Paris Arbitration Week 2021

Key disagreements over how to enhance the value of witness evidence

Highlight points from the Reed Smith webinar

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Contents

Highlight points from the Reed Smith webinar

Witness evidence is a hot topic. The ICC's recent report[1] on the effect of memory on witness testimony, published in November 2020, addresses one aspect of witness evidence, but many factors besides memory, including some practices commonly used in arbitration, can affect the value of witness evidence.

We identified a number of key points of contention within the international arbitration community with respect to witness evidence, ranging from "cross-examination does not enhance the value of witness evidence" to "save in rare situations, documents should be accorded more probative value than witness testimony."

To debate and discuss these issues, we assembled a cast of stars from near and far:

Yves Derains
Founding partner,
Derains & Gharavi

Professor Doug Jones AO
Independent Arbitrator

Wendy Miles QC
Twenty
Essex Chambers

Eun Young Park
Co-chair, International Arbitration & Cross-Border Litigation,
Kim & Chang

Stephanie Smatt Pinelli
General Counsel,
Litigation, ORANO

Steve Ryan
Vice President,
Global Litigation,
TechnipFMC

Professor Kimberley Wade
Professor of Psychology,
University of Warwick

Reed Smith moderators

José Astigarraga
Partner, Reed Smith

Peter Rosher
Partner, Reed Smith

Reed Smith speakers

Michelle Nelson
Partner, Reed Smith

Kohe Hasan
Partner, Reed Smith

Following a presentation by Professor Wade on psychological factors affecting witness evidence, Reed Smith Global Chair of International Arbitration José Astigarraga and Paris-based international arbitration partner Peter Rosher moderated the interactive, dynamic panel discussion.

Audience members had a chance to vote on each point of contention. The results of those polls, which can be found at the end of each section and also in the Annex at page 23 below, confirm the contentious nature of the debated propositions.

These highlights include a range of views expressed by members of the panel and guests. Comments are not attributable to any particular individual.

1 *ICC Commission Report, The Accuracy of Fact Witness Memory in International Arbitration,* ICC publication DRS 890 ENG.

Introduction

The arbitration community has been looking at the issue of cognitive bias in arbitration for a number of years. In parallel, the desire to make arbitration more time- and cost-efficient has also attracted significant attention. These two issues intersect when it comes to witness evidence.

Several years ago, prompted by a speech by Toby Landau QC, the ICC convened a task force to study how to improve the value of witness evidence in arbitration. Co-chaired by Ragnar Harbst and José Astigarraga, with the active participation of the Commission's Chair, Christopher Newmark, the task force ultimately issued a report focused on the issue of witness memory and its impact on witness evidence.

The process of preparing the report revealed some deep philosophical differences between members as to how we should deal with witness evidence generally in international arbitration. The wide spectrum of views made finding a consensus on recommendations on witness memory a challenge.

How we deal with witness evidence depends on many factors including the value we ascribe to it, what we think it should be used for and the role of counsel and the tribunal. These issues were beyond the remit of the task force and so the task force urged the ICC to look at the broader witness-evidence issues in the future.

The philosophical differences that emerged from the survey the task force conducted in support of its report are quite interesting. The views ranged widely. One area of difference was whether fact witness testimony ought to be allowed if there is documentary evidence available on the point, with some opining yes and others opining no. The task force concluded that "a predetermined view of the hierarchy of the value of different types of evidence (such as that documents should be accorded more weight than testimony) is neither justified nor prudent."[2] A key difference that emerged related to the proper scope of witness evidence. The question is the degree to which witness evidence should cover background and context, one view being that they are irrelevant and should not be permitted, and the other that disputed facts virtually always require context to resolve. The contrast between the two approaches – one with laser-like focus on the facts; the other welcoming the wider context – was striking.

The above are just examples. In the course of interviewing both task force members as well as members of the wider arbitration community, we identified other key areas of disagreement as well. To analyze these issues, we gathered an experienced and authoritative panel, representing arbitrators, users and advocates. We also invited our global audience to vote on each of the disagreements prior to and post debate.

What was the purpose of our webinar? Not to reach conclusions but to promote consideration of these important issues. We hope you find this report of our discussion useful.

José Astigarraga
Reed Smith Global Chair of International Arbitration

Peter Rosher
Partner

2 *Ibid*, at para. 6.14.

Scientific report observations

Following welcome and opening remarks from José Astigarraga, Reed Smith's Global Chair of International Arbitration, Professor Kimberley Wade[3] of the University of Warwick gave a presentation on "Witness Evidence issues – memory and the power of suggestion."

Below is a summary of points she covered in her presentation.

Introduction

We like to think our memories are reliable, persistent and robust. But are they?

Many studies on the malleability of witness memory have their origin in the 1970s when Elizabeth Loftus published her misinformation effects study, which concluded that when a witness encounters post-event information, it can substantially affect how they recall the witnessed event.

By the 1990s, scientists were conducting studies on much more spectacular memory distortion, particularly in relation to suggestive interviewing techniques, which can lead people to remember wholly false experiences that never happened – "counterfactual events" – for example, taking a hot air balloon ride in childhood, being attacked by a dog, an overnight hospital stay. A meta-analysis across conducted studies shows an average of 31 percent of participants reporting false memories. No one is immune.

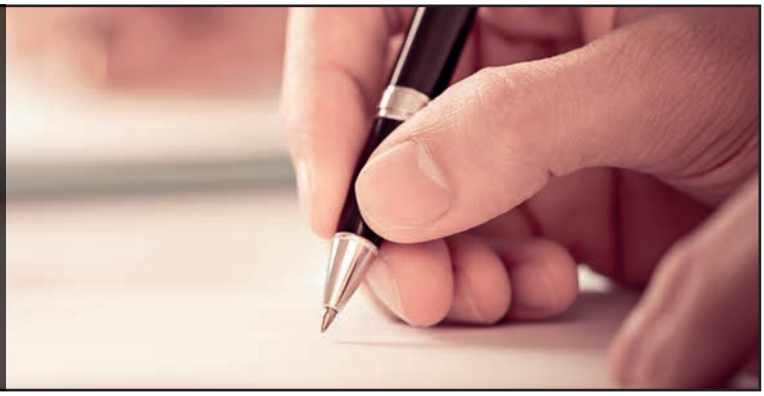
Categorizing distorting factors

Memory-distorting factors can be categorized as either contextual or retrieval factors.

- **Contextual factors** – these relate to the witness themselves or the event and can have a significant impact on memory. Examples include personal expectations or stereotypes, culture, stress and alcohol or drug intoxication.
- **Retrieval factors** – these factors can distort memory a long time after the event and occur when the witness is interviewed or reports the event. Exposure to misinformation can dramatically influence how a witness might recall an event. The perspective from which they recall an event can unconsciously affect the witness. If an interviewer feeds back positively on a response this can inflate a witness's confidence later on.

