FACTUAL WITNESS EVIDENCE IN MODERN CIVIL LITIGATION

Factual witness evidence has traditionally been treated as a lifeblood in the common law courts' endeavour of truth-seeking. The enactment of the domestic Rules of Court 2021 and the Singapore International Commercial Court Rules 2021 introduced significant new features to regulate and manage factual witness evidence in court proceedings. This article addresses select topics that are now central to the presentation of witness evidence in modern civil litigation, namely the issues of content, veracity, timing and control.

Toby **LANDAU** KC
Duxton Hill Chambers (Singapore Group Practice); LLM (Harvard), MA, BCL (Oxford); Barrister (England & Wales), Barrister (Northern Ireland), Barrister (British Virgin Islands), Advocate and Solicitor (Singapore), Attorney (New York); FCIArb, CArb.

Colin **SEOW**
Colin Seow Chambers LLC; LLM (Harvard), LLB (National University of Singapore); Advocate and Solicitor (Singapore), Solicitor (England & Wales), Attorney (New York); FCIArb, FSIArb, FACICA.

I. Introduction

1 The use of witness evidence has become a mainstay of the common law civil litigation process. Even against the backdrop of a full documentary record, witness evidence is perceived as a key means by which litigants exercise their right to be heard, and to channel the merits of their disputes for adjudication by the courts.

2 As systems of civil litigation evolve over time, so have procedural rules and practice on the use of witness evidence in civil trials. Beginning in the 1990s, the Singapore civil litigation system turned the page on the hitherto traditional method of witnesses giving evidence-in-chief by default under oral examination.[1] This shift, brought about by the enactment of the Rules of Court 1996, ushered in a general rule mandating

1 Rules of the Supreme Court (1970 Rev Ed) O 38 r 1. See also Jeffrey Pinsler, "Disclosure of Evidence Before Trial: The Development of the Rules of Court and the Transformation of Policy" [1998] *Singapore Journal of Legal Studies* 15.

the giving of trial evidence-in-chief by way of *affidavit*, unless the court otherwise orders or the parties otherwise agree[2] – marking the advent of the use of affidavits of evidence-in-chief ("AEICs") in civil trials.

3 Around a quarter century later, in April 2021, the Singapore domestic civil procedure rules underwent another significant overhaul with the entry into force of the Rules of Court 2021 ("ROC 2021"), incorporating the recommendations encapsulated in the Judiciary's Civil Justice Commission Report[3] and the Ministry of Law's Report of the Civil Justice Review Committee.[4] At the same time, the Singapore International Commercial Court ("SICC") – a division established in 2015 within the General Division of the Singapore High Court (the "General Division") to hear international and commercial disputes – also launched its first standalone procedural rules, known as the SICC Rules 2021.

4 Chief among the sea changes brought about by the ROC 2021 and the SICC Rules 2021 was the introduction of new rules relating to, firstly, the production of AEICs before discovery of documents (or "AB4D" in shorthand) in domestic civil proceedings and, secondly, the use of witness statements in lieu of affidavits in actions commenced in the SICC. These enhancements are testament to the adaptive nature of Singapore's civil justice system in staying abreast of developments in other jurisdictions around the world.[5]

5 Against this backdrop, this article addresses key topics relating to the use of witness evidence in modern civil litigation, with a focus on civil trials. First, the article analyses the use of statements of factual evidence in Singapore's civil justice system (Part II), and the AB4D procedure contained in the domestic ROC 2021 (Part III). The article then discusses a variety of distinct contemporary issues concerning the use of witness evidence generally, namely issues of content (Part IV), veracity (Part V), timing (Part VI) and control (Part VII). The article finally concludes with some remarks on the role and importance of witness evidence in the future shaping of civil litigation.

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2 Rules of Court 1996 O 38 r 2(1).

3 See <https://www.mlaw.gov.sg/files/Annex_C_Civil_Justice_Commission_Report.pdf> (accessed 1 December 2024).

4 See <https://www.mlaw.gov.sg/files/Annex_B_CJRC_Report.pdf> (accessed 1 December 2024).

5 The AB4D procedure is similar to the approach taken in New South Wales (see *Report of the Civil Justice Review Committee* at para 66, accessible at <https://www.mlaw.gov.sg/news/public-consultation-proposed-reforms-civil-justice-system/>), whereas the use of witness statements have long been the practice under the Civil Procedure Rules in England and Wales.

II. Statements of factual evidence in Singapore civil justice system

A. Use of witness statements under SICC Rules 2021

6 The use of witness statements in civil litigation is a relatively recent development in Singapore's civil justice system, in particular with respect to proceedings commenced in the SICC. Previously, the SICC's procedural rules were part of the Rules of Court 2014[6] which, like their previous iterations, required the use of AEICs for witness evidence in trials.[7] This changed with effect from 1 April 2021, following the revocation of the Rules of Court 2014 and the enactment of two distinct procedural regimes: first, the ROC 2021 applicable to domestic civil proceedings in Singapore, and second, the standalone SICC Rules 2021 governing proceedings in the SICC exclusively.

7 In a marked shift from previous rules and practice, the SICC Rules 2021 adopted the use of witness statements as the generally preferred means by which the SICC will receive evidence in trial and non-trial proceedings.[8] The traditional method of adducing evidence by way of affidavit is confined only to specially enumerated circumstances, such as, *eg*, in applications for a search order, a freezing injunction, or for a committal order for alleged contempt of court.[9]

B. Distinguishing features between witness statements and affidavits

8 Whereas an affidavit is defined as "a statement of evidence in the English language, signed and affirmed before a commissioner for oaths",[10] a witness statement in SICC proceedings "is a written statement signed by a person which contains the evidence which that person would

6 Rules of Court (2014 Rev Ed) O 110.

7 Rules of Court (2014 Rev Ed) O 38 r 2(1).

8 Order 13 r 1(1) of the Singapore International Commercial Court Rules 2021 provides, in material part, that "unless the Court orders otherwise, evidence in trials must be adduced by way of witness statements, cross-examination and re-examination". Order 13 r 1(2) further provides that "A witness's evidence-in-chief must be given by witness statement instead of orally, unless the Court orders otherwise." For non-trial proceedings, see O 13 r 2 of the Singapore International Commercial Court Rules 2021.

9 Singapore International Commercial Court Rules 2021 O 13 r 3(2).

10 Rules of Court 2021 O 15 r 18. Order 13 r 11 of the Singapore International Commercial Court Rules 2021 provides that "The domestic Rules of Court will govern the formalities relating to the giving of evidence by affidavit."

have otherwise given orally".[11] A key distinction between an affidavit and a witness statement is that the former requires execution by the deponent signing and affirming his or her statement of evidence before a commissioner for oaths, while the latter does not. A signed witness statement need only be "verified by a statement of truth"[12] in order for the witness statement to be admissible as evidence.[13]

9 Another notable difference between a witness statement and an affidavit lies in the formal prescriptions relating to their content. In the case of an affidavit, it "must contain only relevant facts" and must not contain "vulgar or insulting words unless those words are in issue in the action" or "anything that is intended to offend or to belittle any person or entity".[14] Further, an AEIC "must contain all material facts which may not be departed from or supplemented by new facts in oral evidence unless the new facts occurred after the date of making the affidavit of evidence-in-chief", and "must contain only evidence that is admissible in law".[15]

10 On the other hand, witness statements in SICC proceedings must, among other things and in addition to containing only relevant facts, observe the following:[16]

> (*a*) a witness statement should as far as possible be in the witness' own words as the function of a witness statement is to set out in writing the evidence of the witness;
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> (*b*) a witness statement should be as concise as the circumstances of the case allow without omitting any significant matters; there may be no need to deal with (or deal with other than briefly) the matters that are common ground;
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> (*c*) a witness statement should not contain lengthy quotations from documents;
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> (*d*) a witness statement should not engage in (legal or other) argument;
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> (*e*) a witness statement must comply with any direction of the Court about its length.

