its cross-examination.[18] Thus, by only allowing, and not mandating, witness statements, the proceedings would in most cases be conducted without witness statements.

It is therefore not surprising that Article 4.4 of the IBA Rules on the Taking of Evidence expressly grants the tribunal the right to order the submission of witness statements:

> The Arbitral Tribunal may order each Party to submit […] to the Arbitral Tribunal and to the other Parties Witness Statements by each witness on whose testimony it intends to rely.[19]

That being said, there is always room for nuance when an issue is decided in the tribunal's discretion. The wishes of the parties and the specific circumstances of the case can make mandating witness statements unsuitable.[20]

[C] Evidentiary Weight of a Written Witness Statement Without a Testimony

A question which arises when using written witness statements in an arbitration is what evidentiary weight should be placed on the witness statement if the witness does

17. Lindskog, *supra* n. 8, at 733, footnote 2891 ('[d]äremot bör i regel inte skiljenämnden mot en parts bestridande bifalla den andres begäran om att förhören skall föregås av vittnesattester. Det måste således stå en part fritt att avstå från att ge in vittnesattester').
18. It could be argued that the submitting party's rights to know in advance what evidence the other party relies on is sufficiently ensured by the arbitral tribunal requiring the parties to identify their witnesses and the subject matter of their testimony, cf. Article 4.1 in the IBA Rules on the Taking of Evidence. There is, however, a considerable difference between knowing the subject matter of a testimony and knowing exactly what the testimony consists of.
19. *See also* Article 5.5 of the Prague Rules.
20. *See* the Commentary on the 2020 IBA Rules on the Taking of Evidence, at 18.

not appear at the hearing. The problem touches on an important aspect of arbitration, namely the other party's right to cross-examine the witness. The value of cross-examination can be debated.[21] Without going further into this discussion, we merely note that cross-examination is common practice in arbitration. There is also a case to be made that, if a party is allowed to submit a witness statement, the other party ought to be allowed to question this evidence.[22] Cross-examination is generally a useful tool for this.

When a witness refuses to appear at the hearing, the other party is denied the opportunity to cross-examine that witness.[23] Thus, to ensure the party's right to present its case, the witness statement's evidentiary weight ought to be affected. Article 4.7 of the IBA Rules on the Taking of Evidence provides as follows:

> If a witness whose appearance has been requested pursuant to Article 8.1 fails without a *valid reason* to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by that witness unless, in *exceptional circumstances*, the Arbitral Tribunal decides otherwise (emphasis added).

For the arbitral tribunal to attach evidentiary weight to the witness statement, either the witness must have provided a valid excuse or exceptional circumstances must exist. This rule reflects common practice.[24] The inclusion of exceptions to the rule that a witness statement without a witness to back it up at the hearing is prudent. The party who has submitted the witness statement has a right to present its case and the reasons for the witness not showing up may be outside of the party's control.[25] However, the exceptions should be interpreted restrictively.

A *valid reason* for not attending the hearing could be some kind of considerable hindrance to attend the hearing. Examples include serious illness and having to undergo a medical procedure with a certain degree of urgency. The excuse ought to be substantiated by some kind of documentation, such as a doctor's note.[26] The death of the witness is of course also a valid excuse.[27] When considering whether the witness' excuse constitutes a valid reason, the arbitral tribunal ought to consider the possibilities of conducting the examination via videoconference.[28] This will exclude many excuses that would previously have been valid, such as being hindered from attending physically by travel restrictions.[29]

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21. *See* Khodykin et al., *supra* n. 4, at 7.140-7.145 for an overview of the debate.
22. Khodykin et al., *supra* n. 4, at 7.144.
23. Note that the other party may not have called the witness for cross-examination. In such cases, the party's rights are not infringed by the witness not showing up, cf. Article 4.8 of the IBA Rules on the Taking of Evidence.
24. Born, *supra* n. 1, at 2456.
25. Cf. Khodykin et al., *supra* n. 4, at 7.158.
26. Khodykin et al., *supra* n. 4, at 7.148.
27. Anne-Véronique Schlaepfer, 'Chapter 4. Witness Statements', in Laurent Lévy and V.V. Veeder (eds), *Arbitration and Oral Evidence, Dossiers of the ICC Institute of World Business Law, Volume 2* (Kluwer Law International 2004), 70.
28. Born, *supra* n. 1, at 2456.
29. Note that if the parties are opposed to videoconferencing, or the arbitral tribunal has mandated against it, not being able to attend physically will generally be a valid excuse.

