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TABLE OF CONTENTS

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BETWEEN ACCURACY AND CREDIBILITY: THE PROBLEM WITH A WITNESS

by Anna Isernia Dahlgren

I. INTRODUCTION

This article considers the panel discussion that took place on June 16, 2022 at the 34th Annual ITA Workshop and Annual Meeting in Austin, Texas and focused on the nature of human memory and its impact on witness testimony in international arbitration proceedings. "The Problem with a Witness" featured Kate Davies QC (Allen & Overy LLP, London)[1] moderating a panel made up of Professor Kimberley Wade (University of Warwick, Coventry),[2] Professor Maxi Scherer (WilmerHale, London),[3] and Ed Williams QC (Cloisters, London).[4]

Finding its roots in the Kaplan Lecture on the Fallacy of Witness Evidence given by Toby Landau QC in 2010,[5] Davies guided the panel through a discussion on the fallibility of human memory, its impacts on international arbitration proceedings, and how the arbitral process can exacerbate or mitigate the effects thereon.

This review begins by highlighting the problems with witness accuracy by examining both Professor Wade's findings in the International Chamber of Commerce

[1] Kate Davies QC is a partner in Allen & Overy's International Arbitration practice group, with extensive experience with both institutional and *ad hoc* arbitration proceedings in both the commercial and investment treaty contexts.

[2] Professor Kimberley Wade is a psychologist who focuses her work on human memory and cognition with a particular interest in how psychology can inform the practice and policy of legal settings. In 2015, she was asked to join the ICC's Witness Memory Task Force, where she served as a scientific advisor.

[3] Professor Maxi Scherer serves as special counsel at WilmerHale, and professor of law at Queen Mary, University of London, and is regularly ranked as a leading arbitration practitioner. Professor Scherer attended the panel virtually.

[4] Ed Williams QC has a trial and appellate practice that focuses on employment-related commercial and discrimination law. Williams also acts as a mediator and co-founded a firm that mediates large-scale legal disputes with a focus on those containing a political element.

[5] *See* Toby Landau QC, The Kaplan Lecture at the Hong Kong Club, *Tainted Memories: Exposing the Fallacy of Witness Evidence in International Arbitration* (Nov. 17, 2010) (write-up available at, https://static1.squarespace.com/static/5fc4c63ed27ff856c265d945/t/5fd03d52ab2d482295d7e0a2/1607482708302/2010+-+Toby+Landau+QC+%E2%80%93+Tainted+Memories%EF%BC%9AExposing+the+Fallacy+of+Witness+Evidence+in+International+Arbitration+.pdf).

("ICC") Task Force on Witness Evidence Report[6] (the "ICC Report") and her remarks about witness confidence as a proxy for accuracy. It then shifts to a review of witness credibility issues before discussing whether it is worth mitigating these issues in witness evidence and how to do so. Finally, it concludes with a few suggestions.

II. THE ACCURACY OF A WITNESS

"*Remembrance of things past is not necessarily the remembrance of things as they were.*"

–MARCEL PROUST, IN SEARCH OF LOST TIME

While often thought of like instantly retrievable film reels stored in the recesses of our psyche, memories are less concrete than we like to imagine. In fact, human memory is extremely malleable, influenced by things like misinformation, personal bias, the phrasing of a question designed to get us to recall something or elicit a specific response, discussions with a co-witness, and the retelling of the event from a different perspective. Yet human memory plays a central role in the procedure of international arbitration, primarily through the introduction of witness evidence in the form of written and oral testimony.

This tension was brought to the forefront of the arbitration community's attention by Toby Landau QC, who followed up his 2010 Kaplan Lecture with his 2015 guest speech, entitled *Unreliable Recollections, False Memories and Witness Testimony*, at a meeting of the ICC Commission of Arbitration and ADR.[7] The ICC responded to Landau's call-to-arms by putting together a task force, focused on "Maximising the Probative Value of Witness Evidence." In November 2020, the task force published the ICC Report, entitled "The Accuracy of Fact Witness Memory in International Arbitration," parts of which Wade discussed during the panel, as elaborated further below.