3 Professor Wade is a cognitive psychologist. Her main area of research is human memory, with a particular interest in the interface between psychology and law.

"A meta-analysis across conducted studies shows an average of 31 percent of participants reporting false memories. No-one is immune."



The ICC task force study

As part of its analysis of witness memory issues, the ICC task force wanted to find out whether the memory distorting factors documented in psychology literature also applied in the context of international arbitration. To do this, they conducted a witness memory study with a cohort of 316 adults between 19 and 83 years of age working in a broad range of industries and from a range of countries. The task force followed the same three-stage process as many documented memory studies:

- **Event** – the participants were presented with a case study based on a commercial contract between a printing company and a flooring company whereby the printing company had hired the flooring company to replace flooring in its factory. Participants were presented with a purchase agreement, a contract, and transcripts from a meeting held between the two companies, and were told that there was now a dispute between the two companies and that they had entered into arbitration.

  At the outset, a group of participants were asked to imagine that they were the managing director of either of the two companies. The purpose of this was to examine whether a participant's recollection would be influenced by their imagining that they had a stake in either of the companies. A control group was not asked.

- **Post-event information** – after a delay some participants were then exposed to post-event information through a biased and misleading memorandum from in-house counsel that contained key facts from the case. A control group was not exposed to the memorandum.

- **Memory test** – in the final stage, all participants were asked to complete a memory test about various details of the case that included two key questions that were central to the dispute:

  - Did the printing company agree or not agree to a $20,000 surcharge from the flooring company?

  - Did the flooring company see printing machinery being moved around the factory?

The results of the experiment reflected the consistent outcome of years of memory study. Exposure to post-event information **can** have a distorting effect:

- Participants who read the biased memorandum were approximately 20 percent more likely to respond favoring their party's case.

- Participants who imagined they were the managing director of one of the companies were 15 percent more likely to respond favoring their party's case.

- When combining these two instances (exposure to the memorandum and instruction to imagine being a managing director of one of the companies), the effect was a 30 percent increase in the likelihood of a witness responding favoring their own party's case.

This is an important finding of the impact of memory distortion in a **commercial** arbitration context. Up until then, studies had been conducted purely in a criminal context.

The ICC report

If witness memory distortion is a potential problem in international arbitration, then the next question to ask is, what measures can practitioners take to mitigate the effects?

Section V of the ICC task force report outlines a number of measures derived from the large body of scientific evidence on memory distortion. The following points are particularly relevant:

- Interviewing a witness early.
- Establishing a rapport with the witness.
- Warning witnesses to think about the source of their memories. Research shows that when an interviewer warns a witness to think about where their information has come from, it can reduce errors.
- Letting a witness freely recall.
- Questioning witnesses individually.
- Keeping accurate records of interviews.

In conclusion, education is critical. Awareness of the risk of memory distortion and good mitigation techniques will enhance practice and the cognitive value of evidence in international arbitration.

> *"The results of the experiment reflected the consistent outcome of years of memory study. Exposure to post-event information **can** have a distorting effect."*

The various propositions discussed by the panelists summarized below are reflective of some of the contentious discussions that took place within the task force when drawing up their report (including the findings of Professor Wade).

Each of the propositions below was assigned a panelist to make submissions from different viewpoints. The viewpoints in the submissions are not necessarily those of the panelists as they were playing a role for the purposes of the panel discussion.

Proposition 1:

Save in rare situations, documents should be accorded more probative value than witness testimony.

Introductory remarks

José Astigarraga introduced this proposition with a hypothetical example based on a contractual relationship between a government entity and a contractor. When the government encountered political problems, it began a distraction exercise, sending correspondence to the contractor accusing it of contractual default. The contractor could have responded refuting the allegations. However, it was so concerned about the impact of the dispute on its relationship with the government that it adopted a non-confrontational position.

The problem for the contractor was that when the dispute reached arbitration two years later, the documentary evidence was one-sided. It appeared from the documents that the contractor had not disputed the government's accusations. What the documents could not show was the backstory of the contractor deciding not to respond in the hopes of diminishing the tensions and thereby avoiding the dispute. This example shows that there can be a story running in parallel to the written content of documents and which a tribunal may also need to hear in order to fairly determine the dispute.

"Documents can be used to establish the basic facts and then supplemented by witness statements, depending on the context."

Submissions of our panel

Panelists

Yves Derains
Founding partner, Derains & Gharavi
Wendy Miles QC
Twenty Essex Chambers

Yves Derains

Documents have more probative value than witness testimony – but it depends on what you want to prove

The proposition has much to commend itself, but needs qualification. A document is a fact in itself. Unless it is a forgery, it happened. In contrast, witness evidence may change. To that extent, documentary evidence may have better value.

However, that value can change in context. Ultimately, if all a party needs to prove is whether something was said or not, then the tribunal may not need to look beyond the document. However, if the context is a misrepresentation claim and the tribunal needs to consider the truth of what is said in the document, then further witness testimony may assist.

Consider a letter from a contractor that says that they cannot meet the contractual requirements. That letter stands as a fact in itself that proves the contractor made that statement. In contrast, a witness saying in testimony that "the contractor told me that he would not be able to do this" does not have the same authority.

It also depends on the type of document. Consider a test report stating that required results were not achieved. It says what it says. It will be very difficult to change that conclusion through contrary witness evidence unless the evidence is that the test results were falsified.

As a guide, documents can be used to establish the basic facts and then supplemented by witness statements, depending on the context. For example, a party may have signed reports during a contract's implementation waiving certain rights. Additional witness evidence might demonstrate that these waivers were not given freely.

Wendy Miles QC

The choice is not a binary one

In order to resolve a dispute, arbitrators need to consider all the evidence before them. Not all witness evidence is equal. But not all documentary evidence is equal either.

In common law jurisdictions the hierarchy of evidence is commonly dealt with under the best evidence rule. Historically, this meant that a party had to produce the original of a document in order to rely upon it in evidence. This rule was finally abandoned as a matter of English law in 2001 in a case involving Bruce Springsteen,[4] which held that where a party does admit secondary evidence on the content of documents, it is for the court to decide, based on all the circumstances of the case, what weight to attach to that evidence.

The position in international arbitration is similar. For example, section 34 of the English Arbitration Act 1996 expressly states that it is for the parties or tribunal to decide upon the weight, relevance and admissibility of evidence. Most matters in international arbitration fall to the question of weight. Tribunals rarely exclude substantive evidence.

