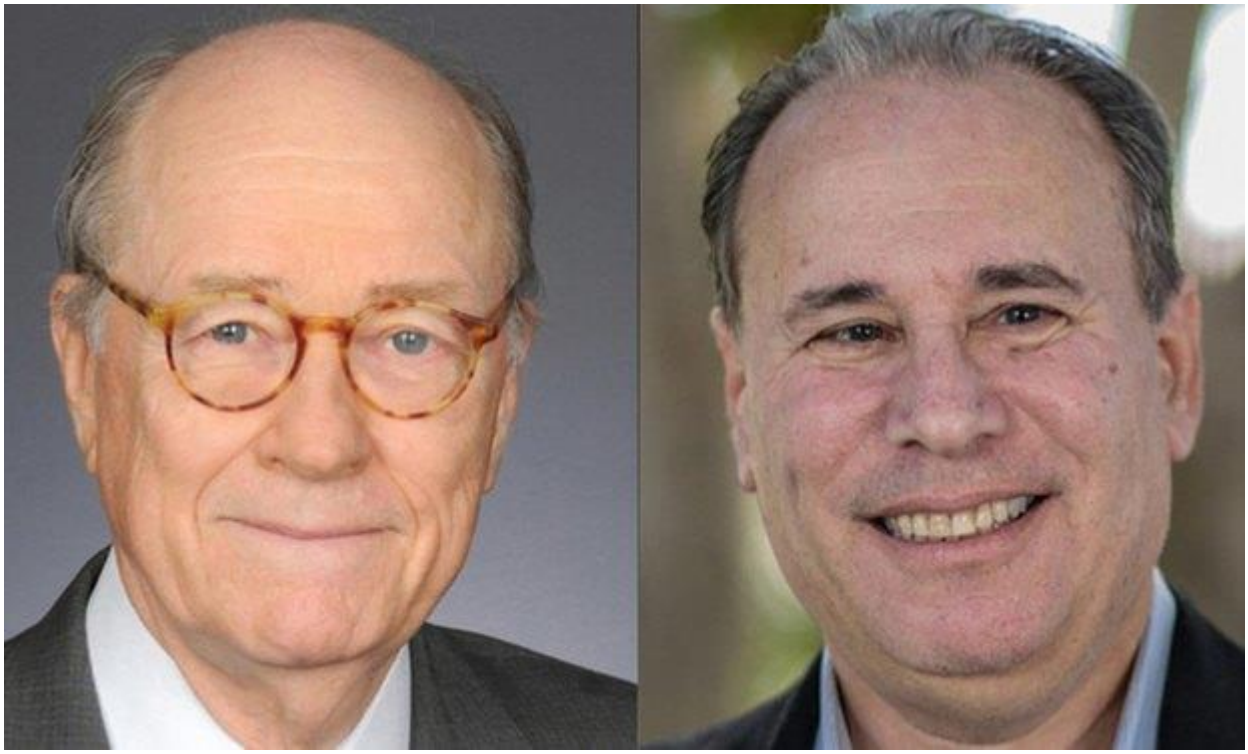
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Remembrance of Things Past: Oral Testimony in International Arbitration

In their International Litigation column, Lawrence Newman and David Zaslowsky discuss a recent study by a task force of the Commission on Arbitration and ADR of the International Chamber of Commerce, "The Accuracy of Fact Witness Testimony in International Arbitration," which focuses on one aspect of witness testimony—the accuracy of witness memory as to facts.

By **Lawrence W. Newman and David Zaslowsky** | March 24, 2021 at 10:30 AM



The climactic event in international arbitration is usually a hearing, at which witnesses are questioned and arguments made. But, unlike in U.S.- or British-oriented court proceedings, where all evidence must be accepted and evaluated in a hearing before a court or a jury, in international arbitration, evidence may be made part of the record of the case from the first pleading, where documents and even written statements of witnesses may be presented. Subsequent submissions to the tribunal by the parties, often after exchanges of relevant documents between them, may provide the tribunal with additional documents.

The “direct” testimony of witnesses at the hearing is often presented in advance through written witness statements that provide the substance of what the witnesses would have given in person through oral questioning by their counsel at the hearing. The witnesses are, however, made available at the hearing for questioning by opposing counsel and tribunal members. The result is that oral testimony at hearings is almost entirely questioning by adversaries and arbitrators.

Obviously, to be persuasive, witnesses must present reliable and credible testimony, both in their written statements and in their responses to oral questioning. A recent study by a task force of the Commission on Arbitration and ADR of the International Chamber of Commerce (ICC), The Accuracy of Fact Witness Testimony

in International Arbitration (the study) (available at www.iccwbo.org), focuses on one aspect of witness testimony—the accuracy of witness memory as to facts. In the course of assessing the accuracy of witness testimony in international arbitration the study also addresses the fundamental question of the extent to which international arbitration cases involve factual issues in which witness memory plays a role.

