

# International Arbitration in England



International Arbitration in England  
Perspectives in Times of Change

Edited by

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Gregory Fullelove  
For Elena

Laila Hamzi  
For Zayn, Laith, NP

Daniel Harrison  
For Ebru, Mae and Eve



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# Foreword

International arbitration is always evolving – it never stands still. Those involved in commercial arbitration in particular have consistently demonstrated a willingness to adapt to suit the needs of end users. This dynamic quality reflects the principle of party autonomy underlying international arbitration. As circumstances change, the motivations, priorities and concerns of commercial players often change too. When this book was conceived, few might have anticipated the scale of change we were about to witness across the globe. Given the increasing momentum to address ethnic and gender inequities, seismic political developments and foreign policy shifts (including the ongoing implications of Brexit), a global pandemic and growing recognition of the role we all have to play in addressing climate change, this ambitious text could not have been better timed to take stock of the implications of these forces on arbitration in England and beyond.

Against this background, the book provides a reflection on the past, including the turbulent events over the last few years, and draws on this to take stock of the current status of arbitration before addressing the impact of current trends on the arbitral process of the future. Two chapters tackle the imperative towards achieving gender and ethnic equity and diversity head-on, issuing a clear call to arms to all stakeholders as well as offering proposals to promote more rapid progress in these critically important areas. The threads of other key themes – the fallout from the pandemic in particular – run through many of the other chapters, while the chapters on climate change disputes and digital dispute resolution explore new frontiers. As sanctions are increasingly used in a bid to address a range of foreign policy challenges, the chapter on the impact of sanctions on arbitration is sadly very timely.

A number of contributors have also taken the opportunity to introduce new ways of approaching old chestnuts. They challenge what some might reluctantly recognise as the onset of standardisation creeping into aspects of what we herald as a truly flexible form of dispute resolution. Several chapters therefore address the approach to issues of practical relevance to users, including practices that can materially affect the bottom line in terms of costs. From the recovery of costs to summary dismissal, document production and innovative solutions for efficiency, these are all recurrent

themes thoroughly deserving of the fresh look and creative ideas offered here. There is a comprehensive analysis of third-party funding, an aspect of arbitration which – as the author notes – is here to stay, but which is evolving over time. Further chapters tackle thorny ethical issues relating to arbitrator and counsel conduct, and the long-debated question as to whether arbitration should be confidential. The role of arbitral institutions and organisations is featured throughout, and the book also offers a thoughtful assessment of the role, reach and influence of CI Arb in a rapidly changing world.

Indeed, the book addresses almost every aspect of the arbitral process through the perspectives of a delightfully diverse group of practitioners, reflective of the rich culture of the London international arbitration market itself. Importantly, it showcases the energy, experience and viewpoint of many younger generation practitioners, who will be pivotal to the future evolution of arbitration. Moreover, while focusing on England (including potential reform of the Arbitration Act 1996 and the implications of Brexit), the analysis and ideas expressed have clear international relevance. Accordingly, this book offers a truly confident and ambitious blueprint for the progress and fortification of arbitration as a method of dispute resolution. My warmest congratulations go to the editors and the contributors alike.

*Paula Hodges QC*  
*May 2022*

# Preface

This book is a collection of essays in which the contributors set out their reflections on the state of certain aspects of international arbitration in England and, where appropriate, their visions for the future. As to potential readership, the book is intended for not only arbitration practitioners involved in international arbitration in England wherever they may be based but also students and teachers of arbitration worldwide.

When the editors first discussed this publication, the concept was to provide a platform for a diverse set of practitioners ‘coming through the ranks’ to express their views on a subject of their choice related to the law and practice of international arbitration in England. We first started talking about the book in the midst of Brexit and its associated interminable debates. The book was then written during the COVID-19 pandemic and, as we prepared the final manuscript, we saw, with great sadness, war once more in Europe. Times of change indeed.

Contributors were encouraged to choose a subject that interested them and which they thought might interest others. The focus of the contributors has in the main been on aspects of what is often referred to as ‘international commercial arbitration’, although you will see a few nods to investment treaty arbitration in certain chapters. That is a reflection of the fact that, although England is not a common seat for investment treaty arbitration, its practitioners are heavily involved in its practice; challenge and enforcement issues also arise within the jurisdiction.

The chapters are, and were intended to be, an eclectic mix. We as editors were delighted with the topics chosen, and it was never our aim to cover all aspects of arbitration in England. There are of course plenty of compendious guides to arbitration in England already available. Accordingly, if you are seeking contributions on, for example, domestic arbitration, maritime arbitration or the mechanics of investment treaty arbitration, you will be better served elsewhere. It will follow, therefore, that this book is not in any way a successor to or an update of Wolter Kluwer’s *Arbitration in England: With Chapters on Scotland and Ireland*, which is indeed one of the more compendious guides available. It might, at most, be considered to be part of the same family: an independent younger sibling, perhaps.