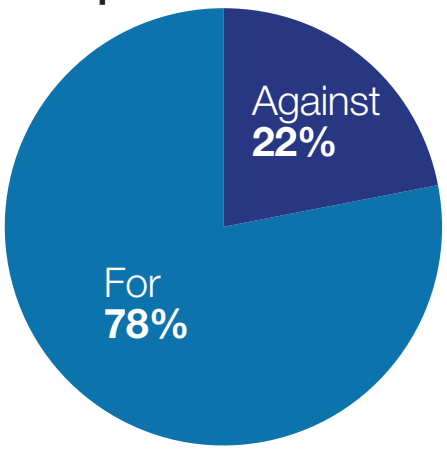
Parties tend to ascribe a higher value to documentary evidence because they think of it as "hard." Yet, the arbitral community has struggled for more than a decade to establish a set of ethical rules for dealing with fraudulent documents. The annex to the LCIA rules sets out guidelines that specifically require that authorized representatives should not knowingly procure, assist in preparing or rely on false evidence or conceal documents.[5] The existence of these guidelines demonstrates that documents do not always tell the truth.

Documents are not infallible. They must be tested and weighed carefully. We do not know how prevalent forgery is within international arbitration and parties are discouraged from raising allegations of fraud without good evidence.

Yet the biggest problem is context. Documents will never tell the full story. Beyond the A4 bundle before the tribunal, there might be thousands more documents that a party could draw upon to construct a narrative which may not necessarily be any more reliable than a witness statement. The advantage of a witness statement is that unlike documentary evidence, a witness may be subject to cross-examination.

"Not all witness evidence is equal. But not all documentary evidence is equal either."

Audience poll



Proposition 1: Save in rare situations, documents should be accorded more probative value than witness testimony. *Interestingly, our audience voted strongly (78 percent) in favor of the proposition that documents should have more probative value than witness testimony.*

This is despite the fact that the ICC task force report argued against the adoption of a hierarchy of measures in international arbitration.

4 *Masquerade Music Ltd & ors v. Springsteen* [2001] EWCA Civ 563.

5 Annex to the LCIA Rules, paras. 3 through 6: "An authorised representative should not knowingly make any false statement to the Arbitral Tribunal or the LCIA Court. An authorised representative should not knowingly procure or assist in the preparation of or rely upon any false evidence presented to the Arbitral Tribunal or the LCIA Court. An authorised representative should not knowingly conceal or assist in the concealment of any document (or any part thereof) which is ordered to be produced by the Arbitral Tribunal."

Proposition 2:

Arbitrators would enhance the value of witness evidence if they were to instruct the parties early in the proceedings as to what are the fact issues as to which the arbitrators wish to receive witness evidence and which ones not.

Introductory remarks

Arbitral tribunals possess broad procedural and evidence-taking powers and authority. In the interests of efficiency, widely used and recognized soft instruments such as the IBA Rules on the Taking of Evidence in International Arbitration (the IBA Rules) often encourage arbitral tribunals to consult with parties as early as possible when it comes to matters such as witness evidence.[6] However, in deciding whether or when to instruct parties on such issues, arbitral tribunals must toe a fine line between ensuring efficiency and ensuring that the value of witness evidence is maintained.

Submissions of our panel

Panelists

Eun Young Park
Co-chair, International Arbitration & Cross-Border Litigation, Kim & Chang
Professor Doug Jones AO
Independent Arbitrator

"Tribunals should provide parties with sufficient time to present their case before making a determination of the issues for witnesses."

Eun Young Park
The timing is critical

The advantage of an issues-based approach is that it would increase the accuracy of witness evidence. However, there are a number of hurdles.

The first is the sufficiency of knowledge of the arbitrators at an early stage in the process. In a normal arbitration process, arbitrators usually make the first procedural order shortly after receipt of the request for arbitration. At this stage, arbitrators generally have limited information about the case. They know the "gist" of the issues but not the full picture. It would be difficult for them to determine the important issues on which witness evidence is needed at this stage without the benefit of the full submissions of the parties. Accordingly, the early identification of issues for witnesses may require a change in the structure of the arbitral process.

The second hurdle is party autonomy. This, together with the adversarial system, is a cornerstone of international arbitration. Arbitrators rely on the facts presented by counsel. Early determination of facts requiring witness evidence by the arbitrators might interfere with this.

Tribunals should provide parties with sufficient time to present their case before making a determination of the issues for witnesses. The pre-hearing conference is too late. A compromise position would be after the parties have submitted their memorials and before the evidence stage of document production and witness statements. Arbitrators could then ascertain important issues with the benefit of the full picture and then determine targeted measures to prevent memory distortion.

Professor Doug Jones
In favor – but the tribunal needs to work with the parties

Almost all witness evidence in international arbitration is in written form. Cost is a major issue. Tribunal-led limitations on witness statement content could be critical for saving costs and time.

6 See, for example, articles 1 and 2 of the IBA Rules, which provide: "The Arbitral Tribunal shall consult the Parties at the earliest appropriate time in the proceedings […] [t]he consultation on evidentiary issues may address the scope, timing and manner of the taking of evidence including, to the extent applicable: (a) the preparation and submission of Witness Statements […]"

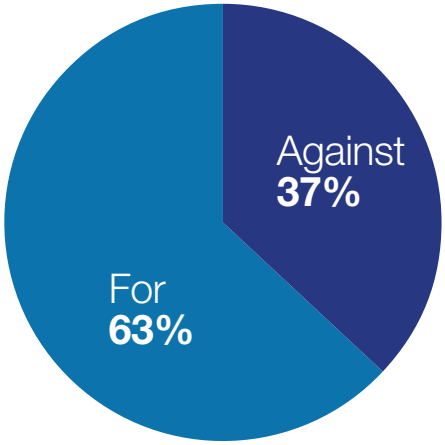
However, there is a danger of a tribunal thinking that it knows best and dictating terms to the parties. Counsel know their cases better than tribunals, even after a hearing. Tribunals should dictate evidence requirements with great trepidation.

A better approach may be for the tribunal to review and analyze the parties' cases following the first round of memorials and then provide parties with the tribunal's view of the issues requiring determination. Parties should then have the opportunity to comment upon that.