11 Singapore International Commercial Court Rules 2021 O 13 r 5(1).
12 Singapore International Commercial Court Rules 2021 O 13 r 5(3). Order 13 r 6(1) further provides that "a statement of truth must state that the maker of the witness statement believes that the facts stated in the witness statement are true".
13 Singapore International Commercial Court Rules 2021 O 13 r 6(4).
14 Singapore International Commercial Court Rules 2021 O 15 r 25.
15 Rules of Court 2021 O 15 rr 16(4)–16(5).
16 Singapore International Commercial Court Rules 2021 O 13 rr 8(6)(*a*)–8(6)(*e*).

11 These distinguishing features underscore an overall tighter regime regulating the use of witness statements in SICC proceedings as compared to affidavits in general.

12 In this regard, the SICC Rules 2021 bear some striking similarities with the trial witness statements regime adopted in England and Wales. For instance, Practice Direction 32[17] ("PD 32") provides that a witness statement "must, if practicable, be in the intended witness's own words and must in any event be drafted in their own language".[18] The relatively recent Practice Direction 57AC[19] ("PD 57AC") further specifies that the content of trial witness statements "must set out only matters of fact of which the witness has personal knowledge that are relevant to the case"[20] and encourages the drafting of witness statements to be "as concise as possible without omitting anything of significance".[21] Witness statements in English civil proceedings are likewise required to be verified by a statement of truth.[22]

13 It is evident that the SICC Rules 2021 and the English approach relating to trial witness statements share a common objective. This is no surprise given that – as elaborated in more detail later in this article – both systems have experienced similar excesses in the deployment of witness evidence in recent years. Whereas the introduction of written statements of witnesses was originally designed primarily to avoid the lengthy process of oral evidence-in-chief, with all its inefficiency, cost and scope for ambush of the opposing party, as well as providing an efficient means for witnesses to advance a coherent presentation of their testimony,[23]

17 Issued under Pt 32 of the English Civil Procedure Rules.

18 See para 18.1 of Practice Direction 32. In England and Wales, a similar requirement is also expressly provided for in relation to affidavit evidence: see para 4.1 of Practice Direction 32.

19 First published in January 2021, and applying with effect from 6 April 2021 in England and Wales. Practice Direction 57AC was the culmination of the recommendations of the Witness Evidence Working Group formed in March 2018 "to address concerns on the part of the judiciary that factual witness statements were often ineffective in performing their core function of achieving best evidence at proportionate cost in trials": see *Mansion Place Limited v Fox Industrial Services Limited* [2021] EHWC 2747 (TCC) at [27].

20 See para 3.2 of Practice Direction 57AC.

21 See para 3.3 of the Appendix to Practice Direction 57AC.

22 See para 20.1 of Practice Direction 32.

23 In England and Wales, the move from oral testimony to written witness statements can be charted from the *Report of the Review Body on Civil Justice* (Cm 394, 1988) which set in motion a chain of reforms designed to modify the adversarial system through a "cards on the table" approach. The chief immediate consequence of this was the introduction, in 1992, of the compulsory exchange of witness statements before trial. A 1995 Practice Direction ([1955] 1 All ER 385) carried this process further. In 1996, Sir Harry Woolf (later Lord Woolf) published a report outlining

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written statements have increasingly degenerated into tools of advocacy. They are all too often drafted by lawyers rather than witnesses; lengthy and argumentative; and more compilations of supposedly supportive material rather than statements of a witness's actual evidence.

14 Hence, on the one hand, the purpose underlying the English approach has been explained as follows:[24]

> The purpose of the new Practice Direction [57AC] is not to change the law as to the admissibility of evidence at trial: per Sir Michael Burton GBE, sitting as a Judge of the High Court in *Mad Atelier International BV v Manes* [2021] EWHC 1899 at [9]; rather it is to eradicate the improper use of witness statements as vehicles for narrative, commentary and argument. The Practice Direction explains that the purpose of trial witness statements is to further the overriding objective by helping the court to deal with cases justly, efficiently and at proportionate cost, including by helping to put parties on an equal footing, saving time at trial and promoting settlement in advance of trial. …

15 On the other hand, in applying the SICC Rules 2021, the SICC seeks to achieve, with the parties' assistance, a set of statutorily prescribed "General Principles", namely: (a) the expeditious and efficient administration of justice according to law; (b) procedural flexibility; (c) fair, impartial and practical processes; and (d) procedures compatible with and responsive to the needs and realities of international commerce.[25] A more robust regulation of the form and content of trial witness statements engendered by the SICC Rules 2021 is consistent with the court's overarching mission in achieving the first and third (and to some extent, also the fourth) General Principles, so as to administer justice in a cost-efficient and fair manner responsive to the needs of the parties.

16 There is no doubt that the SICC Rules 2021 represents a significant step in the direction of streamlining how written witness evidence is better presented in a more focused manner at trial, guided by more determinate rules and guidelines. The affinity between the SICC Rules 2021 approach and the English approach arguably also creates room for potential jurisprudential cross-pollination between the two jurisdictions in regulating the form and content of witness statements.

17 Where does this leave Singapore's alternate regime on the use of AEICs in domestic civil trial proceedings, by contrast? On the one

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further reforms, which led to the adoption of the Civil Procedure Rules in 1999, which entrenched these developments.

24 *Mansion Place Limited v Fox Industrial Services Limited* [2021] EHWC 2747 (TCC) at [37]. Such purpose has longstanding roots: see, *eg*, *JD Wetherspoon Plc v Harris* [2013] EWHC 1088 (Ch) at [39]–[40].

25 Singapore International Commercial Court Rules 2021 O 1 rr 3(1)–3(2).

hand, the absence of rules identical to the SICC Rules 2021 suggests a differentiated treatment to be accorded to AEICs. Yet, on the other hand, inasmuch as the General Principles of the SICC Rules 2021 seek to enable the SICC to administer justice in a fair and cost-efficient manner, so do the "Ideals" underlying the domestic ROC 2021 in the General Division. The Ideals as prescribed in the ROC 2021 are as follows:[26]

> (*a*) fair access to justice;
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> (*b*) expeditious proceedings;
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> (*c*) cost-effective work proportionate to —
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> (i) the nature and importance of the action;
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> (ii) the complexity of the claim as well as the difficulty or novelty of the issues and questions it raises; and
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> (iii) the amount or value of the claim;
>
> (*d*) efficient use of court resources;
>
> (*e*) fair and practical results suited to the needs of the parties.

18 It remains to be seen how much differentiation (if any) there will be in the regulation by the Singapore courts of written witness evidence under the SICC Rules 2021 (in particular, O 13 r 8 thereof) and the domestic ROC 2021 (in particular, O 15 r 25 thereof). Thus far, early jurisprudence emanating from the General Division on the domestic ROC 2021 has been confined to clarifying that an affidavit which is non-compliant with the domestic standard renders it liable to be struck out on grounds of "abuse of process" or "in the interests of justice".[27] This has come with the caution that such grounds are not to be construed too widely lest there be "a deluge of striking out applications and appeals arising out of these applications".[28] It is not clear if the position under O 13 r 8 of the SICC Rules 2021 will be similarly aligned for witness statements, especially if English jurisprudence governing witness statements is considered (to which we return below).[29]

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26 Rules of Court 2021 O 3 rr 1(2)(*a*)–1(2)(*e*).

27 *Asian Eco Technology Pte Ltd v Deng Yiming* [2023] SGHC 260 at [14].

28 *Asian Eco Technology Pte Ltd v Deng Yiming* [2023] SGHC 260 at [16]–[21]. See also *Peloso, Matthew v Vikash Kumar* [2024] 4 SLR 289 at [28] and *Envy Asset Management Pte Ltd v Lau Lee Sheng* [2024] 4 SLR 1210 at [23].