As some authors have observed, it is difficult to imagine what could constitute *exceptional circumstances*, but not a valid reason.[30] There may be some situations where a reason provided is not sufficient to be considered valid, but the specific circumstances of the case justify attaching at least some evidentiary weight to the witness statement.

Even if the witness statement is accepted in accordance with Article 4.7, questions might be raised as to its evidentiary weight. The fact remains that the witness has not been cross-examined and the witness statement's evidentiary weight should be diminished accordingly.[31]

§13.04 DIRECT EXAMINATION

During an oral hearing, fact witnesses are usually initially examined by the party who presented the witness. This examination is referred to as the direct examination. As mentioned in §13.03[A] above, the direct examination is often rendered redundant in international cases by the use of witness statements. Instead, the examining party simply asks the witness some initial questions such as his or her name, followed by the witness confirming the witness statement.[32] Though this procedure is efficient, it is conceivable that a party may still want to conduct a full-length direct examination.

By way of example, take the above-mentioned party who was opposed to the use of written witness statements. Dissatisfied with the arbitral tribunal's decision to order written witness statements, the party nevertheless submits them. At the hearing, the party insists on conducting a complete direct examination. An alternative scenario is that the party provides a witness statement which only includes the broad strokes of the witness' testimony. The party intends for the witness to elaborate on the witness statement in further detail during the direct examination, thus in practice accomplishing the party's goal of conducting a complete direct examination. Should the arbitral tribunal allow such procedural manoeuvres?

Article 8.5 of the IBA Rules on the Taking of Evidence provides that:

> [T]he Arbitral Tribunal may order that the Witness Statement or Expert Report shall serve as that witness's direct testimony, in which event the Arbitral Tribunal may nevertheless permit further oral direct testimony.

In our opinion, best practice is that the arbitral tribunal should, in general, order that the witness statement is to replace a full-length direct testimony. One of the main reasons for using witness statements is that they eliminate the need for direct examinations, which generally shortens the duration of the hearing. It is also common

30. Khodykin et al., *supra* n. 4, at 7.151.
31. Cf. Schlaepfer, *supra* n. 27, at 72-73 where the author presents a sceptical view to witness statements' evidentiary weight in general.
32. Cf. Article 8.5 in the IBA Rules on the Taking of Evidence.

practice in international arbitrations for witness statements to replace direct examinations.[33]

That being said, the parties ought to be provided with an opportunity to conduct a brief direct examination, as long as the questions are limited to the contents of the witness statement. The benefit of such an examination is that it provides the arbitral tribunal with a better idea of the witness' character. As the cross-examining party will often attempt to tarnish the witness' credibility, it would be unfair if the other party could not present the witness in a better light during direct examination.[34] A brief direct examination provides the arbitral tribunal with a 'baseline' from which to evaluate the evidentiary weight of the witness' testimony.[35] For this purpose, we suggest that as a rule of thumb, it is enough for such an examination to be limited to ten to twenty minutes. In our opinion, this balances the interest of efficiency against the parties' right to present their case.

Apart from the above-mentioned brief direct examination, there are situations where further oral direct testimony might be necessary. In certain cases, the unfolding of events between the submission of the witness statement and the oral hearing may justify further testimony from the witness.[36] It is mainly for these situations that the stipulation that 'the Arbitral Tribunal may nevertheless permit further oral direct testimony' is provided in Article 8.5 the IBA Rules.[37] Such testimony will likely be outside of the scope of the witness statement. It is therefore important that the arbitral tribunal is restrictive in allowing such further testimony and provides the other party with an opportunity to respond to the new facts. Otherwise, the further testimony will have the effect of an 'ambush' testimony, potentially limiting the other party's right to present their case. We suggest that the contents of the witness statement ought to be the basis for deciding what further testimony is to be allowed.