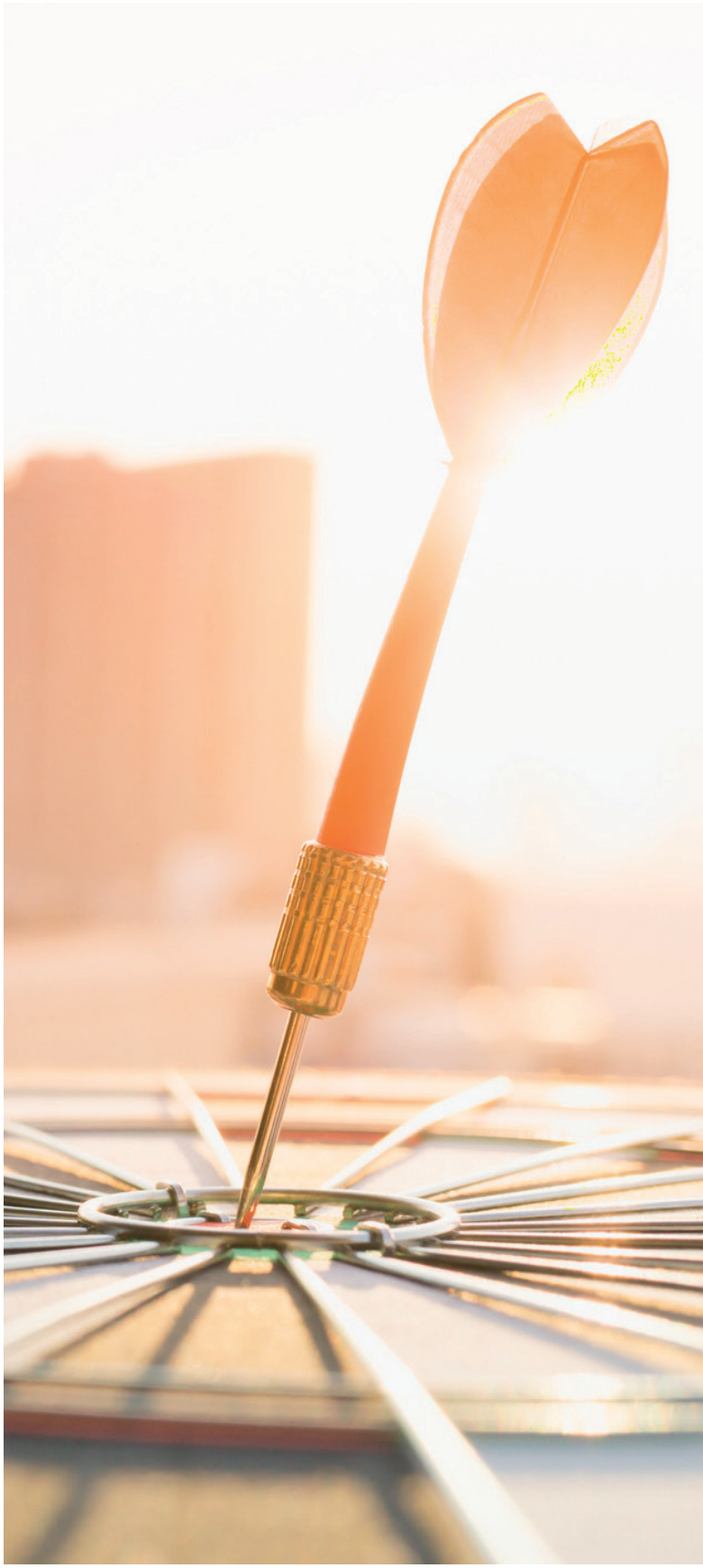
During this process, the tribunal and parties can review why additional witness evidence might be required in addition to the multiplicity of documents. Is it context to explain a one-sided record? Or are there said to be things missing from the documents that need to be deployed? Teasing out these issues can avoid the cost of counsel cutting down every tree in the forest in the hope that nothing is missed, which is a major cause of excessive cost in international arbitration.

Tribunals can work with parties to concentrate on what the witnesses need to say and why they need to say it. This process could start at the case management conference, discussing the issues after the first exchange. This would help parties and the tribunal take a more focused approach to witness testimony.

Audience poll



Proposition 2: Arbitrators would enhance the value of witness evidence if they were to instruct the parties early in the proceedings as to what are the fact issues as to which the arbitrators wish to receive witness evidence and which ones not.
Close to a two-thirds majority favor the early identification of issues for witness evidence.



"Tribunals can work with parties to concentrate on what the witnesses need to say and why they need to say it."

Proposition 3:

Generally speaking, witness evidence relating to "context" should be excluded – witness evidence should be strictly limited to the specific facts in dispute.

Introductory remarks

In certain areas of law, evidence relating to context must be provided. For example, in the interpretation of contracts, evidence relating to context is not only a supplement to assist in the interpretation of contracts or other documents, but it can also be integral to the meaning of the contract or document.[7] Context may also play a significant role in witness evidence. However, as there is a fine line between giving evidence relating to context and giving wide-reaching evidence bordering on submissions or a conclusion based on the facts, there are often calls for restraint when it comes to the scope of witness evidence.

Submissions of our panel

Panelists

Steve Ryan
Vice President, Global Litigation, TechnipFMC
Kohe Hasan
Partner, Reed Smith

> "Arbitration, like all litigation, is a contest of stories."

Steve Ryan
We, as humans, learn through stories

Arbitration, like all litigation, is a contest of stories. Effective storytelling means providing a consistent and credible narrative to say why your side should win. It means setting the scene for the tribunal and providing some detail of matters not in dispute. The tribunal will then have as full an understanding as possible when it comes to determine the disputed facts.

Take the example of correspondence regarding a project to which the recipient has not responded. These letters might seem damning when viewed from one side. However, the recipient may not have responded because at the time it did not want to inflame the situation and endanger the project. This is the kind of context a tribunal might need but which it will not receive if it just sticks to the dry facts.

The value of context and how much to include in witness evidence can depend on your position in the dispute. If you have the contract and the law in your favor then it is less likely that a party will provide contextual evidence. On the other hand, parties arguing against an ostensibly clear-cut position might refer to a greater breadth of contextual documentary and witness evidence.

Understanding the context of the dispute is part of the lawyer's role in preparing their case and so some of the costs incurred in this regard are inevitable. Counsel have to know this information as part of assessing the litigation risk and developing a case strategy. This then determines how much context they choose to present in witness evidence.

That does not mean that parties need to write a book for each witness statement. Counsel should still be careful to provide only contextual evidence that is actually relevant and helpful to the tribunal. At the final hearing it might help to reduce the time and cost associated with witness evidence if counsel and the tribunal agree which contextual facts need to be the subject of cross-examination.

7 See, for example, Lord Hoffmann in Mannai Investment Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] AC 749: "background […] enables us, not only to choose the intended meaning when a word has more than one dictionary meaning but also, in the ways I have explained, to understand a speaker's meaning, often without ambiguity, when he has used the wrong words. When, therefore, lawyers say that they are concerned, not with subjective meaning but with the meaning of the language which the speaker has used, what they mean is that they are concerned with what he would objectively have been understood to mean. This involves examining not only the words and the grammar but the background as well."

Kohe Hasan

Unnecessary contextual evidence is costly and can lead to inconsistent testimony

Arbitration should seek to achieve an expeditious and efficient resolution to a dispute. If witness evidence is packed with unnecessary contextual detail then this increases the time and cost.

When drafting statements we need to consider some key questions:

- What facts have to be proved by the party in order to succeed?
- What does this particular witness have to say that will support the party's case?
- Why is this witness the best person to give that evidence?
- Will this witness subsequently need to give oral evidence?
- Should the witness explain difficulties in the party's case upfront?

Context could help the witness fill in missing gaps. But it can also tempt the witness to fill in gaps with the best possible testimony.

If a witness statement includes significant background information or context, it can lead to inconsistencies that are brought to light under cross-examination. A weaker witness may then be exposed to questions outside their actual sphere of knowledge with a consequent effect on credibility. Professor Wade's witness memory study in support of the ICC report demonstrated that simply imagining that they were in the position of a managing director within an organization could affect how a witness recounts their memory. Excessive contextual evidence can therefore open up a Pandora's box.

