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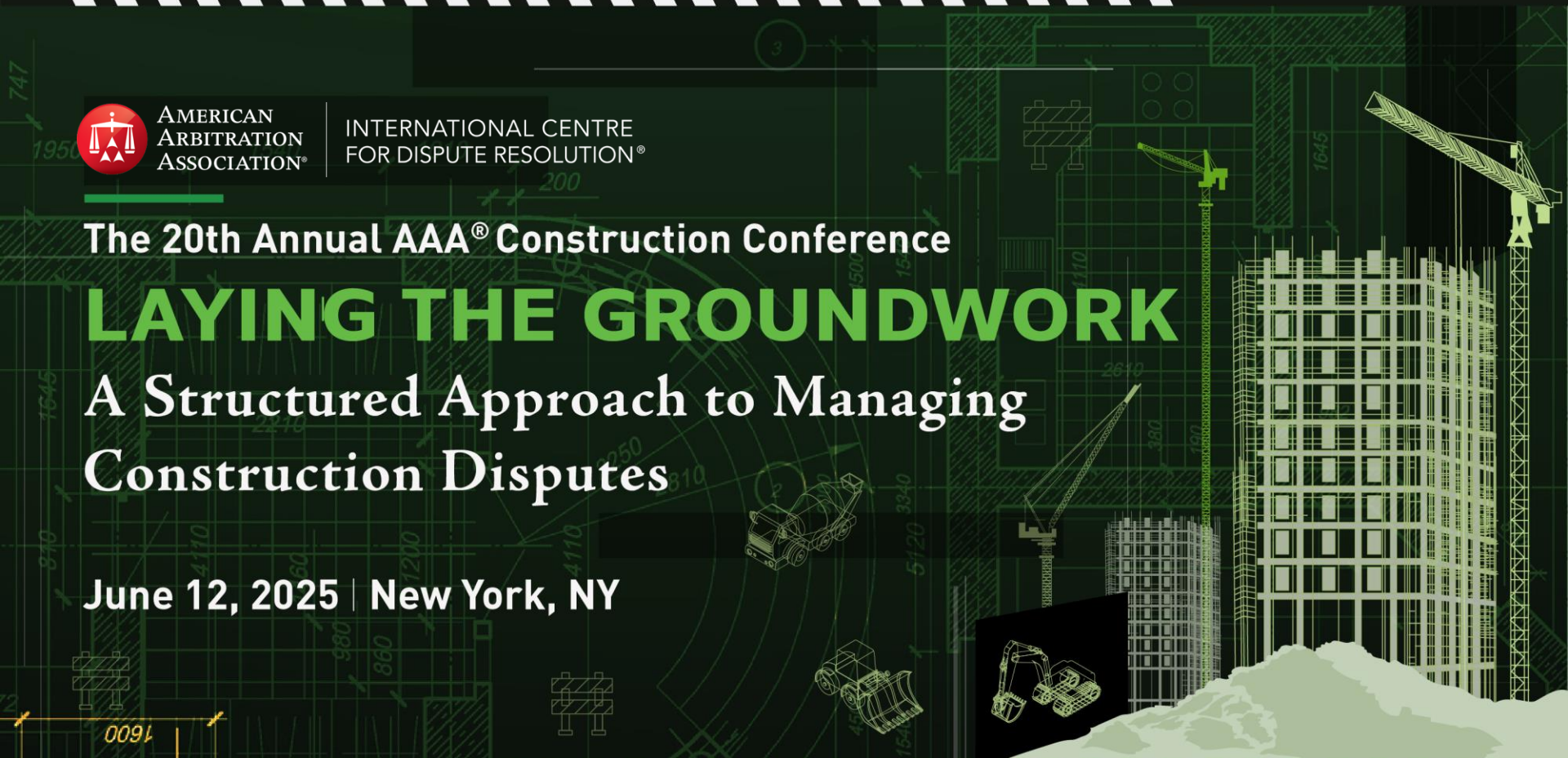
INTERNATIONAL CENTRE
FOR DISPUTE RESOLUTION®

The 20th Annual AAA® Construction Conference

LAYING THE GROUNDWORK

A Structured Approach to Managing
Construction Disputes

June 12, 2025 | New York, NY



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June 12, 2025

3:00- 4:00 PM

**Witness Statements vs.
Direct Examination:
How International Arbitration
Practices Are Being Applied in
Domestic Construction Arbitration**



THE ROLE OF WRITTEN WITNESS STATEMENTS IN CONSTRUCTION ARBITRATION:

BRIDGING INTERNATIONAL PRACTICE
AND DOMESTIC EFFICIENCY

Meet Our Panelists

MODERATOR



Luis M. Martinez

Vice President (ICDR),
International Division of the
American Arbitration Association
New York, NY



Adrian Bastianelli, III

Of Counsel,
Peckar & Abramson, P.C.
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Albert Bates, Jr.