[6] Int'l Chamber of Com. (ICC) Task Force 'Maximising the Probative Value of Witness Evidence,' *The Accuracy of Fact Witness Memory in International Arbitration: Current Issues and Possible Solutions*, ICC (Nov. 2020), *available at* https://iccwbo.org/content/uploads/sites/3/2020/11/icc-arbitration-adr-commission-report-on-accuracy-fact-witness-memory-international-arbitration-english-version.pdf (hereinafter the "ICC Report").

[7] Toby Landau QC, Guest Speech at the ICC Commission on Arbitration and ADR, *Unreliable Recollections, False Memories and Witness Testimony* (Oct. 2015).

A. *ICC Report Findings*

The ICC Report is the first study to apply decades of research on witness memory in legal proceedings to a commercial, instead of a criminal, context. The study examined the extent to which two factors known to influence memory–having a biased perspective and misleading post-event information–affect memory recall in a commercial context. The study found that the presence of these two factors significantly decreased witness accuracy and provided recommendations to mitigate the distorting effects of exposure to such post-event information.

Although a substantive review of the ICC Report is beyond the scope of this article, Wade highlighted the following three findings that bear repeating:

1. The way a question is worded can have a significant impact on a witness's memory recall; using neutral language can avoid the creation of misinformation which may become coded into the witness's memory. Misinformation might merely cause occlusion of an original memory, but there is also a risk that it could completely overwrite the memory and make further accurate recall thereof impossible.

   As one example of neutral language in questioning, the ICC Report provides the following example: "[D]o not ask 'How aggressively did the Respondent's manager react?' or 'How stubbornly did they resist your request?' as the qualifying descriptors 'aggressively' or 'stubbornly' may impact the witness's response. Instead, use more neutral language: 'How did the discussion at the meeting progress?'"[8]
2. Co-witness discussion is a powerful mechanism for the transmission of misinformation. Thus, working to avoid co-witness discussion by conducting solo interviews is an effective method of avoiding exposure to memory-warping misinformation.[9]
3. People often attune their retelling of a memory to the audience they are speaking to. Similarly, where witnesses are employed by a party to the

[8] ICC Report, *supra* note 6, ¶ 5.10.f).

[9] *Id.* ¶ 5.8.

proceeding, they can often tailor their statements in an unconsciously biased manner. Attorneys can avoid unintentionally leaning into this potential bias by asking unbiased and open-ended questions.[10]

B. *Confidence as a Proxy for Accuracy*

Wade also discussed whether a witness's confidence is a good indicator of their accuracy. Wade explained that, in theory, accuracy and confidence should correlate, but that, in practice, correlation only occurs if interviews are conducted appropriately and without a time-delay; even then, the correlation is less than ideal.[11] Exposure to misinformation and a large time-delay made witnesses both more confident and less accurate, as did poor interview techniques. Essentially, even though fact-finders often use witness confidence as a proxy for their accuracy (and thus their reliability), such reliance should be met with extreme caution.

III. BEYOND ACCURACY: THE CREDIBILITY OF A WITNESS

Even if the memory of a witness is preserved as accurately as possible, the credibility determinations made by tribunal fact-finders can significantly affect the worth of that accuracy. Williams described nerves as "the flip-side of memory," acknowledging that whether a witness is perceived as credible, regardless of their accuracy, depends largely on the tribunal's perception of their physical response to examination. Thus, Williams posited, a calm witness is a credible witness.

Williams cited Professor Albert Mehrabian's three elements for effective communication which theorizes that 55% of messages are communicated by body language, 38% by vocal tone, and 7% through actual words.[12] Attorneys would want a witness to balance all three elements in favor of spoken words. Williams showed that nerves pull focus from witness testimony—voices strain and crack, hands fidget, bodies clam up—such that the actual words being said are drowned out by the clamor

[10] *Id.* ¶ 5.10.e).