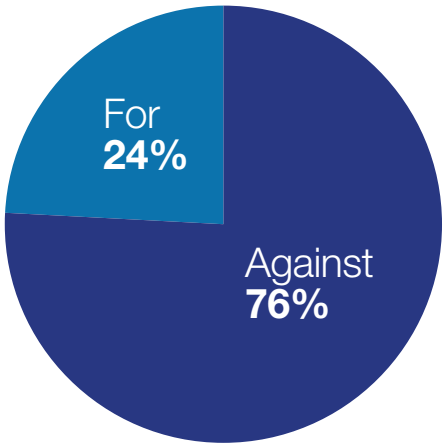
That said, sometimes context is more than a supplement and is integral to the legal analysis. For example with the interpretation of contracts, contextual evidence may assist in the determination of the meaning of the document. Nevertheless, we should be very careful about allowing contextual evidence.

Submissions of other panelists

Professor Doug Jones – There is an important distinction between submissions and context, regularly mixed up by counsel who prepare witness statements and include argument. The place for argument is in submissions, not in the mouths of witnesses who are then attacked in cross-examination.

Yves Derains – A great problem is that you have iteration of contextual evidence and argument made in submissions. This is then repeated by the main witness in their statement, and again in part by other witnesses. Accordingly, argument and context can be repeated several times. This is not helpful to arbitrators and is costly to parties.

Audience poll



Proposition 3: Generally speaking, witness evidence relating to "context" should be excluded – witness evidence should be strictly limited to the specific facts in dispute.
Our audience poll came out strongly against the proposition, thereby favoring the use of contextual evidence.

Proposition 4:

Generally speaking, arbitrators' ability to evaluate witness evidence is not affected by cognitive biases, such as confirmation bias, anchoring, cultural bias, gender bias, language, etc.

Introductory remarks

This issue overlaps with that of witness evidence. There has been much discussion about cognitive bias within the arbitration community. But, there is a lot skepticism. Many say lawyers who receive a sophisticated education and extensive professional preparation and mental training are not vulnerable to cognitive biases.

However, experiments with judges and arbitrators demonstrate that they can be vulnerable to cognitive bias, just like anyone else. For example, studies show that exposing a judge to an arbitrary number can affect the damages they award.

Language is another issue that provoked strong views within the ICC task force. Studies have demonstrated that listeners perceive people speaking with a non-standard accent as less competent or less intelligent. An engineer testifying in a foreign language might provoke a sub-conscious bias in the arbitrator. Interestingly, there have also been studies that show that when someone is working in a foreign language, they show much less empathy but are also less prone to cognitive bias.

Submissions of our panel

Panelists

Stephanie Smatt Pinelli
General Counsel, Litigation, ORANO
Wendy Miles QC
Twenty Essex Chambers

> *"Diversity within the decision making group is another key means of reducing distorting influences."*

Stephanie Smatt Pinelli

It is important for users to have confidence in arbitrators

This is a major concern for users of arbitration. It is impossible to say that arbitrators are not affected. All players within arbitration are subject to influence. However, there are means to limit distortions.

The most important players from the perspective of the user are the arbitrators themselves. It is important that users have confidence in arbitrators. Parties want arbitrators to stick to the facts and legal arguments. High standards of impartiality are important. This may mean strengthening some rules.

Another way of reducing distortion comes from the parties and counsel and how they present their cases. We need simpler questions so that answers are less prone to misinterpretation.

Diversity within the decision-making group is another key means of reducing distorting influences. Individuals can recognize pressures and assist each other in reducing biases.

Wendy Miles QC

We want arbitrators to be human too

Only pre-programmed artificial intelligence devices make 100 percent accurate decisions. Arbitrators are also humans. To deny cognitive bias is to demonstrate ignorance of the science.

A controversial question is whether as counsel we select arbitrators for their cognitive bias. We want someone who will identify with and hear the party we represent and who will be open to our position and arguments. A tribunal that does not see the world in the same way will be harder to persuade, no matter how good we are in presenting our arguments. It is difficult to tell a story in a way which does not resonate culturally.

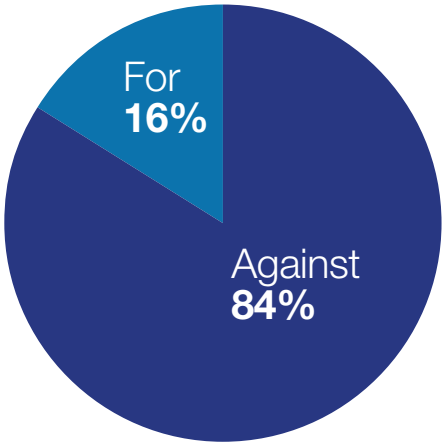
Cognitive bias can arise at many levels and can get ugly. A historical example, albeit one that still rings true today, comes from a case called *Catalina*.[8] This was a challenge to an arbitrator that took place in the English Courts in 1938.

The judgment of the court records that the arbitrator had observed that Norwegians were reliable and therefore truthful witnesses in contrast to Italians or Portuguese, who were liable to mislead. The court removed the arbitrator, observing that it is open for the court to prefer the evidence of one witness over another but not on such a basis.

We have moved on 80 years. It would be nice to say that things like that do not happen anymore. But it is also possible that they are just not said aloud. We operate in a world where cognitive bias happens underground in unpleasant and unfair ways.

It is naïve to think this does not exist. No human being is a computer and nor do we want them to be. However, as counsel and arbitrators we always need to be aware and to check that we ourselves and the processes we introduce do not reinforce certain biases. Keeping decision points open as far into the proceedings as possible may help. But there is no easy solution.

Audience poll



Proposition 4: Generally speaking, arbitrators' ability to evaluate witness evidence is not affected by cognitive biases, such as confirmation bias, anchoring, cultural bias, gender bias, language, etc.
Our audience poll saw a strong majority against the proposition, reflecting widely held concerns regarding cognitive bias. If we want our arbitrators to achieve purely objective decisions then we are not currently achieving the perfection we want.

8 *Catalina (Owners) v. Norma (Owners)*, [1938] 61 Lloyd's Law Reports 360.

Proposition 5:

Cross-examination does not enhance the value of witness evidence.

Introductory remarks

The value of cross-examination is not universally acknowledged within the arbitration community. Some arbitrators have publicly stated that they do not see much value in cross-examination evidence. Others see cross-examination as a bother that gets in the way of evidence.

Consider the example of the cross-examination of the CEO of a company. The witness was lying about what had been said at a specific meeting. To expose this the cross-examination took the CEO through a sequence of events evidenced in emails. Midway through the sequence, the CEO saw that the end of the questions would reveal that they were lying and so began to dissemble. When counsel asked that the tribunal require the witness to answer the questions, the chair declined, explaining, without realizing that the testimony was false, that they just wanted to hear what the witness had to say, thus letting the witness off the hook.