29 See, *eg*, *Prime London Holdings 11 Limited v Thurloe Lodge Limited* [2022] EWHC 79 (Ch); *Mansion Place Limited v Box Industrial Services Ltd* [2021] EWHC 2747 (TCC); and *Blue Manchester Ltd v Bug-Alu Technic GmbH, Simpsonhaugh Architects Limited* [2021] EWHC 3095 (TCC). See para 32 below.

III. AB4D under ROC 2021

19 The AB4D procedure was introduced into the *corpus* of Singapore's domestic civil procedure rules for the first time under the ROC 2021, as O 9 r 8(1):[30]

> If the application to challenge the jurisdiction of the Court has been dealt with or where there is no challenge to the jurisdiction of the Court, after pleadings have been filed and served but before any exchange of documents, the Court may, in any particular case, order the parties to file and serve their lists of witnesses and the affidavits of evidence-in-chief of all or some of the witnesses simultaneously or in any sequence.

20 The AB4D procedure essentially empowers the domestic courts to order parties to exchange lists of witnesses and AEICs prior to the parties' mutual production of documents in the proceedings (otherwise also known as discovery or disclosure of documents). Although this procedure is not novel in foreign jurisdictions (in particular, New South Wales[31]), it constitutes a major change in Singapore's domestic civil litigation system.

21 The rationale for the AB4D procedure "is to shift the focus of witness evidence to the case put forward through pleadings" at the same time as it seeks to reduce the "risk of parties or witnesses adjusting their AEICs to fit the evidence produced during discovery".[32] A host of other potential benefits promised by the procedure include: (a) enhancing the authenticity of AEIC evidence; (b) the narrowing of issues in dispute early in the proceedings; (c) generating efficiencies such as time savings in the ensuing discovery stage of the proceedings; and (d) encouraging settlement of the dispute by enjoining parties to reflect more actively on their own crystallised evidence before discovery is attempted.[33] It is important to further highlight that AEICs exchanged pursuant to the AB4D procedure should be accompanied with documentary exhibits

30 Order 2 r 8 of the Rules of Court 2021 similarly provides that "The Court may order the parties to file and exchange affidavits of evidence-in-chief of all or some witnesses after pleadings have been filed and served but before any exchange of documents and before the Court considers the need for any application."

31 Supreme Court of New South Wales Practice Note SC Eq 11: Disclosure in the Equity Division, at para 4: "The Court will not make an order for disclosure of documents (disclosure) until the parties to the proceedings have served their evidence, unless there are exceptional circumstances necessitating disclosure."

32 *Report of the Civil Justice Review Committee* at paras 66–68, accessible at <https://www.mlaw.gov.sg/news/public-consultation-proposed-reforms-civil-justice-system/>.

33 *Report of the Civil Justice Review Committee* at para 68, accessible at <https://www.mlaw.gov.sg/news/public-consultation-proposed-reforms-civil-justice-system/>.

referred to by the witnesses. This arguably reduces the scope of discovery that may become necessary should the case proceed further in the courts.

22 To date, there has yet to be any reported judgment from the General Division setting out judicial guidance on how the courts' discretion is to be exercised pursuant to the AB4D procedure under O 9 r 8(1) of the ROC 2021. Nevertheless, at least three observations can be made in this regard.

23 The first is that O 9 r 8(1) of the ROC 2021 does not completely replicate the approach in New South Wales. In New South Wales, the relevant practice note provides that discovery of documents will not be ordered prior to the service of evidence "unless there are *exceptional circumstances* necessitating disclosure"[34] [emphasis added] first. Order 9 r 8(1) of the ROC 2021 by contrast simply confers upon the courts a broad discretion to order parties to comply with the AB4D procedure, signifying that the Singapore courts are expected to consider the AB4D procedure more liberally, although perhaps also more regularly going forward. This approach appears to some extent consistent with the revamped discovery procedure under the ROC 2021, operating on the principle that "a claimant is to sue and proceed on the strength of the claimant's case and not on the weakness of the defendant's case".[35]

24 The second observation is that the AB4D procedure was not designed to compel parties to tender and exchange AEICs if the preparation of AEICs cannot reasonably be undertaken without the parties' prior mutual disclosure of documents. The Civil Justice Review Committee's explanation of this outer limit on the manner in which the courts may exercise its discretion is important:[36]

> … the court will not exercise its powers to order AEICs to be filed and exchanged before disclosure of documents if parties are unable to prepare their AEICs without the documentary evidence uncovered during the disclosure of documents. This is especially so for cases where there is asymmetry of information as the party without the necessary information may have difficulties preparing his AEICs without the disclosure of documents.

34 Supreme Court of New South Wales Practice Note SC Eq 11: Disclosure in the Equity Division, at para 4.

35 Rules of Court 2021 O 11 r 1(2)(*a*). See also Civil Justice Commission, *Civil Justice Commission Report* (29 December 2017) at p 19 (Chairperson: Justice Tay Yong Kwang). However, this does not relieve a party from disclosing "known adverse documents", defined as including "documents which a party ought reasonably to know are adverse to the party's case": see O 11 r 2 of the Rules of Court 2021.

36 *Report of the Civil Justice Review Committee* at para 71, accessible at <https://www.mlaw.gov.sg/news/public-consultation-proposed-reforms-civil-justice-system/>.

25 Lastly, unlike in the SICC Rules 2021 where the closest analogy to the AB4D procedure is the memorialisation of proceedings under the memorials adjudication track,[37] the rule governing the AB4D procedure does not explicitly provide that the court may have regard to any agreement between the parties on the exchange of AEICs prior to discovery.[38] The AB4D framework instead envisages that parties may, at best, be asked "to indicate at the [Registrar's Case Conference] whether they have any *objection* to an order [applying the AB4D procedure] being made in their case"[39] [emphasis added]. This suggests that the General Division is likely to be more inclined – as a matter of case management policy – to encourage the use of the AB4D procedure as a norm rather than as an exception in the long term.

IV. Issues concerning content of witness evidence

26 The key distinguishing features between witness statements and affidavits have been outlined in Part II above. And as mentioned, there is currently some uncertainty as to whether the standards for regulating each of the two forms of witness evidence differ significantly.

27 With regard to affidavits, existing judicial interpretation of the ROC 2021 has thus far been limited to rationalising the nexus between the principles encapsulated in O 15 r 25 (regulating the content of affidavits) and striking out as a potential consequence of a violation of these principles. In *Asian Eco Technology Pte Ltd v Deng Yiming*[40] ("*Asian Eco*"), the General Division (*per* Hri Kumar Nair J) observed the following:[41]

> On a preliminary note, I observe that O 15 r 25 of the ROC 2021 makes no direct reference to the striking out of affidavits. Rather, the provision simply stipulates what an affidavit must and must not contain – *ie*, that an affidavit must contain only relevant facts, and must not contain 'vulgar or insulting words unless those words are in issue in the action' or 'anything that is intended to offend or to belittle'. In my view, the principles enshrined in O 15 r 25 may be subsumed within the wording of O 9 rr 16(4)(*b*) and 16(4)(*c*) of the ROC 2021,

37 See O 4 r 6 read with O 8 of the Singapore International Commercial Court Rules 2021. Order 8 r 2 of the Singapore International Commercial Court Rules 2021 provides, among other things, that the claimant's Memorial must be "accompanied by copies of all witness statements, expert reports (where applicable) and documentary exhibits supporting the claim".

38 By contrast, O 4 r 6(2) of the Singapore International Commercial Court Rules 2021 provides that "In deciding the applicable adjudication track, the Court may have regard to any agreement between the parties on the applicable adjudication track."

39 See para 56(11) of the Supreme Court Practice Directions 2021.

40 [2023] SGHC 260.

41 *Asian Eco Technology Pte Ltd v Deng Yiming* [2023] SGHC 260 at [14].

> which provide respectively that the court may order an affidavit to be struck out on the ground that it is an abuse of process or it is in the interests of justice to do so.