It may also be necessary for the examining party to ask questions to clarify certain issues in the witness statement and correct any inaccuracies. Such questions should be allowed, but once again the arbitral tribunal ought to be careful to make sure that the questions confine themselves to the contents of the witness statement.[38] It should also be noted that such questions can often be conducted in the ten to twenty minutes that we suggest for the brief direct examination.

If we return to the party who has submitted a written witness statement that is lacking in detail, it is clear that this strategy entails considerable risk. The witness statement is the basis for which questions should, in general, be allowed. If the witness statement is lacking in detail, this will generally limit the examining party's range of available questions. Furthermore, there is a difference between simply clarifying certain issues in the witness statement (which is generally allowed) and filling gaps

33. *See* Born, *supra* n. 1, at 2458 and the Commentary on the 2020 IBA Rules on the Taking of Evidence, at 27.
34. Cf. Khodykin et al., *supra* n. 4, at 7.67.
35. Cf. Schlaepfer, *supra* n. 27, at 72-73 where the author notes a scepticism among arbitral tribunals towards witness statements that have not been tested orally.
36. Born, *supra* n. 1, at 2458.
37. *See* the Commentary on the 2020 IBA Rules on the Taking of Evidence, at 27.
38. *See* Schlaepfer, *supra* n. 27, at 72. *See also* Khodykin et al., *supra* n. 4, at 11.58.

(which the arbitral tribunal will be restrictive in permitting). We therefore recommend that parties refrain from attempting to circumvent the arbitral tribunal's order to submit witness statements in this manner.

Born has argued that, in principle, a party who wishes to conduct a full-length direct examination on facts already presented in the witness statement should be allowed to do so.[39] The examining party may consider that the witness' testimony is best presented orally.[40] Born notes that such examination must be limited to the facts in the witness statement *and be conducted in the party's allotted hearing time*.[41] Nevertheless, we submit that the arbitral tribunal ought to be restrictive in allowing lengthy direct examinations. There is generally little point in allowing a witness to repeat the contents of the witness statement.[42] The party who wishes to conduct a detailed direct examination should be required to present compelling arguments for why the particular evidence is best presented orally, regardless of the witness statement and the already provided brief direct examination. If lengthy direct examination is allowed, it should be conducted within the allotted hearing time.[43]

§13.05 CROSS-EXAMINATION

[A] Admissible Questions During Cross-Examination

Due to the predominance of written witness statements replacing direct examination, the cross-examination is often the main event in a witness examination. As discussed above, best practice is that the witness statement limits or replaces the direct examination. A further question is whether the witness statement also limits the cross-examination.

Practice regarding this question is varied. One view is that the cross-examination should be strictly limited to the contents of the witness statement (*the restrictive view*). The other is that the examining party should be allowed to ask questions outside the scope of the statement (*the generous view*).[44] Born considers that the generous view is more common.[45] The issue is, of course, not binary, and arbitral tribunals will in varying degrees be restrictive or generous. We examine the merits of the respective views below.

Before doing so, we wish to underline the fact that the primary purpose of cross-examination is to weaken the other side's case. This is often achieved by calling

39. Born, *supra* n. 1, at 2458.
40. Cf. Khodykin et al., *supra* n. 4, at 11.60-11.61.
41. Born, *supra* n. 1, at 2458. *See also* Khodykin et al., *supra* n. 4, at 11.64.
42. Cf. Article 8.3 of the 2020 IBA Rules on the Taking of Evidence which empowers the arbitral tribunal to exclude questions that are duplicative. *See also* Schlaepfer, *supra* n. 27, at 72.
43. Considering the 'chess clock' principle, a party who wants to conduct a lengthy direct examination must carefully weigh the benefit of orally presenting the evidence against the loss of valuable hearing time.
44. Khodykin et al., *supra* n. 4, at 11.65-11.66.
45. Born, *supra* n. 1, at 2458.

the witness' credibility into question.[46] When discussing what questions an arbitral tribunal ought to accept from the cross-examiner, it is important to keep this fact in mind.