Submissions of our panel

Panelists

Steve Ryan
Vice President, Global Litigation, TechnipFMC
Yves Derains
Founding partner, Derains & Gharavi

Steve Ryan

A tribunal needs cross-examination to obtain the full picture

Cross-examination is an essential tool in the process of identifying the truth. This is the case in both arbitration and litigation.

The value of cross-examination is demonstrated by an exercise we ran this year in a trial where we maintained a shadow jury throughout the trial process. This produced some very interesting data. The shadow jury was constantly monitored for its perception of the witnesses during the evidential phase.

Checks were made during and after direct questioning and then before and after cross-examination. We found that the shadow jury's perception of the credibility of the main witnesses was dramatically affected by cross-examination. In some cases from 5 (most believable) to 1 (least believable).

"We found that the shadow jury's perception of the credibility of the main witnesses was dramatically affected by cross-examination."

Only with cross-examination can the tribunal obtain the full picture. Part of telling the story involves direct evidence through your own witnesses. However, you can supplement this with evidence from the other party through cross-examination.

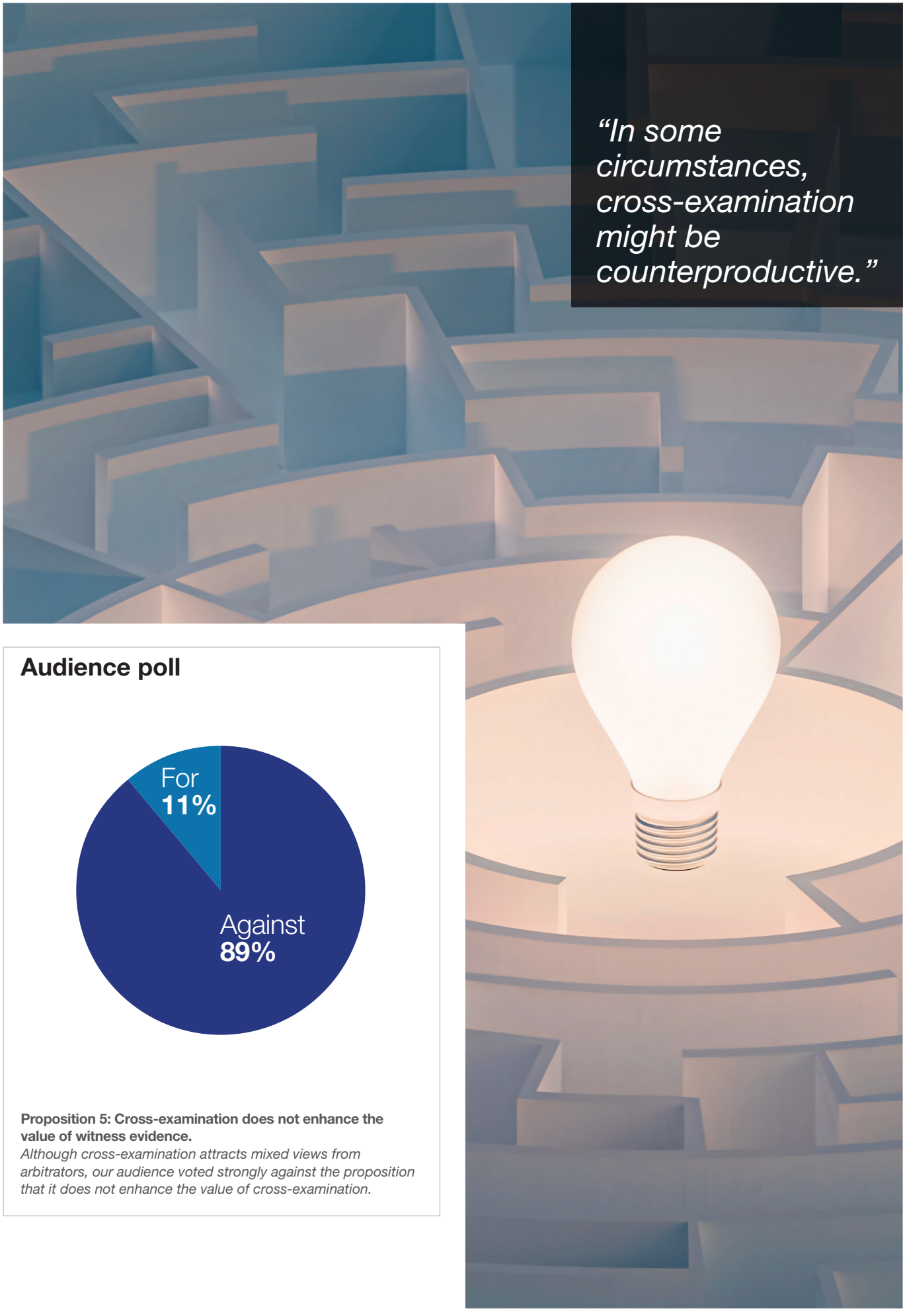
Yves Derains

Cross-examination is valuable, but only use it when necessary

Cross-examination can have a doubly beneficial impact. It helps the tribunal to reach the truth. Yet conversely, it also enhances the value of the witness statement in circumstances where the cross-examination by the opponent does not score an impact.

However, in some circumstances, cross-examination might be counterproductive. The process may make a witness look more credible; alternatively, during the examination the witness may give evidence which is not in the written statement but which damages the cross-examining party's case.

In other cases, the process of cross-examination may be unnecessary if the direct evidence is already weak. Whether to cross-examine or not is a decision that must be taken on a case-by-case basis. It can be hard to resist the urge to cross-examine, but it should always be a strategic question.



Audience poll

Proposition 5: Cross-examination does not enhance the value of witness evidence.
Although cross-examination attracts mixed views from arbitrators, our audience voted strongly against the proposition that it does not enhance the value of cross-examination.

Proposition 6:

Tribunal-led questioning (before counsel questions) enhances the value of witness evidence.

Introductory remarks

We set the scene for this question by considering an arbitration where the opponent put forward a short witness statement from a CEO who played a key role in the transaction. The obvious trap for counsel was that cross-examination on such a short witness statement would give the CEO the opportunity to put in additional evidence before the tribunal. Accordingly, counsel declined to cross-examine. This was a calculated decision based on the belief that more harm than good would come from allowing the CEO to inject testimony not previously identified. The tribunal's decision to itself question the CEO played into the hands of the CEO who wanted to be able to introduce new evidence/testimony, much to the prejudice of the party who played by the rules and provided fulsome and compliant statements for its witnesses.

Submissions of our panel

Panelists:

Stephanie Smatt Pinelli
General Counsel, Litigation, ORANO
Michelle Nelson
Partner, Reed Smith

> *"Witness questioning is difficult and arbitrators need to be comfortable with the case and ready to undertake the exercise."*

Stephanie Smatt Pinelli

Arbitrator questioning can work but only when the tribunal is fully prepared

This is a difficult question. An instinctive view as a user is that the tribunal should raise the questions it wants to ask. A user wants to see independence from the tribunal and that it is not overly influenced by the submissions of counsel.