Contributors were encouraged not only to chart developments to date but also to explore where the path might (or as the case may be, should in their view) lead in the coming years. As set out in the Introduction, a theme of quiet evolution in England emerges throughout the book, with some areas identified as ripe for transformation.

While this book is a set of essays focused on international commercial arbitration in England, we believe that it will be of interest well beyond these shores. Many of the themes explored (e.g., diversity, ethics, efficiency and green arbitration) are of relevance to the practice of international commercial arbitration across the globe. Considering such matters within the context of one arbitral system or jurisdiction, as the contributors do here with England, has some advantages. It has allowed the contributors to focus on proposals that might succeed in this jurisdiction and among its particular practitioner base. Those ideas may, in differing measures, be transferrable or of wider application, but that is for others to judge. These essays can form part of a wider debate.

Finally, we might be asked why this book deals with international commercial arbitration in England and not the United Kingdom as a whole. The 1996 Arbitration Act in England applies equally to Northern Ireland and Wales. Scotland has its own arbitration act and increasingly a thriving arbitral life of its own, with its own challenge and triumphs. The Republic of Ireland, our near neighbour, is of course not part of the United Kingdom at all and, like Scotland, has its own arbitral legal framework and a growing arbitration culture. For all those reasons, we decided to limit the scope of the book and give it the title it has.

In addition to the contributors, we would like to express our appreciation to the large number of people who have assisted us in putting together this publication:

- Our colleagues at Wolters Kluwer, in particular Eleanor Taylor, Vincent Verschoor and Kiran Nasir Gore, who have been understanding as the editors and busy practitioner contributors juggled multiple deadlines when finalising this book.
- The International Arbitration Group and partners of Osborne Clarke LLP, who have supported this project from day one and in some cases assisted in compiling the manuscript and providing much appreciated ‘behind the scenes’ support and research. In particular, we would like to thank Michelle Radom, Zoe Hughes-Nind, Capucine de Hennin, Jamie Howarth, Fran Sterling, Florence Dove and Owen Baldwin.

We have endeavoured to state the law as at 23 May 2022.

*May 2022*  
*Gregory Fullelove*  
*Laila Hamzi*  
*Daniel Harrison*

## CHAPTER 16

# ‘But at the Length Truth Will Out’: Witness Evidence in International Arbitration: Developments and Future Trends

Roman Khodykin & Siobhan Abraham\*

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*This chapter addresses recent scrutiny of the probative value of the evidence of fact witnesses over the last ten years and the reliability or usefulness of such evidence to an arbitral tribunal. It looks at many of the pitfalls affecting fact witness evidence, including the psychological issues associated with witness memory in international arbitration (highlighted in the ICC Report on Accuracy of Fact Witness Memory in International Arbitration), perceptions of ‘overlawyering’ and the decline of the administration of oaths as a method of assessing the probative value of witness evidence. It also looks at potential improvements to the process of providing witness evidence in international arbitration which could gain traction over the next ten years, particularly in light of ongoing increases seen in the volume of documents in most complex commercial arbitrations, and whether a clearer demarcation between witness evidence and legal argument is required. The chapter also addresses the available methods of assessment of witness evidence through cross-examination, and re-examines the rule in *Brown v Dunne* in the context of modern international arbitration practice. While there is little doubt that the witness statement will always have a part to play, the chapter concludes that there are real challenges to the credibility of witness evidence in England and Wales, and that the primacy and ever-increasing size and technological nature of the documentary record will necessitate changes to practise and procedure if the witness statement is to avoid being discredited.*

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\* The views expressed in this chapter are the authors’ own.

## §16.01 INTRODUCTION

The phrase ‘truth will out’ originates from Shakespeare’s *The Merchant of Venice* and appears in a scene where Launcelot Gobbo, the play’s comic relief, decides to ‘try confusions’ by tricking his blind father into believing he is someone else.<sup>1</sup> Eventually, he decides to ‘have no more fooling about it’<sup>2</sup> and admits to who he is. However, the question remains: can one trust what someone says if you have no other means of assessing the truth? This is equally applicable to dispute resolution, when the judge or arbitrator is tasked with assessing the truth of a case armed only with what the parties provide them. Often, this includes witness evidence.