The main benefit of the restrictive view is efficiency. First, it can be argued that, by reducing the range of questions the cross-examiner can ask, the cross-examination will, in general, be shorter. This is true to a certain extent, but if the witness statement is a formidable document, the cross-examiner will likely have little problem asking a large array of questions. Second, the restrictive view makes it easier for parties to plan their case. Knowing that the cross-examiner will be limited to the contents of the witness statement provides foreseeability, which enables the other party to more efficiently plan its rebuttal. Another benefit of the restrictive rule is that it ensures that the parties are not ambushed with new evidence from the examining party.[47]

The main drawback of the restrictive view is that it leaves the cross-examining party's opportunity to undermine the other party's case at the mercy of the other party. For example, the other party can present a witness statement which only contains matters of secondary relevance to the case.[48] The cross-examining party would then be hindered from asking questions about the main issues of the case, limiting its 'access to truth'. However, this issue should not be exaggerated. Generally, a party will not refrain from including matters of primary relevance to the case if its case relies, in whole or in part, on the evidence provided by the witness. Also, if the cross-examining party believes that the witness in question has information of primary relevance to the party's case, it can also call the witness for examination on the relevant issues.

The benefits and drawbacks of the generous view are inverse to the benefits and drawbacks described above. In short, it provides the cross-examining party with a greater opportunity to undermine the other party's case, but at the cost of efficiency. It also entails a larger risk of the cross-examining party ambushing the other party.

We submit that best practice ought to be slightly more generous than the restrictive view. In general, the questions asked should be limited to the contents of the witness statement. However, in addition to this, we suggest that questions can also be asked on submitted documents and oral evidence from other witnesses. Such a rule lessens the above-mentioned risk of the other party limiting the cross-examining party by providing a limited witness statement. We believe that such a rule provides the cross-examining party with a sufficient degree of flexibility to enable it to successfully weaken the other side's case. At the same time, limiting the questions to the evidence that is already a part of the proceeding promotes efficiency and lessens the risk of ambushing the other party.

A related issue is how the arbitral tribunal should deal with an objection that a question is irrelevant. There are different methods for the arbitral tribunal to determine whether a question is irrelevant. In some cases, the question might be so obviously

46. Kaj Hobér, *International Commercial Arbitration in Sweden* (Oxford University Press 2011), 232. *See also* Kaj Hobér & Howard S. Sussman, *Cross-Examination in International Arbitration: Nine Basic Principles* (Oxford University Press 2014), 32.
47. Cf. the Preamble to the IBA Rules on the Taking of Evidence, para. 3.
48. Schlaepfer, *supra* n. 27, at 72.

irrelevant that the arbitral tribunal could accept the party's objection immediately. Otherwise, the arbitral tribunal could hear the parties' views on why they consider the answer to the question to be relevant/irrelevant.

An alternative is for the arbitral tribunal to accept the examining party's argument that the relevance of the answer will become clear by subsequent evidence. If the answer proves to be irrelevant, the arbitral tribunal can simply disregard the witness' answer.[49] This method is advantageous when the relevance of the answer is complicated. However, a legitimate objection is that the arbitral tribunal may be psychologically prejudiced by the irrelevant answer, regardless of it formally disregarding the evidence.[50] We therefore recommend that arbitral tribunals generally refrain from using this method.

[B] Providing New Evidence to Prove a Lie

It is common for the arbitral tribunal to provide a cut-off date, i.e., a deadline for presenting documents and other evidence to the tribunal. In general, this prevents parties from presenting evidence at a late stage in the proceedings, such as during the oral hearing. The purpose of a cut-off date is to ensure that each party can effectively argue its respective case, having been presented with all of the evidence the other party relies on. Cut-off dates also ensure efficient proceedings, as new evidence during the hearing can lead to delays since the other party must generally be allowed the time to consider the new evidence.

