Witness Evidence and Memory Distortion

What lawyers can do to reduce the impact of memory distortion of witnesses in international arbitration

Factual witness evidence can often be the making or the downfall of a parties' case, whether that be in litigation or international arbitration ("IA").

As disputes are the product of events that unfold over the course of time, the memory of witnesses begins with their first involvement with the transaction or incident that gives rise to the dispute and is then both further formed and affected by subsequent events.

However, it is well known that memory is imperfect and subject to possibly distorting influences as soon as it is formed. Memory is malleable – it is not a fixed image that is retrieved when needed but is a dynamic process that can be influenced by subsequent events.

Ensuring witnesses are prepared for hearings is a key part of preparing for IA, and an area in which parties often incur significant time and costs. The ways in which witnesses prepare themselves can however have an impact on their memory, and in-house counsel, external counsel and tribunals, and the witnesses themselves should be aware of this. Preparedwitnesses generally provide greater assistance to a Tribunal, but how do we ensure that this preparation does not assist in the distortion of a witnesses' memory?

In November 2020, the ICC Commission published a report entitled "The Accuracy of Fact Witness Memory in International Arbitration" (the "Report"). The Report, which was prepared by an ICC Task Force "Maximising the Probative Value of Witness Evidence", investigated ways to reduced distortions or contamination of witnesses as they participate in the arbitral process and what counsel, lawyers and witnesses can do to reduce distortions.

In the Report, the Task Force considered whether data from the criminal witness studies could be applied to witnesses in IA given criminal trials' focus on one specific event rather than sustained interaction between parties.

It is notable that a spotlight has recently been shone on this same topic in the context of court proceedings. A new Practice Direction (PD 57AC) and Statement of Best Practice (Appendix to PD 57AC) governing the preparation of witness statements for trials in the Business and Properties Court will come into force from 6 April 2021, seeking to address concerns that the current regime risks the witness' recollection being altered by the process of taking the statement and the fact that often statements contain irrelevant or inadmissible material. In fact the new Appendix specifically states:

> *"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."*

The results of this review will bring in fundamental changes including a requirement for witnesses to provide a statement of compliance which includes express confirmation that their witness statement sets out only their personal knowledge and recollection in their own words and that they have stated how well they recall matters and whether their memory has been refreshed by considering documents.

Existing Research into witness memory distortion

There is an abundance of existing research into witness memory, but often this focuses on criminal eye witness testimony. Studies into the impact of post event information ("PEI") on memory demonstrate that PEI can alter details in our memory and add information to the memory that was never there to begin with. Simply sharing our experience with someone else can be

an opportunity for misinformation. If people can track the sources of their memories easily and they are told to watch out for errors they can better avoid misleading suggestions. Warnings are most effective when they are given before the PEI as they can then scrutinize the information provided.

PEI is applicable to IA, and therefore the way it is presented must be considered. In particular practitioners should be wary of:

1. How the specific wording of a question can change the way a witness replies, for example, in one study, participants who were asked to estimate 'How long was the movie?' answered with an average of 130 minutes vs those who were asked 'How short was the movie?' who responded with 100 minutes on average.

2. The way in which a witness may be influenced by information received after an event. This is called the 'misinformation effect' and describes a phenomenon where typically misleading information which participants are exposed to after an event interferes with or impairs their original memory of that event. Misinformation can overwrite existing factual memory.

3. The creation of entire false memories: it is possible in some circumstances to lead participants to 'remember' entire fabricated events which have happened to them personally, so-called 'false memories'. For example, participants who were reminded of true events from their childhood were, over time, led to also recall a fabricated event (getting lost in a shopping mall) by the inclusion of questions about that fabricated event in successive interviews with the researchers.

4. How the act of retelling a story from a particular perspective can change a witness' memory.

Does this apply to witnesses in IA?

Based on the Task Force's review of this existing data, they were persuaded that the existing research raised two important questions in the context of international arbitration:

- Is there a risk that in some cases, witness evidence which is based upon witness memory is not as reliable as a tribunal might have assumed?

- If so, are there steps that can be taken to improve the reliability of witness evidence?

They decided further research was required to look into this in an IA setting.

In order to test this, the Task Force developed a witness memory experiment to test in a commercial setting by way of online survey. The study confirmed that memory mistakes also occur in a commercial setting. Results were consistent with those found in witness memory studies in criminal context, in particular biasing people in favour of a particular side and exposing them to suggestive post event information affected their memory reports.