[11] *See* ICC Report, *supra* note 6, at 25, n.24 (explaining the report's statement that "witness confidence is not by itself a good indicator of memory accuracy").

[12] Albert Mehrabian and Morton Wiener, *Decoding of Inconsistent Communications*, J. OF PERSONALITY AND SOC. PSYCH. 6, 109–114 (1967); Albert Mehrabian and Susan R.Ferris, *Inference of Attitudes from Nonverbal Communication in Two Channels*, J. OF CONSULTING PSYCH. 31, 248–252. (1967) (theorizing that three elements—words, tone of voice, and facial expressions—account for the liking of a person).

of body language and vocal tone, thereby impacting the credibility of a good faith witness.

To demonstrate the impact cross-examination has on witness nerves, Williams cross-examined Professor Patricia Shaughnessy—conference co-chair and professor of law at Stockholm University—on her interest in foraging, eventually landing on the tension between her love for it due to its sustainable nature and her attending the conference via a carbon-heavy flight from Sweden to Texas. When asked how she felt after the cross-examination was over, Professor Shaughnessy confessed that she was uncomfortable at being unable to predict the direction of the questions and that her body became tense with the more difficult questions. Williams suggested that attorneys expose their witnesses to cross-examination, even on irrelevant topics, as it helps them prepare for the rush of nerves that surface during the real thing, and ultimately allows the witness to increase their perceived credibility through a calm demeanor.

Williams then described the approaches taken by three jurisdictions in witness preparation to mitigate this effect. In the US, attorneys often put witnesses through a full rehearsal, exposing them to questions they will likely be asked on both direct- and cross-examination. In contrast, French practitioners rarely prepare witnesses because testimonial evidence is extremely limited. Finally, practioners from the UK are prohibited from practicing, rehearsing, or coaching witnesses. However, they are allowed to familiarize them; attorneys can put witnesses in the position of being cross-examined for the first time, by asking witnesses personal, unrelated questions in the style of cross-examination, with the aim of preparing witnesses for the impact of nerves that take over during cross-examination.

Interestingly, Wade noted that the research coming out of the shift from in-person proceedings to virtual ones demonstrates that virtual hearings might actually be better venues for determining the credibility of a witness. She explained that the pervasive myth that non-verbal cues serve as deception identifiers has been debunked by research showing that deception is easier to detect when the emphasis is put on verbal cues instead of physical ones, as happens in a virtual setting.

IV. REFORMATION: A WORTHWHILE ENDEAVOR?

"*We don't need to rip up the rulebook, but we may need to adapt it.*"

–Kate Davies QC

With all of the issues stemming from witness accuracy and credibility, how can arbitration practitioners make sure that their witnesses are providing accurate testimony that will be heard in arbitral proceedings? Is it even worth attempting to reform a practice that is littered with red flags and that rarely proves pivotal to a tribunal's decision?

A. *An Arbitrator's Perspective*

Scherer presented the arbitrator's perspective, noting that witness evidence is not presented as a codified memory and that a case rarely hinges on the basis of the singular testimony of a witness. Yet, Scherer acknowledged it is important to be aware of the shortcomings of witness memory as it does beneit the arbitral process. Witness evidence helps shed light on the context of the dispute as well as the atmosphere and relationship between the parties, adding an additional gloss to the documentary evidence. Where documentary evidence provides a black and white landscape, Scherer mused, witness testimony adds color and life without changing the landscape itself. Thus, awareness of our limitations can only help enhance arbitral proceedings.

B. *An Attorney's Task*

When asked what attorneys can do to mitigate the impacts of time on witness memory, as many arbitral disputes harken back to twenty-year-old facts, Wade cautioned that the effect of a time-delay cannot be overcome. However, attorneys can work hard to interview witnesses as effectively as possible. Wade suggested the employment of the cognitive interview technique, recently adopted by UK police officers, which encourages recall in alignment with memory structure, enabling self-prompting of further details without contamination.