That said, the effectiveness of tribunal-led questioning may depend on several factors. The first is that the case must not be too technical. It may be more difficult for an arbitrator to take the lead on technical – as opposed to factual – testimony. The second is the preparedness of the tribunal. Witness questioning is difficult and arbitrators need to be comfortable with the case and ready to undertake the exercise, or they risk undermining the user's confidence in the process.

There is also a risk that tribunal-led questioning could be influenced by unacknowledged cognitive bias. An arbitrator may orient the questioning in a subjective way that is determined by the picture they have built from their review of the written materials.

In contrast to this, a claimant party in the arbitration will typically orient questioning in an objective way. Namely, they will be well aware of the case they are trying to convince the tribunal of, and questions asked will be essentially rhetorical in nature. Counsel will often, therefore, wish to start questioning before the tribunal has an opportunity to do so.

Arbitrator-led questioning works best when the tribunal has prepared and knows the case and the questions they want answered. In contrast, unprepared arbitrators may ask their own questions at the expense of listening to those of counsel.

Michelle Nelson
A question of timing

It is not a case that tribunals should not question the witnesses. It is more a point of timing. In general, tribunals should only ask questions after counsel have conducted their own questioning.

From the counsel perspective, a lot of planning and preparation takes place prior to a hearing, in particular for cross-examination. Timing can be tight. Cross-examination is an art with a beginning, middle and end.

If the tribunal questions first then this can disrupt the advocate's task. The advocate might find they are questioning a witness who has already given half answers. There could be an issue of due process if tribunal questioning interferes with a party's right to present their case as they see fit.

From the arbitrator perspective, it is likely that the tribunal will have its own questions, but these should wait to the end in order to fill in gaps or clarify points. The problem comes where the tribunal tries to test the veracity of the evidence. It is difficult for an arbitrator to be in a situation where it is cross-examining a witness in lieu of counsel because it can appear that the arbitrator has reached a prejudgment on the issue.

Accordingly, tribunals need to adopt a balanced approach. They should hear from both parties and then ask questions afterwards. Further, it does not follow that tribunal questioning reduces the time or costs of proceedings. If costs are an issue then this can be dealt with through management techniques that encourage shorter hearings.

Submissions of other panelists

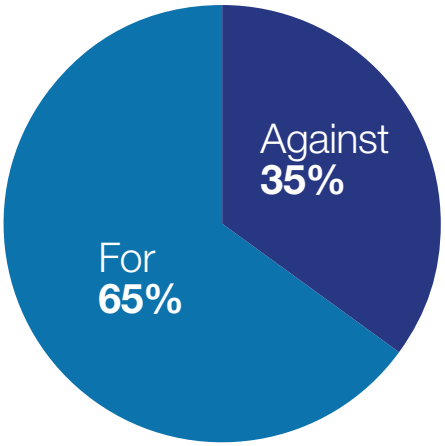
Eun Young Park – It is generally better for counsel to go first. However sometimes issues become acute during tribunal preparation, in which case the tribunal might want to take the lead.

Wendy Miles QC – Counsel spend many hours preparing for the hearing. It is therefore respectful to sit on your hands and defer to that more intimate knowledge. Intervening would be the exception rather than the rule. That does not stop arbitrators asking questions at the end.

Professor Doug Jones – It may be that you do not have a choice. For example if the respondent does not appear. In that situation the tribunal has to ask questions to test whether the unopposed claim is justified. This can be a difficult exercise involving preparedness, identifying the key questions and taking a balanced approach.

Yves Derains – Arbitrators should not start the questioning. It used to be a cultural problem. Thirty years ago, almost all German or Swiss arbitrators would start with an hour of questions without forewarning. Now this practice has rightly disappeared.

Audience poll



Proposition 6: Tribunal-led questioning (before counsel questions) enhances the value of witness evidence.
Our audience voted for this proposition, indicating a preference for tribunal-led questioning. However, the voting was notably narrower than for other propositions.

Proposition 7:

Fact witness conferencing enhances the value of witness evidence.

Introductory remarks

One of many procedural innovations designed to enhance the value of witness evidence, "witness conferencing" of witnesses has proven its worth as an effective innovation in international arbitration. However, extending witness conferencing beyond the realm of expert witness evidence to fact witnesses remains relatively rare, making it somewhat difficult to assess whether it enhances the value of witness evidence.

Submissions of our panel

Panelists

Professor Doug Jones AO
Independent Arbitrator
Eun Young Park
Co-chair, International Arbitration & Cross-Border Litigation, Kim & Chang

Professor Doug Jones
A fascinating concept which enables the tribunal to confront and compare views

A very eminent arbitrator in Singapore, Michael Hwang, has carried out a lot of work in this area, as have some Swiss arbitrators.

Witness conferencing would need to take place issue by issue and would be a delicate task. Take the example of witnesses giving evidence about what occurred at a meeting. If the process is set up so that the witnesses are providing that evidence at the same time then that enables the tribunal to confront and compare their views.

For a real life example, consider a dispute involving delay occurring at a fabrication facility for an offshore project. The delay experts had made assumptions about facts set out in the witness statements of two key site operatives. The experts were asked to identify the assumptions that led them to have a different view about the cause of the delay and the paragraphs in the witness statements they were relying upon.

This led to the identification of a series of disputed facts that had caused the difference between the experts. The tribunal, the experts and factual witnesses then sat down together and went through, with care, each of the disputed facts. It transpired that the individual site operatives were able, in conference, to come to a view on the facts that contradicted their witness statements and then enabled the experts to reach a conclusion as to the true cause of the delay.

Eun Young Park
Cultural issues can be important

A conferencing process could enhance the value of witness evidence. By putting the witnesses together you make it easier to determine their credibility. For example, a witness may be less willing to make incorrect assertions in front of another witness who can immediately refute them.

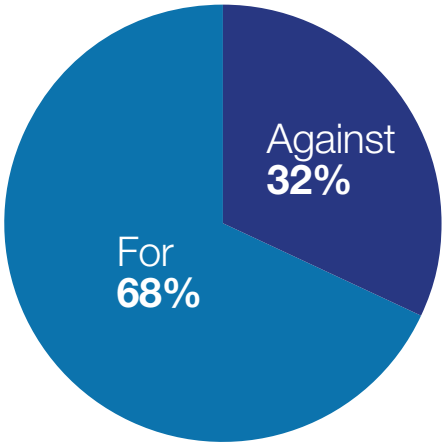
However, there are certain hurdles. For example, some witnesses may have a personal interest in a dispute and be emotionally invested in the outcome. This could lead to a disruptive conference where witnesses interrupt and talk over each other. Good management of the process by the arbitral tribunal is therefore the key to success.