It is difficult to critique the use of witness evidence in international arbitration without being caught between a rock and a hard place. If you advocate for a decrease in the use of witness evidence because it has become unwieldy and its reliability is in doubt, the arbitrator will need the evidential record to be filled somehow in order to draw a reliable factual conclusion. Consequently, you end up advocating for an increase in documentary evidence, with the invariable increases that would bring to the process of document production.

This chapter aims to avoid that conundrum and focuses on the ways in which trends over the last decade or so in the discussion around witness evidence may be carried forward and developed over the next ten years, hopefully to streamline and improve international arbitration in England as an enduring form of dispute resolution.

## §16.02 HISTORY OF WITNESS EVIDENCE IN LITIGATION AND ARBITRATION

### [A] A Brief History of Witness Evidence in England and Wales

It is well known that the common law system of England and Wales and the civil systems of Continental Europe have historically diverged in respect of the basis on which their courts make determinations at trial. English courts and other common law systems have historically placed greater reliance on witness evidence, whereas civil law systems have tended to prioritise the assessment of contemporaneous documentary evidence.

In the mid-twelfth century, Henry II enacted a number of reforms under the Constitutions of Clarendon in which he expanded the jurisdiction of the secular courts in England and Wales.<sup>3</sup> Ecclesiastical courts retained their inquisitorial approach, but the secular courts began to move towards jury-led trials. These juries were selected

1. William Shakespeare, *The Merchant of Venice*, Act II, Scene II, lines 80; 37 in Gwynne Blakemore Evans and John Joseph Michael Tobin et al. (eds), *The Riverside Shakespeare* (2nd ed., Wadsworth 1997).

2. *Ibid.*, lines 83-84.

3. Constitutions of Clarendon, 1164 cited in Ernest Flagg Henderson, *Select Historical Documents of the Middle Ages*, London (George Bell and Sons 1896), <https://avalon.law.yale.edu/medieval/constcla.asp>.

from local people as ‘witness-like persons’<sup>4</sup> who were likely to know the facts of a matter, but it has been said that these jury-trials ‘hardly had any place for a law of evidence’.<sup>5</sup> Jurors were often chosen because of their expertise or local knowledge of the facts, as opposed to their independence.<sup>6</sup>

The modern jury is a far cry from this position, but the English system retained its interest in evidence from persons with direct knowledge of a case. By the nineteenth century in England and Wales, a case without sufficient presentation of oral witness evidence would not be considered to have been properly tested. This has become a long-standing rule of practice following the 1893 case of *Browne v Dunn*.<sup>7</sup> If a party intends to rely on a version of events contradictory to a witness’ testimony, then counsel must put that version of events to the witness on cross-examination.<sup>8</sup>

### [B] Treatment of Witness Evidence in International Arbitration

Modern international commercial arbitration has its origins as a cross-border mode of dispute resolution between merchants and was initially highly international in nature. It became more domestic in the nineteenth and early twentieth centuries.<sup>9</sup> In many respects, it has followed trends established in domestic court proceedings. In particular, tribunals sitting in continental law jurisdictions were more reluctant to hear witness evidence, while common law arbitrations placed much greater reliance on their testimony.<sup>10</sup> Over the recent decades, because of the development of cross-border trade and general globalisation, international arbitration (in England as much as in other leading seats) became more international or supranational. This has resulted in a blurring of the difference between the approaches of civil and common law traditions. The second element which has developed over recent decades is the rise in written, as opposed to oral, witness testimony. It is interesting to compare the reluctance of the drafters of the 1973 United Nations Commission on International Trade Law Arbitration Rules to incorporate provision for written witness evidence with the ubiquity of written statements now.<sup>11</sup> As Gary Born notes in the 2021 edition of

- 
4. John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, vol. 96, 1170 (Columbia Law Review 1996).
  5. Frederick Pollock & Frederic W. Maitland, *The History of English Law Before the Time of Edward I* 660 (2nd ed., Cambridge University Press 1898).
  6. Christopher Milroy, *A Brief History of the Expert Witness*, 7(4) *Academic Forensic Pathology* 516-526 (December 2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6474433/#bibr1-2017.044>.
  7. *Browne v Dunn* (1893) 6 R 67.
  8. See section §16.02[A] above for a discussion of the rule in *Browne v Dunn*.
  9. Stavros Brekoulakis, *Introduction: The Evolution and Future of International Arbitration* in Stavros Brekoulakis and Julian David Mathew Lew et al. (eds), *The Evolution and Future of International Arbitration*, *International Arbitration Law Library*, vol. 37 1-20, 1.2 (Kluwer Law International 2016).
  10. ICC Commission Report. *The Accuracy of Fact Witness Memory in International Arbitration* para. 1.8 (ICC, November 2020).
  11. Gary B. Born, *Chapter 15: Procedures in International Arbitration* in Gary B. Born, *International Commercial Arbitration*, 2283-2492 (3rd ed., Kluwer Law International 2021).