28 The provisions in O 9 r 16(4) of the ROC 2021 relate to the court's power to order any affidavit or other document filed to be struck out or redacted on the ground that: (a) the filing party had no right to file the affidavit or document; (b) it is an abuse of process of the court; and (c) it is in the interests of justice to do so. Previously under the Rules of Court 2014, the rule as expressed in O 41 r 6 provided that "The Court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive." As there is no directly equivalent provision in the ROC 2021, the General Division in *Asian Eco* found it necessary to clarify some contours of the new O 15 r 25.

29 In so doing, the General Division set out useful guidance on the manner in which the courts should address affidavits containing *irrelevant* content:[42]

> … the court should only allow striking out or expunging or irrelevant material *where doing so would serve a broader purpose*. Examples include removing scandalous allegations, substantially reducing the time and costs of trial or further proceedings, or preventing collateral attacks on the parties or their witnesses. This approach would best balance and effectuate the Ideals of fairness, efficiency, and practicality. *If irrelevancy were the only criteria, parties might be encouraged to engage in satellite litigation over any material alleged to be irrelevant on matters peripheral to the case*. That would cause delays in court proceedings, inefficiency in the use of court resources and an increase in costs, which would be contrary to the Ideals. [emphasis added]

30 The above holding in *Asian Eco* is arguably applicable also to witness statements in SICC proceedings, given that both O 13 r 8 of the SICC Rules 2021 and O 15 r 25 of the ROC 2021 share a common sub-provision couched in essentially the same terms, *viz*: "[A witness statement / An affidavit] must contain only relevant facts."[43] Thus, irrelevant content in witness evidence *per se* is insufficient to warrant a striking out or expunging order – whether under the SICC Rules 2021 or the ROC 2021.[44]

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42 *Asian Eco Technology Pte Ltd v Deng Yiming* [2023] SGHC 260 at [20].

43 Singapore International Commercial Court Rules 2021 O 13 r 8(1); Rules of Court 2021 O 15 r 25(1).

44 Order 13 r 8(5) of the Singapore International Commercial Court Rules 2021 further provides that "The Court may order to be struck out of any witness statement any matter which is scandalous, irrelevant or otherwise oppressive." As mentioned earlier, the erstwhile O 41 r 6 of the Rules of Court 2014 carried the same provision.

31 Yet, this seems to be the chief extent of overlap between the SICC Rules 2021 and the ROC 2021 with regard to the content of written witness evidence. Unlike O 15 r 25 of the ROC 2021 where relevance features prominently as the central principle around which the content of witness affidavit evidence is regulated,[45] O 13 r 8 of the SICC Rules 2021 prescribes additional factors against which the content of witness statements is to be tested. These factors include the following:

> (a) a witness statement *must* contain "statements of fact made from the maker's own knowledge"[46] and "comply with any direction of the Court about its length";[47] and
>
> (b) a witness statement *should* (i) as far as possible be in the witness's own words;[48] (ii) be as concise as possible;[49] (iii) not contain lengthy quotations from documents;[50] and (iv) not engage in (legal or other) argument.[51]

32 As highlighted earlier,[52] the SICC Rules 2021 bear striking similarities in this respect with England's civil procedure regime governing the content of witness statements. To this end, it is suggested that guidance may be gleaned from English jurisprudence regarding the scope and effect of these additional principles governing the content of witness statements. In this regard, three English cases in particular are worth highlighting:

> (a) In *Mansion Place Limited v Fox Industrial Services Limited*[53] ("*Mansion Place*"), the English High Court explained that the rationale underlying PD 57AC was to "eradicate the improper use of witness statements as vehicles for narrative, commentary and argument", and that the purpose of trial witness statements "is to further the overriding objective by helping the court to deal with cases justly, efficiently and at proportionate cost, including by helping to put parties on an equal footing,

45 Order 15 r 25(2) of the Rules of Court 2021 provides that an affidavit must not contain "vulgar or insulting words unless those words are in issue in the action" or "anything that is intended to offend or to belittle any person or entity". These are words or content which by definition bear little to no relevance on the dispute in the action.

46 Singapore International Commercial Court Rules 2021 O 13 r 8(2).

47 Singapore International Commercial Court Rules 2021 O 13 r 8(6)(*e*).

48 Singapore International Commercial Court Rules 2021 O 13 r 8(6)(*a*).

49 Singapore International Commercial Court Rules 2021 O 13 r 8(6)(*b*).

50 Singapore International Commercial Court Rules 2021 O 13 r 8(6)(*c*).

51 Singapore International Commercial Court Rules 2021 O 13 r 8(6)(*d*).

52 See paras 12–15 above.

53 [2021] EWHC 2747 (TCC) at [37], citing *Mad Atelier International BV v Manes* [2021] EWHC 1899 (Comm).

saving time at trial and promoting settlement in advance of trial".[54] The High Court further emphasised that the "proper purpose" of trial witness statements is in "providing in writing the evidence that the witness would give as oral evidence in chief".[55] The High Court, mindful of the dangers of satellite litigation regarding witness statement content, also opined that "[w]here a party is concerned that another party has not complied with the Practice Direction in any particular respect, the sensible course of action is to raise that concern with the other side and attempt to reach agreement on the issue". Only where that is impossible should the parties seek the court's assistance and intervention.[56]

(b) In *Blue Manchester Limited v Bug-Alu Technic GmbH, Simpsonhaugh Architects Limited*[57] ("*Blue Manchester*"), the English High Court held that an order for the striking out of a witness statement for not complying with the applicable rules governing content "is a very significant sanction which should be saved for the most serious cases". In this regard, the High Court observed (referring to *Mansion Place*) that "whilst the court will be astute to strike out offending parts of a trial witness statement it will not do so where that is not reasonably necessary".[58] As to other requirements pertaining to content, the High Court highlighted (among other things) that "the fact that a legal representative is permitted to take primary responsibility for drafting a witness statement does not justify departing from the clear requirement that the witness statement should, where practicable, be in the witness's own words".[59] The High Court also took the opportunity to stress that the making of references to and recitals from documents in a witness statement should

54 It should be noted that the principles in Practice Direction 57AC are neither novel nor new in the UK. As *Mansion Place Limited v Fox Industrial Services Limited* [2021] EHWC 2747 (TCC) at [22]–[26] highlighted, pre-existing rules governing the content of trial witness statements in the English courts were already in place for a significant period of time (citing, among other authorities, *JD Wetherspoon Plc v Harris* [2013] EWHC 1088 (Ch) and *Gestmin SGPS SA v Credit Suisse* [2013] EWHC 3560 (Comm)).

55 *Mansion Place Limited v Fox Industrial Services Limited* [2021] EWHC 2747 (TCC) at [38].

56 *Mansion Place Limited v Fox Industrial Services Limited* [2021] EWHC 2747 (TCC) at [49].

57 [2021] EWHC 3095 (TCC) at [44].

58 *Blue Manchester Limited v Bug-Alu Technic GmbH, Simpsonhaugh Architects Limited* [2021] EWHC 3095 (TCC) at [11]. At [43], the High Court added that "judges should resist becoming embroiled in the minutiae of … complaints save where unavoidable".