Cut-off dates raise a certain question for cross-examination, namely whether a party can present documents that have not been previously submitted during cross-examination to prove a point. The most common example is where the examining party presents the document to catch the witness in a lie. By way of illustration, take the following example.

During document production, a party has come across an e-mail sent by Witness X in which the witness admits that Company X's product was faulty. Witness X is supposed to be heard by the other party on the quality of Company X's products. The party can use the documents in two possible ways: either submit the document to the arbitral tribunal before the hearing or wait until asking Witness X during the cross-examination whether he or she considers Company X's products to be without fault. In the example, the arbitral tribunal has provided a cut-off date before the hearing.

Of course, the value of presenting the document at the hearing varies from case to case, but there are two main benefits. First, by catching the witness in a lie, the witness' credibility is likely to be tarnished in the eyes of the arbitral tribunal. Second,

49. Cf. Judge Coleridge's opinion in *Haigh v. Belcher* (1836) 7 Carrington and Payne 389, 173 ER 173.
50. Cf. Lindskog, *supra* n. 8, at 729.

the examining party catches the other party off guard, instead of providing them with an opportunity to address the evidence in their written submissions.[51]

Whether to allow the new evidence is within the discretion of the arbitral tribunal.[52] There is disagreement as to what constitutes best practice in this regard.[53] We suggest that whether or not witness statements have been submitted in the proceedings is a deciding factor. If witness statements are used, the parties have little excuse not to submit documents that prove that something in the witness statement is a lie before the cut-off date. Allowing such documents to be produced during the hearing without having been first submitted would undermine the above-mentioned purpose of a cut-off date. Although there is a dramatic effect to producing the document during the cross-examination, the witness' credibility can just as easily be tarnished by submitting the document before the cut-off and pointing out that the witness statement is not to be relied upon.

However, the party may present a document to prove a lie after the cut-off date if it has a valid excuse for not submitting it earlier. For example, a valid excuse could be that the witness has testified to something during the hearing that was not included in the witness statement (assuming such evidence is admissible). In these cases, the cross-examining party ought to be allowed to present a document proving that the witness is lying.

It can be argued that such an excuse is invalid, as a party who catches a witness in a lie by producing a document on the spot obviously anticipated that the witness might lie. This may be true. However, it is important to distinguish between the knowledge that people sometimes lie (even when in court) and the legal assumption that people tell the truth during legal proceedings.[54] Parties to an arbitration must be allowed to conduct their case on the basis of this legal assumption. Otherwise, it may be rightfully questioned whether the practice of witnesses affirming that they will tell the truth is simply procedural window dressing.

If witness statements are not used in the proceedings, arbitral tribunals ought to be more generous in allowing documents to be produced during cross-examination. This is because the parties in this situation have considerably less knowledge about the contents of the witness' testimony.

Regardless of whether witness statements are used or not, there are limitations as to what evidence can be submitted to prove that the witness is lying. By providing a new document after the cut-off date, the party is in effect ambushing the other party with evidence that it has not had time to prepare for. Born suggests that evidence must

51. Although not uncommon, the possibility of catching a witness in a lie should not be exaggerated. Due to document production and witness prep, the witness is often aware of inconsistencies in their testimony before the oral hearing and has been prepared for possible ambushes. Cf. Hobér & Sussman, *supra* n. 46, at 31.
52. *See, e.g.*, Article 9.1 of the 2020 IBA Rules on the Taking of Evidence and the Commentary on the 2020 IBA Rules on the Taking of Evidence, at 28.
53. *See* Born, *supra* n. 1, at 2428 and Hobér, *supra* n. 46, at 233-234.
54. Cf. Article 8.5 of the 2020 IBA Rules on the Taking of Evidence, which provide that the witness should affirm that he or she commits to tell the truth.

comprise 'documents which are genuinely relevant for purposes of impeachment'.[55] The arbitral tribunal ought to be restrictive in allowing a document which contains other information not directly relevant to this purpose. Furthermore, even when allowing the evidence, the arbitral tribunal ought to provide the other party with a reasonable opportunity to examine the evidence and provide a response.