*International Commercial Arbitration*, '[w]ritten witness statements were historically unknown in many civil law systems'.<sup>12</sup>

This differing treatment of witness evidence means that conflicts still arise as a result of the inherently multi-jurisdictional nature of international arbitration. Practitioners often adopt a combination of procedural methods drawn from both traditions and try to pursue a middle ground, but it has been said that 'generally speaking, if the arbitral practice relating to the communication of submissions and the production of documentary evidence seems to have been mostly inspired by the civil law tradition, the practice regarding witness testimony has been more influenced by the common law tradition'.<sup>13</sup>

Tribunals with their seat in England often consist of a mixture of civil and common lawyers. This synthesised approach can result in a range of views on the credibility of a witness or the value of their testimony ranging from the idea that witnesses can be mercenary and psychologically unreliable to the idea that witnesses can be elucidatory and helpful for the English lawyer when their evidence is properly tested under cross-examination. However, practitioners broadly concur that contemporaneous documentation will be of the strongest probative value.<sup>14</sup> The traditional approach of some Islamic legal systems differs entirely, where 'the words of an upright citizen were worthier than an abstract piece of paper or a piece of information subject to doubt and falsification'.<sup>15</sup>

### §16.03 RULES AND SOFT-LAW DEVELOPMENTS IN WITNESS EVIDENCE IN INTERNATIONAL ARBITRATION: KEY TRENDS

Soft-law instruments have had a significant impact on the development of evidential practices in arbitration in England (and, indeed, worldwide), particularly over the last decade. It is now common to see such guidance become binding on the parties due to its incorporation in an arbitration agreement or a procedural order. It is to this area of development that we now turn.

The introduction to the first edition of the International Bar Association (IBA) Rules on the Taking of Evidence in 1983 (hereinafter '1983 IBA Rules') aimed to create a set of rules described by one of its drafters as intended to govern 'the mechanics of presenting or receiving evidence'<sup>16</sup> in international arbitration, and to arrive at an approach acceptable to lawyers from common and civil law jurisdictions. One of the most significant difficulties that arose in the drafting of the 1983 IBA Rules was

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12. *Ibid.*

13. Roland Ziade and Charles-Henri de Taffin, *Fact Witnesses in International Arbitration*, *International Business School Journal IBLJ* 115 (2010) [3].

14. Jeffrey Maurice Waincymer, *Chapter 11: Documentary Evidence* in Jeffrey Maurice Waincymer, *Procedure and Evidence in International Arbitration, Part II: The Process of an Arbitration*, 827 (Kluwer Law International 2012).

15. Nudrat Najeed, *Good Faith and Due Process: Lessons from the Shari'ah*, 20(1) *Arbitration International* 97 (2004).

16. DW Shenton, *An Introduction to the IBA Rules of Evidence*, *Arbitration International* 118 (1985).

navigating the difference between ‘the manner of presenting evidence through witnesses, and the relative value of evidence obtained under “destructive” cross-examination compared with that contained in documents’.<sup>17</sup> Article 5 of the 1983 IBA Rules did permit witness evidence, but it reflected the limited use of written witness testimony at the time, requiring written witness statements to be produced to the tribunal, which would then circulate the evidence to the parties. Oral cross-examination was permitted but was much more tightly controlled than in the current iteration of the IBA Rules and was to be conducted by the tribunal at first instance.<sup>18</sup>

In the 2010 and 2020 updates to the IBA Rules, Article 4, which deals with witnesses of fact, is significantly more comprehensive than its predecessor.<sup>19</sup> The 1983 IBA Rules do make provision for civil law approaches, which would treat witness evidence with less import, but it is clear that in the nearly three decades between the 1983 IBA Rules and the IBA Rules on the Taking of Evidence in 2010 (the 2010 IBA Rules), there was a significant shift towards the use of written witness statements in international arbitration and therefore an increasing need for its regulation. This trend is also reflected in the 2020 update to the IBA Rules (hereinafter ‘2020 IBA Rules’).