59 *Blue Manchester Limited v Bug-Alu Technic GmbH, Simpsonhaugh Architects Limited* [2021] EWHC 3095 (TCC) at [25].

be based on necessity.[60] The High Court further rejected the notion that "there is some principle that a witness against whom allegations are made, whether directly or indirectly, and whether in a professional negligence claim or otherwise, is thereby given carte blanche to disregard PD32 or PD57AC by replying to the allegations in a way which includes argument, comment, opinion and/or extensive reference to or quotation from documents".[61]

(c) In *Prime London Holdings 11 Limited v Thurloe Lodge Limited*,[62] a defence trial witness statement was said to "provide commentary and argument and do not therefore comply with Practice Direction 57AC". The claimant applied for the witness statement to be declared inadmissible, whereas the defence cross-applied for a proposed revised (and presumably more compliant) version of the witness statement to be admitted at trial. Applying *Manson Place* and *Blue Manchester*, the English High Court reiterated that under PD 57AC "the court retains its full powers of case management" in the face of a non-compliance with the practice direction (as was found to be the case there). This included the court exercising its powers to strike out part or all of the witness statement; order that the witness statement be redrafted; order that the witness gives some or all of their evidence-in-chief orally; and order adverse costs against the non-complying party.[63] The High Court ultimately approved the revised version of the witness statement subject to some redactions of content. However, the High Court cautioned against considering the case before it "as providing carte blanche to parties to play fast and loose with the Practice Direction, and to leave it to the court to produce a compliant witness statement". The High Court cited its dismay at "failures on both sides to act constructively in agreeing a way forward" as the reason for the more involved role that it found itself playing in redressing the content-based breaches in question.[64]

60 *Blue Manchester Limited v Bug-Alu Technic GmbH, Simpsonhaugh Architects Limited* [2021] EWHC 3095 (TCC) at [35]–[38].

61 *Blue Manchester Limited v Bug-Alu Technic GmbH, Simpsonhaugh Architects Limited* [2021] EWHC 3095 (TCC) at [42].

62 [2022] EWHC 79 (Ch).

63 These are sanctions expressly provided for under para 5.2 of Practice Direction 57AC.

64 Another case illustrating the need for parties to adopt a sensible approach in raising complaints of non-compliance with the practice direction is *Curtiss v Zurich Insurance Plc* [2022] EWHC 1514 (TCC). See also other similar decisions on breaches of the practice direction: *McKinney Plant & Safety Ltd v The Construction Industry Training Board* [2022] EWHC 2361 (Ch), *Primavera Associates Ltd v Hertsmere Borough Council* [2022] EWHC 1240 (Ch) and *Greencastle MM LLP v Payne* [2022] EWHC 438 (IPEC).

33 In all material respects, the SICC's procedural regime regulating the content of witness statements is commendable, given the international and commercial character of the SICC and the disputes it is designed to adjudicate. In this connection, cautionary lessons may be drawn from international commercial litigation's counterpart, international commercial arbitration, where there has been growing concern as to how:[65]

> [i]n the hands of counsel, witness statements have been transmogrified from a written account of the evidence which a witness would give in his or her own words under oral questioning before a tribunal, to an unhappy amalgam of legal submission, documentary commentary and quotation, and speculation, with some direct experiential evidence included (but not always). A prototypical witness statement in a contemporary international arbitration bears little resemblance to what a witness would actually say before the tribunal if giving evidence, despite this being their intended (and sole) purpose. In this form, witness statements are vehicles for lawyers to make legal submissions even though they have ample opportunity to do that through (1) pleadings, (2) written submissions, and (3) oral argument before the tribunal.

34 The so-called "transmogrification" of witness statements into vehicles for commentary and argument – as noted, a process also evident in civil litigation – does more harm than simply escalating costs in arbitration proceedings. If left unaddressed at the more systemic level, it could lead to a lasting erosion of trust in arbitration as a dispute resolution mechanism where it is expected that tribunals will ensure that proceedings are conducted efficiently with costs contained.[66] These are important lessons for civil litigation. But the problems in arbitration are well addressed by both the SICC Rules 2021 and the fact that – unlike in arbitration – these are rules that may be deployed by the court proactively and firmly, without the "due process paranoia" commonly experienced by arbitral tribunals.

35 Once again, it remains to be seen whether the same approach will be deployed in domestic litigation with respect to AEICs under the ROC 2021, where commentary, submissions and quotations from documents are still not entirely eschewed in practice. It may be recalled here that O 3 r 1 of the ROC 2021 expressly requires the Rules to be

65 Douglas S Jones & Robert Turnbull, "Memorials and Witness Statements: The Need for Reform" (2022) 88(3) *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 339 at 344.

66 See, *eg*, Chief Justice Sundaresh Menon, Supreme Court of Singapore, "The Pursuit of Justice: Securing Trust in Arbitration" keynote address at the SIAC Annual India Conference 2024 (6 September 2024) at para 30, accessible at <https://www.judiciary.gov.sg/news-and-resources/news/news-details/chief-justice-sundaresh-menon--keynote-address-delivered-at-the-siac-annual-india-conference-2024>.

given not just a "purposive interpretation"[67] but also an interpretation in accordance with a set of prescribed Ideals, which include "expeditious proceedings", "cost-effective work" and "efficient use of court resources".[68] The way is therefore open for courts to adopt an interpretation of the Rules to discourage more decisively deficient and wasteful presentation of AEICs in domestic civil litigation. It is also arguable that any perceived gaps in standards in the text of the ROC 2021 compared to the SICC Rules 2021 can be addressed by a more stringent application of the domestic courts' overriding discretion to limit the quantum of costs recoverable by parties, drawing on domestic communitarian policy objectives.[69] It is hoped that there may be more jurisprudential development on this aspect of the ROC 2021 to clarify this area.

V. Issues concerning veracity of witness evidence

36 Both the ROC 2021 and the SICC Rules 2021 in their own respects provide certain basic procedural safeguards in fostering a measure of accountability against what a witness states in his or her affidavit or witness statement (as the case may be). Where the ROC 2021 are engaged, affidavits are required to be affirmed before a commissioner for oaths;[70] whereas under the SICC Rules 2021, witness statements are to be accompanied by a statement of truth signed by the maker of the witness statement.[71]

37 A failure to observe such procedural safeguards attracts remedial consequences centred around protecting the integrity of a fair trial or proceeding. Thus for instance, under the SICC Rules 2021 a witness statement not verified by a statement of truth may be considered inadmissible evidence, either on application of a party or on the court's own motion.[72] Sanctions for contempt of court can also be invoked if a person "makes, or causes to be made, without an honest belief in its truth, a false statement in a witness statement verified by a statement of truth or an affidavit".[73] Likewise in the case of AEICs, witnesses giving evidence do so on pain of criminal charges in the event of perjury.[74]

67 Rules of Court 2021 O 3 r 1(1).
68 Rules of Court 2021 O 3 r 1(2).
69 Colin Seow, "Recoverability of Foreign Lawyer Costs in the Singapore International Commercial Court" (2023) 35 SAcLJ 86 at para 25.
70 Rules of Court 2021 O 15 r 18.
71 Singapore International Commercial Court Rules 2021 O 13 r 6.
72 Singapore International Commercial Court Rules 2021 O 13 r 6(4).
73 Singapore International Commercial Court Rules 2021 O 13 r 12.
74 The criminal offence of giving false evidence is provided for in s 191 of the Penal Code 1871 (2020 Rev Ed). The offence of fabricating false evidence is additionally provided for in s 192 of the Penal Code 1871 (2020 Rev Ed).

A. Issues concerning human memory

38 Nevertheless, the quality of witness evidence is not dependent solely on witness honesty and truthfulness. Other factors may also have a significant impact. One such factor which has garnered more awareness in recent years is the scientific and psychological mechanism of human memory. In short, as is now increasingly appreciated, it is perfectly possible for a witness to give perfectly honest and yet entirely fictional testimony, given the fallibility of human memory. This is particularly significant in the Anglo-US litigation adversarial model that most common law jurisdictions (including Singapore) have adopted, where evidence through subsequent oral recollection of things observed previously, and sometimes a long time earlier, has been placed at the centre of the evidentiary process.[75]

39 As the understanding of the nature of human memory has increased over recent years, so too has the mismatch been revealed between the way human memory works, and the standard common law procedure for the eliciting and recording of recollections. Much of the process that is considered standard practice in this regard is premised on the assumption that human memory is akin to a mechanical recording device, with "on", "record" and "playback" switches. This assumption is wholly misconceived. Human memory is, to the contrary, an extremely complex – and extremely sensitive – process of perception, deconstruction and encoding, storage, and subsequent retrieval and reconstruction. Every step of this sequence is fragile mechanism, vulnerable to a range of influences and possible corruptions, with the result that a false or tainted recollection may easily – and honestly – be recalled as a genuine memory. And the manner in which witnesses are interviewed, re-interviewed, proofed, prepared, presented and examined in the standard civil litigation process actually plays directly into these very vulnerabilities.[76]

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75 Toby Landau QC, "Tainted Memories: Exposing the Fallacy of Witness Evidence in International Arbitration" in *International Arbitration: Issues, Perspectives and Practice:* Liber Amicorum *Neil Kaplan* (Wolters Kluwer, 2019) at ch 4. By contrast, in civil law jurisdictions, focus has traditionally been placed less on witness evidence than on documentary evidence. Indeed, historically, full written witness statements have been generally unknown in civil law systems, and explicitly forbidden in some (see David Caron, Lee Caplan & Matti Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press, 1st Ed, 2006) at p 620).