Partner,
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Senior Partner,
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Fitzgerald, LLP
McLean, VA



Alvin F. Lindsay

Partner
Hogan Lovells US, LLP
Miami, FL



Why Focus on Witness Statements?

- Inspired by successful use in International Practice (compare AAA Construction vs. ICDR Rules)
- Improve efficiency and cost-effectiveness of preparation for and presentation of fact testimony
- Reduce costly and time-consuming deposition discovery
- Enhance arbitrators' ability to focus on key factual disputes



What are Written Witness Statements?

- Primary tool for presenting factual testimony
- Submitted in advance of hearings
- Signed declarations with supporting documents
- Often replace full direct examination



How They Work in International Arbitration

- Hearing time reduced
- More focused cross-examinations
- Parties and arbitrators are better prepared
- Advance insight into contested issues

Efficiencies:

- Strategic streamlining of proceedings
- Clarity and structure in case presentation
- Enables arbitrators to manage complex issues early
- Better control over timing and cost



Comparison – U.S. Domestic Arbitration

- Emphasis on live, direct testimony
- Limited pre-hearing witness disclosures
- Witness statements typically are submitted shortly before hearings
- More introductory direct testimony allowed before cross



Why Introduce Witness Statements Domestically?

- Condenses hearing schedules and often reduces cost
- Prepares parties and arbitrators for cross-examination, resulting in shorter and more focused cross
- Reduces surprise



Addressing Resistance

Common Concerns:

- Loss of spontaneity and live performance on direct
- Perceptions of witness statements are lawyer-driven
- Hesitance from parties familiar with live direct examination
- When will the arbitrator read the witness statement?
- The hearing is shortened, but is the overall cost of the arbitration reduced?

Response:

- Witness credibility is best determined on cross
- Direct examination is just as lawyer driven
- Lawyers need to try the process in domestic arbitration
- Proper preparation retains authenticity and credibility



Best Practices for Drafting Statements

Generally:

- Use the witness's own voice
- Integrate key documents for support—BUT do not excessively quote from documents
- Consider addressing cross-examination points
- Balance clarity with detail



Best Practices for Drafting Statements

Timing and Strategy:

- Typically at least two rounds of witness statements
- Coordinate with documentary evidence submissions
- Consider rebuttal opportunities and factual predicate for expert testimony

Arbitrator Preferences:

- Clarity, honesty, and relevance without undue legal advocacy
- Logical structure linked to evidence
- Rebuttal statements should focus on material factual discrepancies
- Witness statements outline material facts—they are not legal briefs



Written Expert Statements/Reports In International Arbitration

Streamlining Complex Technical Evidence - Purpose & Format:

- Independent Expert Testimony for the Benefit of the Tribunal
- Structured reports typically submitted much earlier in international matters
- Address technical subject matter with basis for opinions and supporting documents and analysis

Benefits:

- Clarifies expert positions early
- Focuses and narrows the technical issues in dispute
- Reduces duplicative or unnecessary witness testimony



Written Expert Statements/Reports In International Arbitration

Common Practices:

- Typically two rounds of expert statements, often submitted together with a legal submission, fact witness statements and supporting documents
- Permits joint expert reports or "hot-tubbing" of experts to focus areas of dispute

Strategic Considerations:

- Independence versus Advocacy
- Expert conclusions often drive party's broader case theory
- Focus on differences with opposing expert, and clearly explain basis for opinion
- Consider necessary factual support when preparing witness statements



Combining Approaches

Balancing Written and Live Testimony for Impact:

- Use written witness *and* expert statements to streamline direct presentation
- Preserve live cross-examination for critical or credibility-based issues
- Blend traditional direct examination with written evidence summaries for coherence
- Have some witnesses presented using direct examination



Conclusion

Making Informed Choices in Construction Arbitration:

- Written witness and expert statements enhance efficiency, structure, and preparation
- Live testimony still plays a crucial role—especially for credibility or impact
- International practices offer a flexible toolkit—not a one-size-fits-all solution
- The key is strategic adaptation: tailor the approach to the dispute, tribunal, and facts
- A thoughtful mix of methods supports fairness, persuasion, and better outcomes





THANK YOU



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