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ITA CONFERENCE PRESENTATIONS

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A REPORT ON #YOUNGITATALKS "THE PSYCHOLOGY OF WITNESS EVIDENCE AND ITS ROLE IN TRIBUNAL DECISION-MAKING"

by Alexander Westin-Hardy

I. INTRODUCTION

On October 27, 2021, Young ITA organized an event on the topic of "The Psychology of Witness Evidence and its Role in Tribunal Decision-Making", hosted by Allen & Overy in London. Katrina Limond (Young ITA UK Chair, Allen & Overy London) and Robert Bradshaw (Young ITA UK Vice-Chair, Lalive London) led a roundtable discussion paneled by Professor Kimberley Wade (Professor of Psychology at the University of Warwick), Christopher Newmark (Arbitrator, Mediator and former Chairman of the ICC Commission on Arbitration and ADR), Professor Aldert Vrij (Professor of Applied Social Psychology at the University of Portsmouth) and Professor Maxi Scherer (Queen Mary University of London; WilmerHale).

Katrina Limond began by giving a brief introduction and summary of recent developments highlighting the importance of psychology in dispute resolution, particularly for witness evidence. These developments include publication of the ICC Commission Report on The Accuracy of Fact Witness Memory in International Arbitration (the "ICC Report")[1] and the introduction of a new Practice Direction governing trial witness statements in the Business and Property Courts of England and Wales.[2]

II. THE RELIABILITY OF FACT WITNESS MEMORY

Robert Bradshaw opened the discussion; the first topic being the reliability of fact witness memory. Professor Wade explained that eliciting detailed and accurate reports from witnesses can be difficult. Multiple studies have demonstrated the fallibility of witness memory, and Professor Wade pointed to two key explanations for

[1] INTERNATIONAL CHAMBER OF COMMERCE, THE ACCURACY OF FACT WITNESS MEMORY IN INTERNATIONAL ARBITRATION (2020).

[2] Civil Procedure Rules, Practice Direction 57AC.

why honest witnesses may nevertheless misremember events. First, a witness's memory can be influenced by information (and misinformation) they encounter after the event, including practices commonly employed by arbitration counsel in preparing witness evidence. For instance, evidence such as emails, meeting minutes or photographs may unconsciously override a witness's recollection of events. Similarly, discussing events with other witnesses can "contaminate" witnesses' memories. To reduce the risk of such contamination, Professor Wade highlighted recommendations in the ICC Report including interviewing witnesses separately and eliciting reports before witnesses can confer. Second, a witness's personal perspective matters and witnesses' beliefs and motivations may unconsciously bias the way they report information. This is particularly relevant in international arbitration, where witnesses will often take a particular perspective, either as claimant or respondent, especially when testifying on behalf of their employer. Subtle differences in the phrasing of questions can also affect a witness's answers, and even influence their recollection of events.

Mr. Newmark and Professor Scherer provided practitioners' views on witness memory. Professor Scherer noted that as an arbitrator, her experience has been that witness memory is not set in stone but is contextual. She highlighted the importance for arbitrators of asking open questions, and recommended all practitioners review the ICC Report and the recommendations for witness preparation in an article by Professor Wade and Dr Cartwright-Finch.[3] Mr. Newmark provided an example of wording he has used in a procedural order with an option to describe how witness evidence has been prepared—it remains to be seen how this will affect the content of witness evidence and cross-examination.

III. WITNESS CREDIBILITY AND DETECTING DECEIT

The second topic was witness credibility, including how to detect verbal and non-verbal cues of deception. Both Mr. Newmark and Professor Scherer agreed that identifying dishonest witnesses is extremely difficult in practice and emphasized that

[3] Kimberley Wade & Ula Cartwright-Finch, *The Science of Witness Memory: Implications for Practice and Procedure in International Arbitration*, 39(1) J. INT'L ARB. 1 (Feb. 2022).

they place greater importance on the substance of witness evidence than its delivery. It is all too easy to misinterpret common physical manifestations such as sweating, twitching, foot-tapping, or gaze aversion as signs of dishonesty, when they may simply be the result of nervousness, individual habits, or cultural differences. Professor Scherer emphasized that judging whether witness evidence is credible involves a contextual assessment, and that the only reliable indicator of dishonesty is the presentation of directly contradicting documentary evidence. Professor Vrij, a leading expert on the psychology of deceit, agreed that reliance on non-verbal cues and body language is a poor method for identifying whether someone is lying; there is no universal "tell" in liars' behavior. He highlighted a number of errors in the conventional wisdom. For example, while fidgeting is often seen as a sign of dishonesty, liars in fact typically make fewer movements due to the greater cognitive load of fabricating a story. Focusing on the speaker's appearance may actually hinder credibility assessments. A more reliable indicator of honesty is the amount of information provided by a witness; truth-tellers give more detailed answers than liars. In practice, Professor Vrij concluded, interviewers should focus on listening to witnesses rather than watching them and, if aiming to facilitate verbal lie detection, should ask open rather than closed questions.

IV. THE PERSPECTIVE OF AN ARBITRATOR

Third, Mr. Newmark gave an arbitrator's perspective on assessing witnesses and the impact of witness evidence on tribunal decision-making. He explained that while witnesses can provide helpful context, few cases turn solely on witness evidence. He noted that the most effective way for counsel to deploy witness evidence is to focus on the issues of fact that cannot be proved by documents, a strategy that gives the tribunal the essential information they need to make an award but that limits the scope for cross-examination. Mr. Newmark also suggested that counsel consider using descriptive narratives or chronologies in written briefs or opening submissions in place of witness evidence. He reiterated that witness statements need not be unduly lengthy, that first drafts of statements should not be produced until after the witness has been interviewed, that witnesses should not argue the case, and that

witnesses should be able to acknowledge any gaps in their memory.

V. THE EFFECT OF REMOTE TESTIMONY

Finally, Professor Scherer discussed remote hearings and the effect of remote testimony on assessing witnesses. Professor Scherer discussed the results of a recent survey into remote hearings which showed that, while experts and counsel rated them as worse for giving evidence and conducting cross-examinations, tribunal members found them better for developing an understanding of the case and for assessing witness and expert evidence.[4] Professor Scherer suggested that hybrid hearings may offer advantages, including more effective assessment of witness evidence up-close on-screen, easier recall of recordings of the hearing and improved communication amongst legal teams and tribunal members.

VI. PRACTICAL TIPS FOR PRACTITIONERS

The panel answered questions from the audience, including considerations for witnesses testifying in a second language (and the potential pitfalls of using an interpreter unless necessary), the impact of time on a witness's memory, and how obvious it can be to tribunal members when witness statements are drafted by lawyers. Katrina Limond rounded off the discussion by providing some practical tips for practitioners, including considering the practical points in the ICC Report and listening (and reviewing transcripts) closely to pick out discrepancies in evidence that may indicate deceit.

ALEXANDER WESTIN-HARDY is a trainee solicitor in the International Arbitration group at Allen & Overy, in London. He holds a B.A. and an M.Phil. from the University of Cambridge.

[4] Gary Born, Anneliese Day & Hafez Virjee, *Remote Hearings (2020 Survey): A Spectrum of Preferences*, 38(3) J. INT'L ARB. 292 (2021).

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