[C] Issues of Digitalization in Relation to Cross-Examination

A problem that arises from digital hearings is the possibility of a party coaching the witness during cross-examination. The party can be present in the same room as the witness and covertly provide notes to them in response to questions from the cross-examiner. If the party has no scruples when it comes to underhand tactics, the witness can also feign 'technical difficulties' to buy time in which to prepare an answer to a particularly difficult question. This issue is virtually non-existent in a live hearing as it would be blatantly obvious if opposing counsel attempted to assist the witness.[56]

A simple technical solution is to require opposing counsel to be visible during cross-examination in their own 'window' of the videoconferencing tool used. We cannot see any valid objections to the arbitral tribunal mandating this. It is natural that a digital hearing should use the technological solutions available to make sure that the hearing maintains the same integrity as a live one. We submit that this ought to be considered best practice.

The main drawback of the solution is that it does not fully ensure that the witness is not influenced by the other party. Counsel could potentially arrange for a colleague to sit with the witness *incognito* and provide coaching. It is impossible for the arbitral tribunal to control exactly who is working on the case in the counsel's organization. An alternative is to mandate that an independent observer should be present with the witness during their testimony. This solution ensures that the witness is not influenced. It is, however, an impractical solution, encumbering the hearing with extra logistics.[57]

We therefore submit that, although an independent observer solves the issue entirely, it cannot be considered best practice. However, the parties are of course free to agree on the use of independent observers.

55. Born, *supra* n. 1, at 2428.
56. However, there is the possibility of discussing the case with the witness during breaks. *See* §13.06 below regarding witness sequestration.
57. For the purpose of increasing cost-efficiency while still ensuring procedural integrity, another solution is to set up two cameras: one showing the witness, and the other showing the hearing room from the side. This enables the arbitral tribunal to monitor whether someone is covertly trying to coach the witness.

§13.06 WITNESS SEQUESTRATION

[A] Before the Witness Testifies

[1] General

When a witness is to testify at a hearing, the question arises whether the witness ought to be sequestered before giving their testimony. It is common for the arbitral tribunal to mandate that a fact witness not be allowed to attend the proceedings before the witness has testified.[58] It can be discussed whether this is best practice, as the IBA Rules on the Taking of Evidence are intentionally silent on this issue.[59] The rationale for sequestration is that the witness could otherwise tailor his or her testimony in accordance with what occurs during the proceedings.[60] Some authors suggest that the witness can attend the hearings if it is unlikely that the witness will be able to tailor the testimony so that a party will receive an unfair advantage.[61] We submit that, since it can generally be assumed that the witness will be able to tailor the testimony, arbitral tribunals ought to be restrictive in allowing witnesses to attend. Another benefit of witness sequestration is that the proceedings will also appear fairer. The parties can rely on there being no testimony tailoring, regardless of whether the particular witnesses would have actually altered their testimonies or whether a party would actually gain an advantage. Considering this, we therefore submit that this should be best practice.

Another aspect of sequestration is that the witnesses should not be allowed to discuss the case with the party representatives, counsel, or other witnesses. The rationale for this rule is the same, namely that the witness could otherwise tailor their testimony.[62] The arbitral tribunal can enforce this with varying degrees of strictness, mandating that the witness should refrain from any communication with the other members of the 'team' during the hearing or simply admonishing the witness not to discuss the case, but otherwise allowing conversation between the different individuals involved in the case. We suggest that the stricter rule is to be preferred, but the logistics of the proceedings may make this position untenable.