The ICC Report recommends applying a similar technique.[13] One of those

[13] ICC Report, *supra* note 6, at 25.

recommendations emphasized the importance of uninterrupted narratives as a natural way to capitalize on memory structure and coding, making it more likely that witnesses will prompt themselves to remember more. Interruptions break this natural cycle, making it more likely that a memory will be less accurate.

C. *An Institution's Choice*

The UK recently implemented Practice Direction 57AC, as discussed by Davies and Williams, which sets out a new fundamental regime for the preparation of witness statements in UK courts.[14] In relevant part, the regime dictates that witness statements must be written by the witness and must include a list of all the documents shown to the witness as part of their preparation. Williams praised 57AC as a good start in the right direction, noting its underlying principle that witness testimony should be limited with most of the evidence coming from documents.

Scherer expressed interest in establishing similar practice guidelines for the treatment of witnesses in international arbitration. Speaking to the likely benefit of a new practice guideline, Scherer highlighted the notable difference between the UK's 57AC and a potential practice guideline for international arbitration; as international arbitration practitioners are trained in the methods of their respective jurisdictions, their styles of witness interaction will vary. Scherer suggested that an established baseline might help level the witness preparation playing field. Scherer submitted that a variety of suggestions – such as listing what documents have been provided to witnesses in preparation, explaining how witnesses have been prepared, or whether there were any external service providers used in witness preparation – are worthy of consideration in the creation of a practice guideline.

V. SUGGESTIONS

The ICC Report acknowledges that many of its recommendations may not always be appropriate for any given situation. However, the adoption of mitigating interview techniques should be largely appropriate for all counsel collecting witness reports. Counsel should focus their efforts on refining their interview techniques to avoid unintentionally distorting witness recall through suggestive interview tactics. In

[14] Practice Direction 57AC, Civil Procedure Rules (U.K.).

addition, an institutional practice guideline should recommend the implementation of the cognitive interview technique, coupled with an emphasis on counsel neutrality, in order to collect statements that are as true to the event as possible.

This author also adopts Scherer's stance that a practice guideline would be beneficial to mitigate many of the issues with witness memory in international arbitration. Individual arbitral institutions, being the arbiters of their own procedures, should take the initiative to consider the recommendations of the ICC Report and adapt them to their particular cultural styles and chambers. Further study of the ICC Report and Wade's follow-up report[15] are similarly recommended for arbitrators, counsel, clients, and arbitral institutions alike.

Additionally, this author believes that real steps should be taken to develop practice guidelines that address the panel's discussion of witness credibility determinations. Without accurate credibility determinations, witness accuracy is largely irrelevant.

Williams made it clear that credibility is often inaccurately determined through body language which can be deeply impacted by nerves. There is a clear link, then, between witness credibility and accuracy being determined by the confidence of a witness or lack thereof, as understood through their physical reaction. This is particularly important for a variety of witnesses, including those who cannot control their nerves in legal proceedings and neurodiverse witnesses, whose communication styles can lead neurotypical people to perceive them as deceptive.[16] Thus, by reducing fact-finder reliance on body language, the arbitral community can reduce miscalculations of witness credibility.[17]

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[15] Kimberley A. Wade & Ula Cartwright-Finch, *The Science of Witness Memory: Implications for Practice and Procedure in International Arbitration*, 39 J. OF INT'L ARB. 1 (2022), preprint *available at* https://psyarxiv.com/fxjm6/.

[16] Aldert Vrij & Jeannine Turgeon, *Evaluating Credibility of Witnesses – Are We Instructing Jurors on Invalid Factors?*, 11 J. OF TORT L. 231 (2018) (examining the effect of typical traits of people with autism—gaze aversion, repetitive body movements, poor reciprocity and literal interpretation of figurative language—on perception of credibility and finding that "[a]utistic individuals were indeed judged as more deceptive and lower on perceived competence and character compared to neurotypical individuals").