76 Toby Landau QC, "Tainted Memories: Exposing the Fallacy of Witness Evidence in International Arbitration" in *International Arbitration: Issues, Perspectives and Practice:* Liber Amicorum *Neil Kaplan* (Wolters Kluwer, 2019) at pp 228–241.

40 Happily, there is now a keener appreciation of the weaknesses and potential inaccuracy of human memory, both in the courtroom[77] and beyond. In particular, two significant developments have occurred in recent years on this issue, namely the publication in 2020 of a major report on human memory in the context of international arbitration by an International Chamber of Commerce (ICC) task force,[78] and the issuance by the English Courts of a new PD 57AC on the preparation and presentation of witness evidence that takes account of the research on memory. Both initiatives are directed at changing standard practices so as to reduce, as far as possible, the scope for the corruption of memories, as well as increasing transparency in the way in which witness testimony is prepared and presented.

41 Of particular note is the Statement of Best Practice annexed to PD 57AC, which sets out (by way of introduction to a detailed scheme) the following exhortations:[79]

> 1.3 Witnesses of fact and those assisting them to provide a trial witness statement should understand that when assessing witness evidence the approach of the court is that human memory:
>
> (1) is not a simple mental record of a witnessed event that is fixed at the time of the experience and fades over time, but
>
> (2) is a fluid and malleable state of perception concerning an individual's past experiences, and therefore
>
> (3) is vulnerable to being altered by a range of influences, such that the individual may or may not be conscious of the alteration.

42 This is not to say that witness testimony must now be disregarded. As the English Court of Appeal has cautioned in *Kogan v Martin*:[80]

> … We start by recalling that the judge [below] read Leggatt J's statements in *Gestmin v Credit Suisse* [[2013] EWHC 3560 (Comm)] and *Blue v Ashley* [[2017] EWHC 1928 (Comm)] as an 'admonition' against placing any reliance

77 See, *eg*, *Mattingley v Bugeja* [2021] EWHC 3353 (Ch) at [25]–[26], citing *R (Dutta) v General Medical Council* [2020] EWHC 1974 (Admin) at [39]–[41]. See also *Kimathi v The Foreign and Commonwealth Office* [2018] EWHC 2066 (QB) at [96]; *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3650 (Comm); *Lachaux v Lachaux* [2017] EWHC 385 (Fam); and *Carmarthenshire County Council v Y* [2017] EWFC 36.

78 International Chamber of Commerce, "The Accuracy of Fact Witness Memory in International Arbitration" (June 2020) <https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/icc-arbitration-and-adr-commission-report-on-the-accuracy-of-fact-witness-memory-in-international-arbitration/> (accessed 1 December 2024).

79 See Appendix to Practice Direction 57AC (Statement of Best Practice) at para 1.3.

80 [2019] EWCA Civ 1645 at [88].

> at all on the recollections of witnesses. We consider that to have been a serious error in the present case for a number of reasons. First, as has very recently been noted by HHJ Gore QC in *CBX v North West Anglia NHS Trust* [2019] 7 WLUK 57, *Gestmin* is not to be taken as laying down any general principle for the assessment of evidence. It is one of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed. … [A] proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon *all* of the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence. [emphasis in original]

43 Although the Singapore judiciary has yet to offer a definitive exposition on how witness memory evidence is to be treated in light of these developments, there is little reason to doubt that the Singapore courts, as with the English courts, will arrive at a position aligned with what is now a substantial body of studies and literature regarding the fallibility of human memory.[81]

44 In this connection, it may be noted that the Singapore Court of Appeal has in *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA*[82] ("*Ernest Ferdinand*") already opined that "the court must take a realistic view of human memory" such that, for instance, "[i]t cannot expect a witness, especially one of advanced years, to recall – decade after the fact – the precise day and the hour in which one out of many transfers was made".[83] The Court of Appeal, in expressing its disapproval of group witness preparation in *Ernest Ferdinand*, at the same time embarked on reasoning firmly grounded in human psychological factors that can be at play in witness memory evidence:[84]

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81 See, *eg*, Magdalena Kękus *et al*, "Online Misinformation Can Distort Witnesses' Memories. Analysis of Co-witness discussions Using an Online Version of the MORI-v Technique" *Frontiers in Psychology* (17 January 2024) <https://www.frontiersin.org/journals/psychology/articles/10.3389/fpsyg.2023.1239139/full> (accessed 1 December 2024).

82 [2018] 1 SLR 894.

83 *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA* [2018] 1 SLR 894 at [126]. On the facts of the case, the Court of Appeal however found on the totality of the evidence and circumstances that the witness in question was not credible when the witness sought to rely on his own alleged imperfect recollection manifesting what the court found to be "vague, unsatisfactory, and even evasive answers [given by the witness] when cross-examined".

84 *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA* [2018] 1 SLR 894 at [140]. See also Alvin Chen & Gan Jhia Huei, "Group Witness Preparation – *(cont'd on the next page)*

> Thirdly, witness preparation should not be done in groups. As the court in [*R v Momodou (Practice Note)* [2005] 1 SLR 3442[85]] observed, group preparation exacerbates the risk that witnesses may change their testimony to bring it in line with what they believe the 'best' answer to be (and, in particular, to make their testimonies consistent with each other). The same is true where a witness is prepared together with other involved persons, notwithstanding that they may not themselves be called as witnesses. Again, this may occur even if the solicitors and witnesses approach the exercise with the purest of intentions. Human beings are social animals; all but the most contrarian of us naturally incline toward seeking agreement with others who are aligned with us. A witness, upon hearing the answer of another witness (or observing the other witness's reaction to the first witness's answer), may come to doubt, second-guess, and eventually abandon or modify an answer which was actually true. A case prepared in such a manner may come to resemble a thriving but barren plant: the fibres of (apparent) consistency, coherence, and plausibility may grow large and strong, but the fruit – *the truth of what transpired between the parties* – withers on the vine. [reference added; emphasis in original]

45 It will be a matter of time before the Singapore courts will have an opportunity to provide more judicial guidance on this topic. However, it is perfectly possible – and, it is suggested strongly advisable – for relevant stakeholders to take steps in the meantime to incorporate the best practices identified elsewhere into their preparation and presentation of witness testimony.

B. Issues concerning legal representation

46 The preparation and presentation of witness evidence is further impacted by legal representation. As has already been observed, despite its intended purpose, factual witness evidence, in modern practice, is rarely the independent, unvarnished account of an individual witness's own involvement in the issues in dispute. Rather, witness statements have evolved into a "major vehicle for advocacy" and a "product of intense

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Psychology Matters" *Law Gazette* (July 2019) <https://lawgazette.com.sg/practice/compass/group-witness-preparation-psychology-matters/> (accessed 1 December 2024).