This shows that high level of interaction between a witness and other sources of information can lead to distortions of memory. In IA this starts when potential witnesses are co-workers and discuss, and continues when lawyers get involved for drafting submissions. Risk increases when preparing witness statements and for the hearing. There is "undoubtedly a high risk of memory distortions" in IA. However, this is not to say that less interaction is the way to resolve this, because (i) witness testimony isn't all about memory; and (ii) some procedures are necessary or beneficial for other reasons despite the risk of memory distortion. This is a balancing exercise.

In criminal trials memory is key. But in IA proving disputed facts is not the only purpose served by witness evidence. Witness evidence could be used for various reasons including:

- To prove disputed facts
- To explain docs e.g. give context, meaning to particular words used
- To provide context or tell the story
- To provide technical explanations

Therefore there is not one singular purpose for all witness evidence, which means that the importance of memory distortion (and the requirement to take steps to reduce its impact) really depends on the individual witness evidence. It is important to assess the impact memory distortion should have on your case before deciding whether each step is necessary.

Measures to reduce the impact of memory distortion

The Report suggested measures that can be taken to improve accuracy of witness memory by in-house counsel, external counsel and Tribunal members. However, these are not rules or best practice, but instead an open list that practitioners can select from as appropriate. Thoughtful analysis is required to avoid under- or over-correcting.

The full list of measures, split into two categories (A) Measures that can be taken to reduce distorting influences and their effect on witness evidence; and (B) Measures to help identify and weigh distorting influences that might exist and take them into account when weighing witness testimony, can be found in Section V of the Report. These measures are summarised below.

(A) Measures that lawyers can take to reduce distorting influences and their effect on witness evidence, such as:

1. When preparing witnesses, such as during interviews:

    a. Meet with witnesses individually and avoid meeting with likely witnesses in groups to avoid memory contamination.
    b. Avoid setting out a party line to prospective witnesses which may affect their recollection of events so as to match with the party lines.
    c. Discourage witnesses from needlessly discussing the matter with other witnesses.
    d. Keep an accurate record of witness interviews.
    e. Ensure witnesses are at ease to communicate the most accurate version of the facts and reminding them that if they do not remember, they should simply say so.
    f. Ask witnesses unbiased and open-ended questions, using neutral language and avoid intervening and influencing a witness' answer, or giving feedback on their answer.
    g. Avoid needlessly showing the witness other sources of information that may contaminate their memory.

2. When assessing information relayed by witnesses:

    a. Take into account the period of time elapsed between the experience and its recall.
    b. Consider to what extent the reliability of a witness' recollection may be influenced by the effect that facts being recalled could have on the witness' own position (e.g. career progression, embarrassment).
    c. Consider to what extent the witness has already discussed the issues and/or the evidence with (i) other witnesses and (ii) in-house counsel or management.
    d. Identify any direct conflicts of recall between the witnesses.

3. When preparing witness statements:

    a. Establish good practice rules at the beginning of the arbitration regarding who should draft the witness statement, the language to be used, the number of drafts, etc.
    b. Consider providing the witness with a list of topics/key questions to answer in their own terms/ language as a first step, either before or after the initial meeting with the witness.
    c. For witnesses capable of doing so, consider having them draft the first draft of the witness statement.
    d. Consider avoiding numerous drafts and re-drafts of the statements. Every iteration of a witness' evidence, is more likely than not to move the witness' account closer to the pleaded case of the party submitting the testimony.
    e. Consider drafting witness statements of co-witnesses independently.
    f. Deploy documents carefully.

4. When preparing witnesses for the hearing:

    a. Consider carefully the extent of witness preparation that is permitted under the rules that apply to the arbitration.
    b. Consider using the measures described above to avoid memory contamination in the course of preparing a witness ahead of a hearing.

(B) Measures to help identify and weigh distorting influences that might exist and take them into account when weighing witness testimony

1. Steps that can be taken by all players: All players in IA, including in-house counsel, external counsel and arbitrators must evaluate, deal with, and can impact witness memory. The more that all involved understand the memory process, the better positioned they will be to help enhance the value of witness evidence. Therefore, each player can:

a. Educate themselves to understand better the workings of human memory, which is an ever evolving area.
b. Consider training to be able to conduct cognitive interviews. Cognitive interviews use basic principles in memory and cognition such as building a rapport with witnesses and having them participate more actively during the interview process.
c. Be aware of what affects memory, including: (i) the Misinformation effect (as discussed above); (ii) memory conformity (where a witness' memory appears to change in order to match and corroborate potentially conflicting information subsequently provided by another witness); (iii) age of the witness; (iv) vividness of the memory; and (v) one's own bias affecting one's perception of witness memory recollection