Many of the facts and circumstances in any given international arbitration will not be in dispute, obviating the need to establish them through testimony. In most instances, the parties will have previously had commercial or investment relationships reflected in contracts, correspondence or internal memoranda, which will be considered by the tribunal in the absence of witness testimony. As for witness testimony, the study separates out testimony that does not involve memory: such as providing background information to set the scene in which the dispute arose; providing context for contemporaneous documents; explaining language used in documents and providing technical explanations. These types of testimony are based, the study says, on experience and knowledge, rather than on memory.

But, the study states, there are instances where the accuracy of a witness' recollection is important—such as concerning who was present and what was said in a meeting or conversation that was not recorded or re×ected in a contemporaneous writing—and may be distorted, especially by after-the-event interactive communications between witnesses and other sources of information such as fellow employees and in-house and external lawyers. The study describes in detail measures that can be taken by in-house counsel, external counsel and arbitrators to improve the accuracy of witness memory by reducing distorting influences that might have an adverse effect on the accuracy of witness testimony.

Although taking steps to protect against such influences might reduce memory distortions, the study says that it regards a recommendation to do so as "premature" because "fact witness evidence in international arbitration is not just about memory" (¶4.4). As the study says, "The same witnesses may also testify about matters in which memory does not play a role and because the process by which witnesses are prepared to testify may be "beneficial for other purposes."

The study also describes steps that can be taken by arbitral tribunals regarding witness testimony (¶5.34). For example, a tribunal might consider requiring that witness statements contain information about the way in which the witness statements were prepared and the extent to which the witnesses may have considered or discussed evidence with other witnesses (¶5.36). But the task force expressed itself as "firmly of the view" that, in all but exceptional circumstances, the preparation of witness statements not become the subject of inquiry by tribunals or the basis for requests for documents (¶6.9).

The task force also addresses the question of the comparative value of witness testimony versus documentary evidence, as to which it says there are "diverse views in the arbitral community" (¶6.12). The task force points out that some kinds of documentary evidence are less reliable than others and expresses its belief that a predetermined view of the hierarchy of the value of different types of evidence "is neither justified nor prudent" because "there is no single 'best' practice" (¶6.14).

Near the conclusion of the study, the task force raises the rhetorical question of whether it "might not make sense" for some or all of the steps it describes to be taken in order to make sure that the memories of witnesses be as accurate as possible. The task force responds that the answer to the question should be "no" because much fact witness testimony does not depend on accurate memory and because the process by which witness testimony is prepared with what may be multiple contacts by lawyers and others may nonetheless produce an accurate presentation of the facts that cannot be obtained through the more restrained approach of trying to obtain a more "pristine" recollection. The study states: "In essence, the suitability and utility of each of the suggestions can be evaluated only in the context of the specific circumstances of each case." (¶6.6)

The task force declines to take a position as to procedures that "better enhance the value of witness evidence"—cross-examination, leading questions and tribunal-led testimony. Rather, the study leaves such determinations to the parties and arbitrators "in light of the specific circumstances of the case." (¶6.15). The study does add a footnote (n. 28) disclosing that some members of the task force stressed the important role that cross-examination plays in testing whether the testimony of the witness is reliable. But the task force takes the position that it is "beyond the scope of this Report to comment on the efficacy of cross-examination in eliciting the truth and … the impact of cross-examination on human memory has yet to be the subject of much scientific study."

Scientific study may not be needed to appreciate the impact of cross-examination of a witness in which his or her memory is jogged by confrontation with a document in which the witness earlier contradicted his or her testimony on a material factual issue. Indeed, witness memory may not be the only source of incorrect testimony. Rather, untrustworthy witness evidence may come from biased or false testimony from party representatives who feel constrained not to deviate in their testimony from their employer's position in the case or may even fear for the loss of employment if they are forthcoming with adverse facts in their testimony.

Such concerns may be magnified in cases involving state enterprises, where issues of loyalty and reprisal for undesired disclosure can be more strongly feared. In addition, inaccurate or misleading testimony may not be so much a product of imperfect recollections or deliberate misstatements as a failure to present a full picture of the material facts.

Although the ICC study does not go into the role of cross-examination in correcting such deficiencies, hearing time in international arbitration proceedings is largely devoted to cross-examining witnesses. Questioning a witness before a tribunal in a way that exposes the unreliability of the witness" testimony and obliging him or her to correct prior testimony can have a powerful effect. Such questioning is more likely to be successful when done on the basis of documents that are inconsistent with the testimony of the witness than is questioning focused on memory, such as the way in which the witness statement was prepared. Witness testimony involving memory may be unreliable for various reasons—the failings of human beings to recall in good faith, calculated omissions and lies.

Although the importance of cross-examination in international arbitration is generally recognized, the realities of evidence based on witness memory are probably not so well appreciated. The ICC study goes a long way toward enhancing that understanding. Perhaps further thinking about witness testimony will result in recommendations of practices in the presentation of witnesses whose testimony relies on their memory of critical past events.

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