85 See further *R v Momodou (Practice Note)* [2005] 1 SLR 3442 at [61]:

> … An honest witness may alter the emphasis of his evidence to accommodate what he thinks may be a different, more accurate, or simply better remembered perception of events. A dishonest witness will very rapidly calculate how his testimony may be 'improved'. These dangers are present in one-to-one witness training. Where however the witness is jointly trained with other witnesses to the same events, the dangers dramatically increase. Recollections change. Memories are contaminated. Witnesses may bring their respective accounts into what they believe to be better alignment with others. They may be encouraged to do so, consciously or unconsciously. They may collude deliberately. They may be inadvertently contaminated. Whether deliberately or inadvertently, the evidence may no longer be their own …

lawyering".[86] As the late Johnny Veeder QC once remarked in the context of international arbitration:[87]

> Written witness statements can bear little relation to the independent recollection of the factual witness, with draft after draft being crafted by the party's lawyer or the party itself, with the witness's written evidence becoming nothing more than special pleading, usually expressed at considerable length. It rarely contains the actual unassisted recollection of the witness expressed in his or her own actual words.

47 Civil litigation is as vulnerable as arbitration in this regard. To be sure, this is not a criticism of legal representation *per se*. Witnesses, if left entirely unguided, may well have difficulty identifying what issues are relevant and require to be addressed, and how evidence is to be set out and narrated such as to be coherent, clear, and to provide them with the fairest opportunity to be heard. Rather, it is the relative lack of rules and guidelines that has led to lawyers' excesses in practice.

48 As noted above, guardrails and best practices for this exercise have now been put in place by the English courts, such that witness statements in civil litigation stay true to their original foundations. These are rules that are designed to ensure that evidence is conveyed in the individual witness's own words, coming from the witness's direct personal knowledge, limited only to factual matters (as opposed to commentary, argumentation, or recital of documentation). This codification of principles and guidance has, in turn, generated a more systematic development of court jurisprudence addressing the issues and the challenges involved.

49 For Singapore, there has yet to be any formal codification of principles and best practices similar to the English PD 57AC.[88] But the courts have, from time to time, had occasion to elucidate on the legal practitioner's ethical responsibilities in drafting AEICs for witnesses.[89] These cases generally revolve around the exposition of the principle that lawyers have no general duty to actively verify the truth of a client's

86 Toby Landau QC, "Tainted Memories: Exposing the Fallacy of Witness Evidence in International Arbitration" in *International Arbitration: Issues, Perspectives and Practice:* Liber Amicorum *Neil Kaplan* (Wolters Kluwer, 2019) at pp 222–223.

87 Johnny Veeder QC, "Introduction" in *Arbitration and Oral Evidence* (Laurent Levy & V V Veeder eds) (Kluwer Law International, 2004) at pp 7–9.

88 Specifically with regard to issues concerning witness evidence preparation with the assistance of legal representatives, see Appendix to Practice Direction 57AC (Statement of Best Practice) at paras 3.8–3.12.

89 Jeffrey Pinsler SC, "Witness Preparation before Trial: What the Rules of Ethics Do Not Say" (2018) 30 SAcLJ 978 at para 8.

statements in affidavit,[90] with the more recent authorities delving sporadically into other aspects of lawyers' ethical responsibilities, namely on witness preparation in one case[91] and an alleged suppression of affidavit evidence in another.[92] In so far as the existing legal professional conduct rules are concerned, guidance has been relatively basic.[93]

50 It is suggested that rather than relying on jurisprudential development on a case-by-case basis, England's approach in codifying the relevant principles and best practices by way of a practice direction ought to be considered in Singapore. The SICC, in adopting the use of witness statements as evidence, as well as being a close parallel to arbitration, seems well positioned to lead the charge on such efforts (which domestic regulation of AEICs may come to emulate). The SICC's strength in

90 *Wee Soon Kim Anthony v Law Society of Singapore* [1988] 1 SLR(R) 455 at [21]:

> It is not for an advocate and solicitor, whether in his capacity as counsel or solicitor, to believe or disbelieve his client's instructions, unless he himself has personal knowledge of the matter or unless his client's statements are inherently incredible or logically impossible. His duty to his client does not go beyond advising him of the folly of making incredible or illogical statements.

See also *Tang Liang Hong v Lee Kuan Yew* [1997] 3 SLR(R) 576 at [74]: "… it would be placing an unduly onerous burden on counsel on every instance to verify the truth or otherwise of what their clients have deposed to in an affidavit", and *Bachoo Mohan Singh v Public Prosecutor* [2010] 4 SLR 137 at [119]:

> … the mere fact that a client makes inconsistent statements to his solicitor is no reason for the solicitor to verify those statements; it is only where it is *clear* that the client is attempting to put forward false evidence to the court that the solicitor should do so, or cease to act. Evidently, therefore, the duty to verify arises only in the presence of compelling reasons or circumstances, and is not triggered simply because the client gives conflicting instructions.

91 *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA* [2018] 1 SLR 894 at [134] and [136]–[142], essentially emphasising that "the solicitor in preparing (not *coaching* or *training*) the witness must not allow other persons – including the solicitor – to *actually supplant or supplement* the witness's own evidence" [emphasis in original], "the preparation should not be too lengthy or repetitive … to a degree where [the witness's] true recollection of events is supplanted by another version suggested to him", and "witness preparation should not be done in groups".

92 *Law Society of Singapore v de Souza Christopher James* [2024] 3 SLR 1570 at [76]:

> … the Law Society had to not only prove that [the lawyer's client] had suppressed its breach of its Search Order Undertaking from the court because it did not exhibit the Reports nor supporting documents to Sudesh's 29/1/19 Affidavit, but also that [the lawyer] omitted these documents from Sudesh's 29/1/19 Affidavit because he had intended to assist [the client] suppress the breach from the court in order to obtain a favourable outcome for [the client]. The latter inquiry focused on the subjective intention of [the lawyer], as objectively ascertained.

93 See Legal Profession (Professional Conduct) Rules 2015 r 9(2)(*h*)(iv) providing that a legal practitioner must not draft any affidavit or witness statement containing "any statement of fact other than the substance of any evidence which the legal practitioner reasonably believes, having regard to the legal practitioner's instructions, the witness making the affidavit or statement would give if that evidence was given orally".

drawing from the rich and diverse expertise of its international judges[94] is a unique advantage in this regard.

VI. Issues concerning timing of witness evidence

51 The new AB4D procedure introduced by way of the domestic ROC 2021 has been discussed in Part III. The AB4D procedure stands not merely as an optional protocol through which AEICs can be directed to be adduced earlier in the civil litigation process (*ie*, before discovery). As mentioned, it is expected that the AB4D procedure is something that the Singapore courts may well employ with regularity moving forward.

52 The potential concerns with the AB4D procedure were carefully considered in the course of the law reform, including additional legal costs (especially where simpler claims are concerned involving relatively straightforward discovery) and difficulty identifying relevant witnesses early in the proceedings.[95] The ROC 2021 in any event do not prevent parties from seeking permission post-discovery to file supplemental AEICs in the proceedings.[96]

53 The Civil Justice Review Committee in its analysis took the view that these concerns do not outweigh the overall benefits that the AB4D procedure can offer in the long term in reshaping Singapore's domestic civil litigation system:[97]

> These concerns however, are premised on the assumption that counsel and parties will continue to prepare for cases as they have done to-date. Under the CJRC's proposals, parties and their counsel will have to engage in a much more thorough preparation of witness evidence at an early stage of proceedings. While this may frontload the costs incurred to prepare witness evidence, it will result in greater time and costs savings for parties in the long run.
>
> In addition, the court will not exercise its powers to order AEICs to be filed and exchanged before disclosure of documents if parties are unable to prepare their AEICs without the documentary evidence uncovered during the disclosure of documents. This is especially so for cases where there is asymmetry

94 See <https://www.judiciary.gov.sg/singapore-international-commercial-court/about-the-sicc/judges> (accessed 1 December 2024).

95 *Report of the Civil Justice Review Committee* at paras 69(a)–69(c), accessible at <https://www.mlaw.gov.sg/news/public-consultation-proposed-reforms-civil-justice-system/>.

96 *Report of the Civil Justice Review Committee* at para 69(d), accessible at <https://www.mlaw.gov.sg/news/public-consultation-proposed-reforms-civil-justice-system/>.