[17] *See* Vrij & Turgeon, *supra* note 16 (suggesting that the US legal community should consider crafting jury instructions that educate jurors on the lack of connection between nonverbal cues and credibility); *but see* Denault et al., *The Detection of Deception During Trials: Ignoring the Nonverbal Communication*

Accordingly, this author questions the importance of fact-finders being able to see a witness during their testimony. As noted by Wade, being unable to rely on body language results in a better determination of witness credibility because it forces listeners to focus on verbal cues instead of misleading physical ones. And while Williams' demonstration showed that cross-examination creates involuntary physical reactions in witnesses, this author is not so sure that merely exposing a witness to cross truly calms the nerves. Having worked in US courtrooms and seen many witnesses flail under the pressure of cross-examination, she believes that cross-examination will generally produce these involuntary physical reactions regardless as most laymen are going to be nervous about simply being in a legal proceeding and because cross-examination is an uncomfortable experience by design.

Accordingly, it may be wise to incorporate recommended practice guidelines to place witnesses out of view of the fact-finders should proceedings return to an in-person format. This would force listeners to focus on verbal cues instead of misleading body language, extending the benefit of virtual hearings while eliminating the arbitration community's concern of being unable to control a witness.[18] While vocal tone would still be noticeable, tribunals would be unable to use body language to improperly assess accuracy.

Finally, culture can also impact the perception of credibility, such that further research should be done to understand how various cultures perceive and broadcast credibility.[19] This is particularly important in an arena as international as arbitration

of Witnesses Is Not the Solution—A Response to Vrij and Turgeon, 21 INT'L J. OF ETHICS AND PROOF 3 (2020) (recommending that jurors consider demeanor to enrich their overall understanding of witness testimony).

[18] 2021 INTERNATIONAL ARBITRATION SURVEY: ADAPTING ARBITRATION TO A CHANGING WORLD 24 (White & Case, 2021), *available at* https://www.whitecase.com/publications/insight/2021-international-arbitration-survey (citing 38% of respondents as thinking virtual hearings would make controlling witnesses and assessing their credibility more difficult).

[19] ICC Report, *supra* note 6, at 28; *see* Lorraine Hope et al., *Urgent Issues and Prospects at the Intersection of Culture, Memory, and Witness Interviews: Exploring the Challenges for Research and Practice*, 27 LEGAL AND CRIM. PSYCH. 1 (2022); *see also* Nancy Amoury Combs, *Testimonial Deficiencies and Evidentiary Uncertainties in International Criminal Trials*, 14 UCLA J. OF INT'L L. AND FOREIGN AFF. 235, 252 (2009) (discussing the additional impediment to fact-finding in international criminal tribunals by the cultural differences between witnesses and Western court personnel).

and should receive all due consideration.[20]

VI. CONCLUSION

In law, as in life, credibility and accuracy are not equal partners. Accuracy goes to the very nature of memory, which the ICC Report and panel speakers demonstrate is subject to manipulation via the procedures employed by attorneys in international arbitration. Thus, the onus is on attorneys to make sure that accuracy is preserved before proceedings begin. Credibility, instead, goes largely to the demeanor of the witness as perceived by the fact-finder once proceedings have begun. While attorneys can employ Williams' technique to try to help mitigate nerve-based responses to direct- and cross-examination, witness credibility is largely in the hands of the witness and the tribunal.

If a witness is not perceived as credible, it does not matter how accurate their recall is. This is the experience of many a neurodivergent person, who may avoid eye contact and fidget to self-soothe, trying to explain themselves to a neurotypical person but being perceived as dishonest.[21] Thus, by cultivating more accurate perceptions of witness credibility in the courtroom, in addition to preserving witness accuracy in pre-proceeding stages, the international arbitration community can more effectively safeguard the efficacy of witness testimony.

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[20] *See* WON KIDANE, THE CULTURE OF INTERNATIONAL ARBITRATION (2017) (providing an in-depth study of the role of culture in modern day arbitral proceedings).

[21] *See* Alliyza Lim *et al.*, *Autistic Adults May Be Erroneously Perceived as Deceptive and Lacking Credibility*, J. AUTISM DEV. DISORD. 52, 490–507 (2022), *available at* https://doi.org/10.1007/s10803-021-04963-4.

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Table of Contents

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