Moreover, there are potential imbalances of power that could affect the effectiveness of the conference and the veracity of the evidence. This is related to cultural issues. If a superior and subordinate from a hierarchical society are providing testimony at the same time then there is an issue as to whether the subordinate can speak openly. For example, in a London case, a Korean witness burst into tears when asked to give evidence in front of his former superior, and was subsequently allowed by the tribunal to provide testimony separately.

"Witness conferencing would need to take place issue by issue and would be a delicate task."

Arbitrators must be aware of these issues and in such circumstances determine criteria for assessing the veracity of the witnesses. It is important to bear in mind the social and cultural backgrounds of the witnesses. Successful witness conferencing requires extensive preparation and control from the tribunal. This is particularly so where there are translators involved and there is a potential imbalance (with one party giving evidence through a translator and the other not).

Audience poll



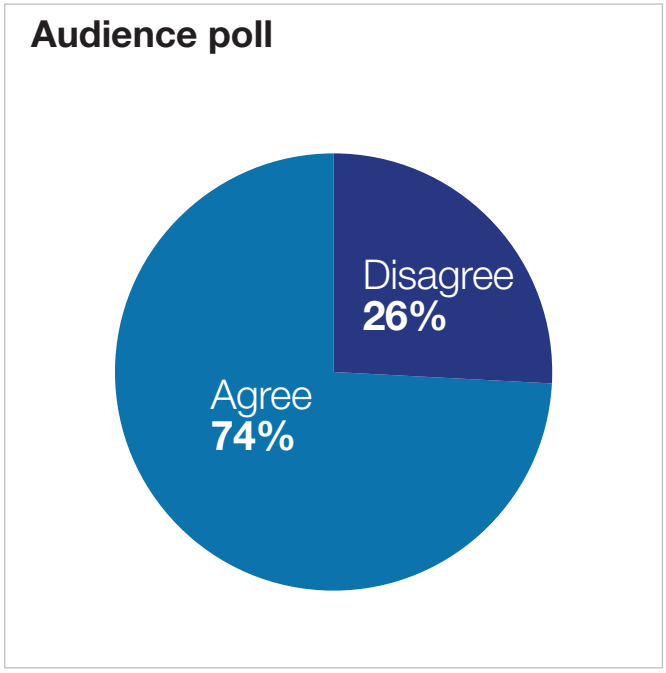
Proposition 7: Fact witness conferencing enhances the value of witness evidence.
This is a technique known as hot tubbing. It takes place primarily with experts where they might provide evidence at the same time, allowing easy comparison of the answers. Could you apply this technique to fact witnesses? The answer was yes for over two-thirds of participants when polled.

"There are potential imbalances of power that could affect the effectiveness of the conference and the veracity of the evidence."

Concluding remarks

After all the points had been debated and discussed, a final question was put to the audience, inviting them to vote as to whether the discussions had swayed their views on one or more of the propositions.

The results were as follows:



The results of the final poll were surprising to us. Almost three quarters of the participants changed their opinion with respect to one or more of the propositions as a result of the discussion.

As set out in our introduction, this webinar was not designed to reach a conclusion. Rather it aimed to promote discussion and debate on this rich topic. From the change in opinion between the start and the end program, the debate was clearly thought provoking and our panelists succeeded admirably in provoking analysis of the issues.

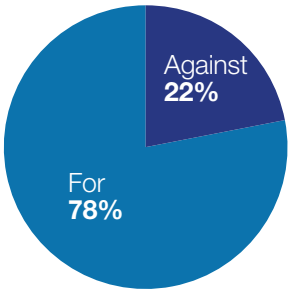
With thanks to Adam Calloway (Associate, Paris) and Daniel Newbound (Knowledge Management Lawyer, Leeds) for their work in preparing these event highlights.

Annex

Summary of results from our audience polls

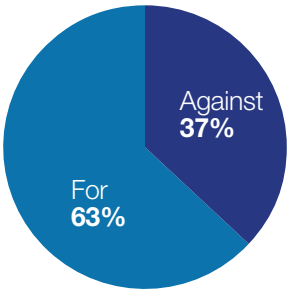
Proposition 1:

Save in rare situations, documents should be accorded more probative value than witness testimony.



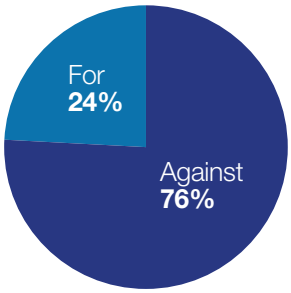
Proposition 2:

Arbitrators would enhance the value of witness evidence if they were to instruct the parties early in the proceedings as to what are the fact issues as to which the arbitrators wish to receive witness evidence and which ones not.



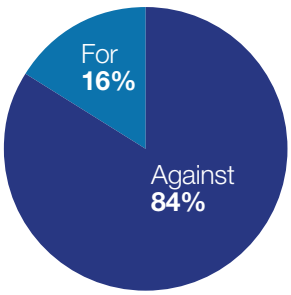
Proposition 3:

Generally speaking, witness evidence relating to "context" should be excluded – witness evidence should be strictly limited to the specific facts in dispute.



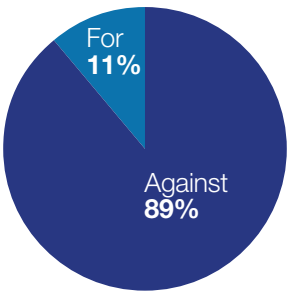
Proposition 4:

Generally speaking, arbitrators' ability to evaluate witness evidence is not affected by cognitive biases, such as confirmation bias, anchoring, cultural bias, gender bias, language, etc.



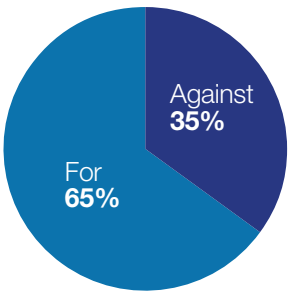
Proposition 5:

Cross-examination does not enhance the value of witness evidence.



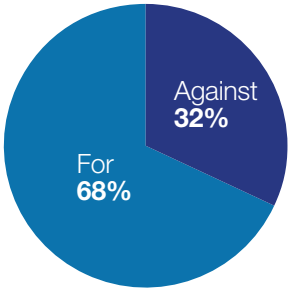
Proposition 6:

Tribunal-led questioning (before counsel questions) enhances the value of witness evidence.

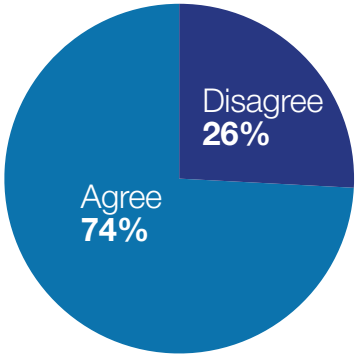


Proposition 7:

Fact witness conferencing enhances the value of witness evidence



Did the webinar sway audience views on one or more of the propositions?



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