97 *Report of the Civil Justice Review Committee* at paras 70–71, accessible at <https://www.mlaw.gov.sg/news/public-consultation-proposed-reforms-civil-justice-system/>.

> of information as the party without the necessary information may have difficulties preparing his AEICs without the disclosure of documents.

54 The explanation provided highlights, in significant part, the role of counsel in the civil litigation process. Thus, counsel not only have a considerable impact on how written witness evidence is prepared and presented (as discussed earlier), they also play a critical role in realising the relevant Ideals underpinning the AB4D procedure.

55 Once again, it is seen that the role of the advocate and solicitor in Singapore is central in ensuring that witness evidence is canvassed fairly and efficiently within reasonable costs.

VII. Issues concerning control of witness evidence

56 Litigation necessarily entails strategising by counsel and parties, and this oftentimes includes a party's selection of witnesses. However, the incentives underlying a party's choice of witness may not necessarily be based on who that party considers has the most intimate and reliable personal knowledge of the facts in issue. A party may well rest its choice instead on who it thinks will perform better as a witness on the stand, and be most resilient to cross-examination. A party may out of purely tactical reasons also choose to remain silent, or to avoid calling a particular witness for extraneous reasons.[98] The result is that those best placed to give the best evidence may not be made available to the court.

57 The adversarial system of litigation affords some safeguards against tactical witness line-ups, through a procedure available to parties known as a request for an "order to attend court" (previously known as the *subpoena*).[99] However, an order to attend court is predicated upon a

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98 Toby Landau QC, "Tainted Memories: Exposing the Fallacy of Witness Evidence in International Arbitration" in *International Arbitration: Issues, Perspectives and Practice:* Liber Amicorum *Neil Kaplan* (Wolters Kluwer, 2019) at p 222:

> As a practical reality, the witness identification and selection process is not about securing all available evidence in order to allow the tribunal to find the 'truth'. Rather, it is a strategic and tactical exercise aimed at selecting witnesses who are best able to present and express themselves; who support the official case; who are resilient enough to withstand cross-examination; and who are able to give a favourable impression to the tribunal. In many cases, this list of requirements may exclude key individuals, and thereby militate *against* the presentation of a complete evidential record. In such cases, the tribunal may only be left with the blunt and vastly inferior alternative of drawing adverse inferences by reason of a witnesses' evidence.

99 See O 15 r 4 of the Rules of Court 2021 and O 20 r 3 of the Singapore International Commercial Court Rules 2021. The procedure also allows a party to request for an "order to produce documents".

party's request. The civil procedure rules do not explicitly state that the courts have the power to issue an order to attend court on their own motion. In England, the Court of Appeal has further held that:[100]

> … in civil litigation, a court has no general power to order one party to call, as a witness on the substantive issues, a person whom that party does not wish to call. Party autonomy is paramount.

58 There is also the available – but relatively blunt – tool of the drawing of adverse inferences by the failure of a party to adduce particular evidence or a particular witness. As litigation strategy evolves, the question arises: can or should the courts do more? It is suggested that where, *eg*, the AB4D procedure applies, the early exchange of witness AEICs in the proceedings creates conditions conducive for the courts to explore and discuss with parties the possibility of identifying additional witnesses in the earlier pre-trial stage of the proceedings. This may well require the courts to adopt a more interventionist case management stance in Singapore's traditionally adversarial system of dispute resolution. But this will be consistent with one of the key anchoring principles undergirding the ROC 2021, namely enhancing judicial control over civil litigation.[101] As the Civil Justice Reform Committee has explained in relation to the ROC 2021:[102]

> Ultimately, enhancing judicial control over litigation furthers the public interest. It strikes a proper balance between the interests of litigants (and their counsel) in advancing their cases in the best possible manner, and the public duty of our judicial institutions to ensure that court machinery is not abused.
>
> …
>
> The CJRC recommends a move from the current system where the judge focuses largely on adjudication to a role where the judge works more actively with parties to find the best way to resolve a case.
>
> In established common law jurisdictions, judges are playing an increasingly active role throughout court proceedings, while maintaining the adversarial nature of the system.

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100 *QX v Secretary of State for the Home Department* [2022] EWCA Civ 1541 at [133], *per* Coulson LJ. At [136], Coulson LJ further held:

> If the other side considers that the evidence of X is crucial, it can issue a witness summons under CPR Part 34 and call X itself. Of course, that is not always a safe course because, in civil litigation, the party calling X cannot cross-examine him or her; his evidence would have to be adduced by way of examination-in-chief in the conventional way …

101 *Report of the Civil Justice Review Committee* at para 25, accessible at <https://www.mlaw.gov.sg/news/public-consultation-proposed-reforms-civil-justice-system/>.

102 *Report of the Civil Justice Review Committee* at paras 27–34, accessible at <https://www.mlaw.gov.sg/news/public-consultation-proposed-reforms-civil-justice-system/>.

> …
>
> The desired outcome is a judge who strikes an optimal balance between adjudicating a case and resorting to judicial activism. The CJRC proposals are calibrated to empower a judge to actively shepherd a case towards a timely, cost-effective conclusion without impinging on the rigour which the adversarial system brings to bear in the adjudication of disputed issues.

59 Under the SICC Rules 2021, the SICC is similarly conferred with broad case management powers, with "control over the conduct of all trials", including giving directions "identifying or limiting the issues at which factual evidence may be directed" and "identifying the witnesses who may be called or whose evidence may be read".[103] This paves the way for a far more proactive role by the court.

VIII. Conclusion

60 The trajectory of reforms in Singapore's civil litigation system has consistently been marked by the desire to enhance efficiency whilst maintaining fairness and minimising litigation costs for the parties. The enactment of the domestic ROC 2021 and the SICC Rules 2021 – still in relative nascency – holds much promise in that regard in the context of the regulation of witness evidence.

61 The landscape as now charted by the new rules will no doubt benefit from more developed jurisprudence in time. But in the meantime the way is clear – and ripe – for more comprehensive guidance and the codification of best practices, as has now been done elsewhere.

62 In particular, given the essential role of counsel in so many aspects of the preparation and presentation of witness testimony, it is suggested that relevant and up-to-date professional ethical standards are now critical. As at the time of going to press, an Ethics and Professional Standards Committee commissioned by Sundaresh Menon CJ has, in its interim report, proposed the development and promulgation of a new "Ethical Best Practices in Dispute Resolution Guide" to "set out best practices and ideal standards specific to disputes work".[104] Inclusion within the Guide of principles and best practices in relation to witness evidence will be welcome. And this is all the more so, given the expanding

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103 See O 20 rr 5(1)(*a*)–5(1)(*b*) of the Singapore International Commercial Court Rules 2021.

104 See *Interim Report of the Ethics and Professional Standards Committee* (15 December 2023) at para 68(c), accessible at <https://www.judiciary.gov.sg/news-and-resources/news/news-details/media-release-interim-report-of-the-ethics-and-professional-standards-committee>.

role that Singapore advocates and solicitors may soon come to play in dispute resolution not just domestically, but internationally.[105]

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105 See, in this regard, the latest development brought about by the Singapore International Commercial Court (International Committee) Bill establishing "an International Committee of the Singapore International Commercial Court ('International Committee') in Singapore to hear prescribed civil appeals and related proceedings from prescribed foreign jurisdictions" where "Singapore advocates and solicitors, foreign lawyers and law experts who have been registered to appear before the SICC, can appear before the International Committee": "Joint Media Release: Enhancing Singapore's offerings as an International Dispute Resolution Hub with the Singapore International Commercial Court (International Committee) Bill" *SG Courts* (14 October 2024) <https://www.judiciary.gov.sg/news-and-resources/news/news-details/joint-media-release--enhancing-singapore-s-offerings-as-an-international-dispute-resolution-hub-with-the-singapore-international-commercial-court-(international-committee)-bill> (accessed 1 December 2024).