Witness Recollection and International Arbitration

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In November 2020, the International Chamber of Commerce (ICC) published an ICC Commission Report on "*The Accuracy of Fact Witness Memory in International Arbitration*". James M. Turner QC, counsel and arbitrator at Quadrant Chambers, reviews the ICC Report's salient findings and suggestions and asks whether it advances matters.

In *Gestmin v Credit Suisse* [2013] EWHC 3560 (Comm), Leggatt J (now Lord Leggatt JSC) criticised the legal system's reliance on oral testimony. In a striking passage (at [15]-[22]), he pointed out not just the inherent fallibility of human recollection, but its propensity to be modified, as well as the lack of correlation between its accuracy and its clarity. There are also numerous cases deprecating the practice of interviewing two or more witnesses together: see, e.g., *Smith New Court Securities v. Scrimgeour Vickers* [1992] BCLC 1104 at 1115-1116, and *R v Momodou* [2005] 1 WLR 3442 CA.

The ICC Report is a promising combination of academic research and practical observation. As regards academic research, the "Task Force" identified that much of the research in this field to date has concerned witnesses to criminal acts – by their nature often short-lived and shocking. Commercial disputes, by contrast, frequently involve events spread over weeks, months or years, often of a banal or repetitive nature. To address this, research was conducted by an academic at Warwick University. This confirmed that witness memory in such settings is subject to the same distortions.

The Task Force also noted that the value of witness recollection varies with its role in the particular case. The corruption of witness evidence is less of a concern if it goes little further than setting the scene, or providing a context for contemporaneous documentation, or providing a technical explanation.

Turning, then, to the vulnerability of memory to distortion: "*memories are not an objective unyielding imprint of the past, but a subjective, pliable patchwork of experience, thoughts and daydreams*" (EJ Newman, M Garry, "*False Memory*" in *The SAGE Handbook of Applied Memory*, 2013). Their pliability lays them open to interference by post-event (mis-) information. This can arise from:

- Talking to co-witnesses, especially if another witness seems more credible;
- Retelling an experience to friends, officials or lawyers; or even
- The way in which questions about the event are phrased.

Tthe "misinformation effect" can be reduced by –

- Asking open-ended, neutrally-phrased questions;
- Asking witnesses for a complete account of the relevant event as early as possible;
- Reminding witnesses that their task is to report only their own personal knowledge; and
- Encouraging them to identify the source of their knowledge.

The fifth section of the report sets out several pages of steps that can be taken to guard against the distortion of witness recollection by misinformation. All involved – in-house counsel, external counsel and arbitration tribunal – have a part to play. These lists are a useful statement of best practice – even if they assume, optimistically, that everyone involved in the process will wish to preserve the 'purity' of their witnesses' evidence, uninfluenced by the exigencies of the dispute.

One suggestion is that the tribunal might consider requiring witness statements to include information as to how they were prepared. There is, on the face of it, real merit in this suggestion. It seems to have become fashionable to ask witnesses how their statements were drafted. When such questions are unexpected, a witness will often claim (incredibly) to have written the statement without assistance from lawyers. It might save considerable time to stipulate that this information be provided in advance. The difficulty, however, lies in properly circumscribing the enquiry, to avoid trespassing into matters covered by privilege, to say nothing of encouraging requests for documents and the like. The authors of the report recognise this danger and discourage tribunals from becoming embroiled in such inquiries, at any rate routinely.

Stepping back, then, what does the ICC Report add? On one level, it may be said that it replicates at much greater length what Leggatt J said in Gestmin, and that it is a reiteration of existing best practice – rather than any grand new statement of what it should be. It is also somewhat hampered by the narrowness of its remit.

However, that would be an unfair and even parochial view. International arbitration is by definition not just the preserve of England and Wales, after all. In pulling together and advancing an impressive assemblage of academic research on the vulnerability of witness recollection, curating an extensive statement of best practice and seasoning the whole with practical experience, the Report is a valuable service to the international arbitration community. It contains many valuable insights – not least the authors' obvious impatience with those lawyers who use witness evidence to argue their client's case. All disputes lawyers should read it.

The ICC's Report can be downloaded on this link: http://bit.ly/ICC_WER

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James specialises in cross-border commercial disputes in international arbitration, energy, shipbuilding, offshore construction, shipping and banking.

"A skilled tactician who can be entrusted with anything" (Chambers UK), as an advocate – with *"a deservedly excellent reputation"* (Chambers UK) – he appears most often in arbitration, before tribunals operating under LCIA, ICC, HKIAC or LMAA Rules, as well as in ad hoc matters. His Court work is almost exclusively in the Commercial Court and on appeals up to and including the Supreme Court.

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