The other key development in terms of soft law was the launch of the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration in December 2018 (hereinafter ‘Prague Rules’).<sup>20</sup> They reflect a more civil law-centric approach to practice than the 2020 IBA Rules, encouraging tribunal-led case management from the start of proceedings and seeking to improve procedural efficiency by drastically reducing document production.<sup>21</sup> Indeed, Article 4.2 of the Prague Rules provides that ‘[g]enerally, the arbitral tribunal and the parties are encouraged to avoid any form of document production, including e-discovery’. Perhaps the expectation as a result of this dramatic decrease in the role of document production would be an increased reliance on party-led witness evidence, but this is not the case, and witness evidence under the Prague Rules is strictly managed by the arbitral tribunal.<sup>22</sup> The Prague Rules have been heavily criticised as being inadequate for the complexities of modern international arbitration,<sup>23</sup> but it remains to be seen whether they will gain traction in English-seated arbitrations over the next ten years.

17. Roman Khodykin and Carol Mulcahy. *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration* (Oxford University Press 2019), s. 1.5.

18. *Ibid.*, 1.12; 5-6.

19. *Ibid.*, 7; 216.

20. See <https://praguerules.com/upload/medialibrary/9dc/9dc31ba7799e26473d92961d926948c9.pdf>.

21. It is worth noting that while the Prague Rules reflect a more civil law-centric approach to practice than the IBA Rules, there is nothing to stop a tribunal in an English-seated arbitration from adopting the approach set out in the Prague Rules under its wide powers to decide procedural and evidential matters under ss 34 and 38 of the Arbitration Act 1996.

22. *Supra* n. 20, Art. 5.

23. See, e.g., Amaral, *Prague Rules v. IBA Rules and the Taking of Evidence in International Arbitration: Tilting at Windmills: Part II*, Kluwer Arbitration Blog (6 July 2018); Berger, *Common Law v. Civil Law in International Arbitration: The Beginning or the End?*, 36 *Journal of International Arbitration* 295 (2019); Kocur, *Why Lawyers from Civil Law Jurisdictions Do Not Need the Prague Rules*, Kluwer Arbitration Blog (19 August 2018).

The next section will examine the main developments in witness evidence over the last ten years and their uptake in international arbitration, before considering how those changes might evolve over the next ten years in English-seated arbitrations (and indeed more widely).

#### **§16.04 CHANGES IN THE TREATMENT OF WITNESS EVIDENCE**

Since 2010, there have been four main aspects of the discussion of witness evidence among arbitration practitioners:

- (1) questions around the reliability of written and oral witness evidence, including due to cross-examination and the fallibility of memory;
- (2) the involvement of lawyers in the preparation of written witness evidence;
- (3) the decreasing value of testing evidence and cross-examination in international arbitration; and
- (4) the increasing importance of documentary evidence in international arbitration.

##### **[A] ‘Would I Lie to You?’: Assessment and Probative Value of Witness Evidence**

The first trend that has received considerable attention in the arbitration community over the last ten years is the mounting body of scientific evidence suggesting that the current techniques and procedures involved in taking and presenting witness evidence may themselves impact the reliability of the witness evidence they produce. For many years, lawyers in England and other common law jurisdictions would interview laypeople and draft their witness statements. What transpired when the process was looked at critically with the assistance of psychological research is that even an honest witness’ memory can be unconsciously distorted to such an extent that, through no fault of their own, their *memory* is not a reliable indicator as to the *truth* of a situation.

This is not new. Indeed, the American jurist Professor John Henry Wigmore wrote extensively on the fallibility of witness evidence in the 1920s and 1930s.<sup>24</sup> Such questions have been noted by arbitration commentators over the years, but they began to gain renewed traction in 2010 when Toby Landau QC gave his Kaplan lecture titled ‘Tainted Memories: Exposing the Fallacy of Witness Testimony’.<sup>25</sup> Mr Landau discussed witness memory and its reliability in arbitration in the context of the body of psychological research relating to the reliability of memory that exists in the world

24. See John Henry Wigmore, *Wigmore on Evidence: A Treatise on the Anglo-American System of Evidence* (3rd ed., Little, Brown & Co. 1940).

25. Toby Thomas Landau, *Chapter 4: Tainted Memories: Exposing the Fallacy of Witness Evidence in International Arbitration (Fourth Kaplan Lecture, 17 November 2010)* in Hong Kong International Arbitration Centre (ed.), *International Arbitration: Issues, Perspectives and Practice: Liber Amicorum Neil Kaplan*, 119-144 (Kluwer Law International 2018).

outside arbitration, including criminal law, and urged international arbitration practitioners to approach evidential procedures by reference to its conclusions.