58. Born, *supra* n. 1, at 2462. However, cf. Nigel Rawding, Gregory Roy Fullelove & Penny Martin, 'Chapter 18: International Arbitration in England: A Procedural Overview' in, Julian David Mathew Lew, Harris Bor, Gregory Roy Fullelove & Joanne Greenaway (eds), *Arbitration in England, with chapters on Scotland and Ireland* (Kluwer Law International 2013), 389. The authors submit that the arbitral tribunal will generally permit the witness to attend the hearing 'unless there are particularly contentious factual questions in issue'.
59. The Commentary on the 2020 IBA Rules on the Taking of Evidence, at 26.
60. Born, *supra* n. 1, at 2462.
61. Blackaby, et al., *supra* n. 4, at 407.
62. Blackaby, et al., *supra* n. 4, at 407.

[2] Party Representatives Acting as Witnesses

The same considerations that justify sequestering fact witnesses are of course applicable to a party witness. However, if the witness is the party representative, there is often a legitimate interest in the party attending the entire hearing, such as the need to instruct counsel. A balance can be struck between these opposing interests by scheduling the witness examinations of the party representatives first and limiting the number of party witnesses who are allowed to be present.[63] We consider that this practice generally is sound. However, the issue of testimony tailoring remains, as some of the party witnesses will be allowed to hear the other party's witness testimonies before giving their own. The arbitral tribunal ought to consider this when attaching evidentiary weight to the witness in question's testimony.

[3] Expert Witnesses

With regard to expert witnesses, arbitral tribunals generally allow them to attend the hearing. Their attendance is justified as the expert witness is not being heard on matters of fact. Furthermore, it has been held that exposing the expert to the evidence is 'beneficial, rather than harmful'.[64] There is merit to this view, but it must be kept in mind that the expert is party appointed. One can assume that experts generally provide evidence based on their professional opinion and not simply based on what the party wants them to say. However, as the expert is generally paid by the party to testify, they may have an incentive to tailor their testimony. We therefore question the prudence of allowing party-appointed experts to attend the entire hearing.[65]

[B] After the Witness Has Testified

After witnesses have testified, there is generally no objection to them attending the rest of the hearing. However, we wish to raise an issue, namely that the witness may need to provide new testimony. Arbitral tribunals will generally frown upon a witness being heard a second time. However, an example of when this might be allowed is where evidence provided after the testimony affects the testimony's evidentiary weight. If the party who relies on the witness ought not to have foreseen this, a new testimony may be allowed.[66] Considering this possibility, however small, we suggest that witnesses should not be allowed to attend hearing even after testifying.

63. Born, *supra* n. 1, at 2463.
64. Born, *supra* n. 1, at 2462. Khodykin et al. concur with this opinion, *see* Khodykin et al., *supra* n. 4, at 11.100.
65. For tribunal-appointed experts there is no such issue.
66. Lindskog, *supra* n. 8, at 730.

[C] Issues of Digitalization in Relation to Witness Sequestration

As a result of digital hearings, witness sequestration becomes harder to uphold. In principle, the sequestered witness is not allowed to view the proceedings via video-feed. However, it is difficult for the arbitral tribunal to control this. If the hearing is conducted via videoconference, the witness can in theory be present in the same room as the party, keeping outside of the view of the camera. A possible solution is to mandate that an independent observer should be present together with the witness during the hearing. This solution is impractical. The independent observer must be present with the witness (whether physically or digitally) for a sizeable portion of the hearing, at least until the witness has testified. This will entail additional costs for the parties, not to mention inconvenience to the witness who may have other matters to attend to. If the proceedings last for several days and there are several witnesses who need to be observed, this solution may border on the absurd.

We also wish to point out that the issues of keeping the witness effectively sequestrated also exist in live hearings. It is difficult for the arbitral tribunal to ensure that the parties do not inform their witnesses of what has occurred during a break, or provide the witness with a transcript. The arbitral tribunal must generally rely on admonishing the witness that they are not to discuss the case during breaks and rely on the ethical conduct of the parties, counsel, and witnesses. We submit that these methods are sufficient and that independent observers should only be mandated if both parties request them.