2. Steps that can be taken by Tribunals: Tribunals also have a part to play in reducing memory distortions and evaluating witness evidence in the light of distortions. For example, they might consider requiring that each witness statement include information about the way in which it was prepared and the extent to which the witness has considered or discussed evidence with the other witnesses. The tribunal can also give instructions to the witness prior to his/her examination at the hearing such as alerting the witness about the importance of distinguishing between personal knowledge and information gained post-event from secondary sources or excluding witnesses from the hearing room until they have given their evidence.

Conclusions

The value of witness evidence is affected by many factors, memory being just one. Factors such as cultural perceptions, manner of presentation, language, and cognitive biases by arbitrators, counsel and witnesses, all bear on the value of witness evidence.

There are a number of measures which, where appropriate, can help to protect the authenticity of witness memory, but it is critical to consider whether any particular step is useful, appropriate or even possible in the specific circumstances of each case. There is no single best practice but better training and awareness of practitioners will reduce the effect of memory distortion on witness evidence.

Just because a memory is imperfect does not mean witness evidence is not valuable. The aim is to reduce the imperfections, and being aware of measures that can be taken or matters to take into consideration can assist greatly.

Of course, parties should be alive to the need to distinguish between distortions and deliberate efforts by a witness to distort or shade the truth, and the above is focused on an honest and co-operative witness.

Notably, there are many similarities between the "measures" suggested by the Task Force and the new PD57AC for witness evidence in court proceedings. By way of example, PD 57AC requires that:

- a trial witness statement must state only that which the witness claims personally to recollect about matters addressed in the statement, and must identify what documents, if any, the witness has referred to or been referred to for the purpose of providing the evidence set out in their trial witness statement (PD 57AC, paragraph 3.2);
- that the preparation of a trial witness statement should involve as few drafts as practicable, as repeatedly revisiting a draft statement may corrupt rather than improve recollection (Paragraph 3.7 of the Appendix to PD57AC); and
- any trial witness statement should be prepared in such a way as to avoid so far as possible any practice that might alter or influence the recollection of the witness other than by refreshment of memory by referring to documents the witness created or saw while the facts evidenced or referred to in the document were still fresh in their mind.

It will be interesting to see whether arbitral bodies will seek to introduce some more concrete controls in relation to witness evidence, like PD 57AC, or whether they will retain the flexibility for practitioners to interpret in their own manner. Whether arbitral bodies choose to do so or not, in practice, given the fact that a number of practitioners' work spans across both arbitration and litigation spheres, it seems likely that the norm (at least in arbitrations involving UK-based practitioners) may lean towards the requirements in PD57AC and the Statement of Best Practice.

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Amy has a broad range of experience in complex, high value disputes and investigations, usually with an international element. Amy has worked for a variety of clients including large corporates, banks, insurance firms, and clients in insolvency proceedings. She has experience of High Court litigation, as well as financial services regulation and investigations.

Background

Amy graduated from The University of Manchester with a first class degree in Law, after which she joined Freshfields Bruckhaus Deringer as a trainee solicitor. During her training contract she was seconded to the firm's Dubai office. On qualification in March 2016, Amy joined the Freshfields Dispute Resolution department, where she acted for a wide range of clients including international banks, large retail clients, airlines, automotive companies and insurance firms. Amy joined Enyo Law in September 2019.

Cases include:

- Advising the joint administrators of Monarch Airlines on the administration process and an urgent judicial review relating to the allocation of airport slots.
- Advising Volkswagen on civil and regulatory issues relating to emissions from its diesel engines, primarily for the High Court litigation in one of the largest consumer group actions seen by the English Courts.
- Advising a major international insurance firm on an FCA enforcement investigation into the life insurance, pensions and retirement and asset management sectors.
- Advising a global bank on an FCA enforcement investigation in relation to financial crime.
- Assisting one of the Arbitrators of the Basketball Arbitration Tribunal to resolve disputes between players, agents, coaches and clubs.
- Acting for Sotheby's in a multi-million pound High Court dispute in relation to professional negligence.
- Advising on DIAC arbitration proceedings in relation to issues with the construction of a new airport terminal.
- Advising on a construction arbitration for a Bahraini water plant built behind schedule and not to specification.