Similar warnings were voiced by the English courts. In 2013, Leggatt J delivered his well-known decision in *Gestmin SGPS SA v Credit Suisse (UK) Ltd*, critiquing the way in which witness evidence has habitually been presented at trial: 'I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of witness testimony.'<sup>26</sup> Leggatt J made two key observations, noting first that 'psychological research has demonstrated that memories are fluid and malleable ... [rather than] ... a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time', and that 'external information can intrude into a witness' memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection'.<sup>27</sup>

There is an extensive body of scientific work in this area. However, much of it relates to the criminal law and the psychology of police interviews of eyewitnesses to crimes. Little of this learning has been brought into the civil and commercial arena. That said, the English Commercial Court has taken a lead in exploring the issue. In *Gestmin*, Leggatt J relied on the 2008 Guidelines on Memory and the Law, published by the British Psychological Society (the Guidelines). Three of the key points from the Guidelines were: first, that the act of remembering is a constructive process (remembering will be affected by multiple external factors, from experiences at the time of the memory, to attempts to recall it, to the process of recording it for use as witness evidence); second, that memories typically contain only a few highly specific details; and third, that recall of a single or several highly specific details does not guarantee that a memory is accurate or even that it actually occurred. Indeed, it is entirely possible to construct a false memory of something for a variety of reasons, including the contamination of the memory with post-event information. However, it is important to note that the existence of a false memory has no bearing at all on a witness' subjective truthfulness or otherwise.<sup>28</sup>

In *Gestmin*, Leggatt J concluded that while witness evidence nonetheless retained its probative value, judges (and this is equally applicable to arbitrators) should tread carefully to avoid two common mistakes. These are to assume that: (i) the stronger and more vivid the recollection, the more likely it is to be accurate; and (ii) 'the more confident another person is in their recollection, the more likely it is to be accurate'. He concluded that:

The best approach from a judge is to base factual findings on inferences drawn from documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in

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26. *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3650 (Comm) at [16].

27. *Ibid.*, at [17].

28. See [https://www.judcom.nsw.gov.au/publications/benchbks/sexual\\_assault/british-guidelines\\_on\\_memory\\_and\\_the\\_law.html](https://www.judcom.nsw.gov.au/publications/benchbks/sexual_assault/british-guidelines_on_memory_and_the_law.html).

the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.<sup>29</sup>

In the years since the *Gestmin* decision, the fallibility of memory has continued to be considered by the English courts.

In the 2017 case of *Lachaux v Lachaux*, Mostyn J commented that ‘it is certainly often difficult to tell whether a witness is telling the truth and I agree with the view of Bingham J that the demeanour of a witness is not a reliable pointer to his or her honesty’.<sup>30</sup> He did not, however, go any further than to issue this caution as to the probative value of the evidence in relation to the honesty of a witness, when it is clear from the scientific evidence that a memory can be tainted or unreliable even when the witness is entirely honest. In another 2017 case decided by Mostyn J, he again acknowledged the body of evidence in respect of the fallibility of memory, but he ultimately reiterated the orthodox view that oral evidence given under cross-examination is the gold standard. This was because it reflects the long-established common law consensus that the best way of assessing the reliability of evidence is by confronting the witness.<sup>31</sup>

Indeed, in 2020, the High Court concluded that documentary evidence should take primary position in the judge’s assessment of the evidence before them, noting that it is an error of principle to ask ‘do we believe him/her?’ before considering the documents, as an honest witness can construct an entirely false ‘memory’.<sup>32</sup>

Arbitral institutions have started to follow suit. The International Chamber of Commerce (ICC) has recently taken steps to review the literature available in respect of the fallibility of witness memory and published its report in November 2020 (herein-after the ‘ICC Report’).<sup>33</sup> It commissioned its own report from two independent memory experts, Dr Ula Cartwright-Finch (an arbitration lawyer and psychologist) and Dr Kimberley Wade of the University of Warwick, to review the application of the extant body of psychological research regarding memory to international arbitration. It addressed issues such as how the specific wording of a question can change the way a witness replies, how a witness may be influenced by information received after an event, and how the act of retelling a story from a particular perspective can change a witness’ memory.<sup>34</sup> The ICC Report’s overall conclusion was that science shows that

29. *Gestmin*, *supra* n. 26 at [22].

30. *Lachaux v Lachaux* [2017] EWHC 385 (Fam) [2017] 4 WLR 57.

31. *Carmarthenshire County Council v Y* [2017] EWFC 36; [2017] 4 WLR 136.

32. *Dutta, R (On the Application of) v General Medical Council (GMC)* [2020] EWHC 1974 (Admin).