§13.07 CONCLUDING REMARKS

In this chapter, we have discussed best practice in relation to some common issues on witness examination. When dealing with evidentiary matters, the IBA Rules on the Taking of Evidence are a good starting point as they generally reflect best practice. However, as the IBA Rules often provide broad rules, they do not always provide clear answers. An example of this is the rule in Article 8.5 that allows further direct testimony even if witness statements are submitted. The article does not provide how restrictively or generously the rule should be applied. As we have suggested in §13.04, best practice is that, apart from a brief direct testimony to 'warm up' the witness, further direct testimony should generally not be permitted. Some other issues are left outside of the IBA Rules entirely, such as whether a witness ought to be sequestered.

Based on our experience and review of international literature on the subject, our conclusions as to what constitutes best practice in relation to the issues discussed in this chapter can be summarized as follows:

(i) The use of written witness statements is best practice in international cases. A party can be mandated to submit witness statements if it wishes to rely on a witness. *See* §13.03[A]-[B].

(ii) If a witness does not appear at the hearing, it is best practice to disregard the witness' written witness statement, unless the party can present a valid

excuse, or exceptional circumstances exist. If the arbitral tribunal decides not to disregard the witness statement, it ought to carefully consider the fact that the witness has not been cross-examined when determining the evidentiary weight of the statement. *See* §13.03[C].

(iii) Written witness statements ought to replace direct examination. However, we suggest that the parties should be allowed to conduct a brief direct examination, as long as the questions are kept within the scope of the witness statement. Such an examination provides the arbitral tribunal with a 'baseline' from which to better evaluate the witness' credibility and ensures that the witness is not flung directly into cross-examination. As a rule of thumb, we suggest that such an examination should be limited to ten to twenty minutes in length.

During direct examination, the party may also ask questions to clarify and correct inaccuracies in the witness statement. This can generally be achieved within the above-mentioned time frame, but there may be instances where more time is needed. In certain cases, the unfolding of events may justify the witness providing further testimony. The arbitral tribunal ought to be restrictive in allowing this and should in any event provide the other party with an opportunity to respond to the new evidence. If the examining party can present compelling arguments, the arbitral tribunal may in exceptional cases allow a full-length direct testimony. This should come at the cost of the party in question's allotted hearing time. *See* §13.04.

(iv) If written witness statements are mandated in an arbitration proceeding, questions during cross-examination should generally be limited to the contents of the witness statement. However, questions about submitted documents and oral evidence from other witnesses should be allowed. *See* §13.05[A].

(v) In arbitrations where written witness statements are used, the cross-examining party ought to generally be hindered from confronting a witness with new evidence during cross-examination to prove a lie. If the cross-examining party has a valid excuse why the evidence was not submitted before the cut-off date, the arbitral tribunal may allow it. A valid excuse exists if the witness testifies to something that was not included in the witness statement (but for one reason or another is still admitted as evidence). If witness statements are not used, the arbitral tribunal can be less restrictive in allowing the production of documents during cross-examination. Regardless of whether witness statements are used or not, the document must clearly prove that the witness is lying. The arbitral tribunal must also provide the other party with an opportunity to respond to the new evidence. *See* §13.05[B].

(vi) So as to ensure that a witness is not being covertly coached during a digital cross-examination, it is best practice for the other party and its counsel to be visible in their own 'windows'. *See* §13.05[C].

(vii) Fact witnesses ought to be sequestered before giving testimony. Exceptions can be made for party witnesses. In the authors' view, arbitral tribunals should also be restrictive in permitting expert witnesses to attend the hearing. *See* §13.06[A].

(viii) Permitting the witness to attend the hearing after giving testimony is generally not considered an issue. However, we suggest that there is a case to be made for sequestration to continue after testimony has been given, in light of the (albeit small) possibility of the witness testifying a second time. *See* §13.06[B].

(ix) The use of independent observers to ensure that witness sequestration is upheld during digital hearings cannot be considered best practice. It is sufficient that the arbitral tribunal admonishes the witnesses not to take part in the proceedings in any way until they have been heard. *See* §13.06[C].