33. ICC Report, *The Accuracy of Fact Witness Memory in International Arbitration* (November 2020).

34. *Ibid.*, para. 2.7 and Appendix 1 ‘Selected Review of Scientific Literature relating to Memory and Witness Evidence’.

the memory of an honest witness who gives evidence in international arbitration proceedings can easily become distorted and may therefore be less reliable than the witness, counsel or the tribunal expects.<sup>35</sup>

The evidence discussed in the ICC Report suggested that such issues of fallible witness memory were also applicable to scenarios common to international arbitration and raised the question of how to improve the reliability of witness evidence.<sup>36</sup>

Drs Wade and Cartwright-Finch offered various suggestions about how to limit the ‘creep’<sup>37</sup> of post-event information into memory and witness testimony. These included ensuring that a witness makes a contemporaneous (or near-contemporaneous) record of events, ensuring the interviewer sticks to open questions, and if a witness is unsure about an answer, endeavouring not to corrupt their memory by pushing for a definitive answer.<sup>38</sup> Other practitioners have also made suggestions as to the form a modified witness statement could take in order to ensure it sets out much more clearly what the arbitrator needs to know in order to decide the dispute. Examples include a written statement with questions and answers set out in transcript form, or a video transcript of the witness giving oral evidence-in-chief.<sup>39</sup>

The ICC Taskforce’s review of the scientific literature appears to conclude that while distortions of memory are important considerations which an arbitrator should take into account – and which counsel should try to mitigate – the other benefits of witness evidence may be sufficiently valuable in the context of an arbitration to retain the use of witness evidence in substantially the form in which it is currently presented.<sup>40</sup> These benefits are described as:

- proving disputed facts which cannot otherwise be proven with documentary evidence;<sup>41</sup>
- providing context to and explaining contemporaneous documents;<sup>42</sup>
- ‘telling the story’ from a personal level to increase credibility;<sup>43</sup> and
- setting out technical explanations.<sup>44</sup>

The ICC Report concludes that there are also types of witness for whom steps to avoid the distortion of memory are largely unnecessary, such as witnesses giving evidence based on their technical understanding or expertise. The mitigating steps it

35. *Ibid.*, para. 1.5(a).

36. *Ibid.*, paras 2.31, 3.13.

37. *Ibid.*, para. 2.4.

38. *Ibid.*, para. 2.30.

39. Laurence Shore, *Chapter 3: Document Production, Witness Statements, and Cross-Examination: The Enduring Tensions in International Arbitration* in Stavros Brekoulakis and Julian David Mathew Lew et al. (eds), *The Evolution and Future of International Arbitration*, *International Arbitration Law Library*, vol. 37, 39-46, 43-44 (Kluwer Law International 2016).

40. ICC Report, *supra* n. 33 at paras 4.5-4.12.

41. *Ibid.*, paras 4.13-4.14.

42. *Ibid.*, paras 4.15-4.20. This is comparable to the way witness statements are used in Part 25 interim applications to the court, i.e., that a witness statement is required to adduce supporting evidence, meaning that the statement is often used merely as a narrative of the factual events key to the legal case, rather than offering a first-person perspective on the underlying events.

43. *Ibid.*, paras 4.21-4.25.

44. *Ibid.*, para. 4.26.

proposes (most of which are fairly standard aspects of best practice witness interviewing) are largely to be used for witnesses giving evidence as to statements made during meetings, or where no written record is available.<sup>45</sup>

This raises two significant issues with respect to the way witness evidence is dealt with in both court proceedings and international arbitration:<sup>46</sup>

- first, that the memory itself which a witness describes is not a fixed, ‘flashbulb’ record of an event and so is of questionable reliability as a tool to establish the ‘truth’ of a situation; and
- second, that the process of a lawyer interviewing a witness, of questioning them as to the specifics of their memory, transliterating their recollection into a written witness statement and then cross-examining them on those recollections, far from assisting in reaching a reliable conclusion as to the ‘truthful’ facts of a matter, in fact corrupts and distorts the witness’ memory to such an extent that that memory can offer little probative assistance to a court or tribunal.

As Dr Cartwright-Finch writes, ‘the process of preparing witness evidence necessarily exposes fact witnesses – whose primary purpose is to report to the arbitral tribunal on events after the fact – to post-event information’.<sup>47</sup>

### **[B] ‘The First Thing We Do, Let’s Kill All the Lawyers’:<sup>48</sup> Lawyers and the Preparation of Witness Evidence**

One of the key distinctions to be made in a discussion of witness evidence is of course between oral and written witness evidence. Witness statements used to be infrequent even in common law jurisdictions, with evidence presented orally at the hearing. A party’s counsel would conduct examination-in-chief in an attempt to tease out the witness’ story, a lengthy process which considerably increased court time. By the mid-twentieth century, the view was that ‘the evils of delays and disproportionate

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45. *Ibid.*, para. 4.30.

46. It should be noted that this is not a view shared by all practitioners: Gary Born comments in his 2021 update to his seminal *International Commercial Arbitration* that ‘[a]lthough it deserves to be taken seriously, and should be instructive for counsel in some circumstances, this criticism substantially overstates the defects in witness statements, and does not address the benefits of efficiency from, or possible alternatives to, such statements. In reality, it is clear to almost all experienced practitioners and arbitrators that written witness statements are fundamental to an efficient arbitral process’. See Gary B. Born, *Chapter 15: Procedures in International Arbitration* in Gary B. Born, *International Commercial Arbitration*, 2283-2492 (3rd ed., Kluwer Law International 2021).

47. Ula Cartwright-Finch, *Chapter 9: Human Memory and Witness Evidence in International Arbitration* in Tony Cole, *The Roles of Psychology in International Arbitration*, *International Arbitration Law Library*, vol. 40, 199-123 (Kluwer Law International 2017).

48. William Shakespeare, *Henry VI*, Part II, Act IV, Scene II, lines 76-77 in Gwynne Blakemore Evans and John Joseph Michael Tobin et al. (eds), *The Riverside Shakespeare* (2nd ed., Wadsworth 1997). The oft-quoted line from Dick the Butcher is not without its own controversy, and has been fuelling arguments between lawyers and non-lawyers for centuries.

expenses plagued High Court litigation in England'.<sup>49</sup> Despite unsuccessful attempts to introduce cost-saving reforms into the process in the 1950s,<sup>50</sup> it was not until 1992 that the compulsory exchange of pretrial witness statements was introduced, and not until 1995 that such statements would replace evidence-in-chief in its entirety. Now, witness statements are the primary means of giving evidence in common law systems, and the English reforms of the mid-1990s have permeated international arbitration wholesale.

The primary advantage of this is, in theory, savings of time and costs. Examination-in-chief was expensive and time-consuming. Provision of evidence-in-chief in statement form means parties come to the hearing much more prepared, relevant issues are narrowed by virtue of prior review of the evidence, and cross-examination can be used to greater effect in probing those issues. It also permits a more coherent expression of the witness' personal knowledge of the facts, which is one of the great benefits of witness evidence in general.

As for the civil law perspective, though we are no longer in a position where civil lawyers are reluctant to utilise witness statements at all, civil law practitioners have traditionally been reluctant to allow lawyers to draft witness statements. Common practice would be for a witness to be directly examined by the judge or a tribunal. This approach can still be seen in some countries, such as Sweden, where the parties would submit a 'Statement of Evidence', the main purpose of which is to give the adverse party an opportunity to consider what evidence is required in response. The Statement of Evidence would normally include, very precisely, names of the witnesses and what they intend to prove with that piece of evidence.<sup>51</sup> No written statement is traditionally required from the witness, though over time the position has softened and nowadays written witness statements are becoming commonplace in arbitration in Sweden.

The position in common law countries was quite the opposite. Historically in England and Wales, solicitors would interview a witness and draft his or her statement. However, in England, recently there has been a general consciousness, particularly among judges and arbitrators, that written witness evidence has become 'over-lawyered' and thus the reliability of the evidence to a court or tribunal, in its 'honest' depiction of the narrative facts of a case, has been diluted to the point where it is often of limited utility. This was an impression shared by a substantial majority of the judges of the Commercial Court, that factual witness statements were often ineffective in performing their core function of providing the best evidence at proportionate cost in Commercial Court trials.<sup>52</sup>

This sense of over-lawyering has occurred in various ways. The most obvious is perhaps in the drafting of witness statements by a party's lawyers, such that the statement can be used as a further opportunity to state the merits of a party's legal case, rather than as a narrative document setting out the perspective of the witness in their

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49. Landau, *supra* n. 25 at 119-144.

50. See, e.g., the review of the Evershed Committee in 1953, which resulted in little change; *Ibid.*, 121.

51. Lars Heuman, *Arbitration Law of Sweden: Practice and Procedure*, 380 (Juris Publishing 2003).

52. *Factual Witness Evidence in Trials Before the Business and Property Courts: Report of the Witness Evidence Working Group*, para. 1, <https://www.judiciary.uk/wp-content/uploads/2019/12/Witness-statement-working-group-Final-Report-1-1.pdf>.

own words. This approach is in fact endorsed in Article 4.5(b) of both the 2010 and 2020 IBA Rules which provides that a witness statement must contain '[a] full and detailed description of the facts [...] sufficient to serve as that witness' evidence'.<sup>53</sup> There is no express requirement for the statement to be in the witness' own words. Within international arbitration practice, it is almost guaranteed that a witness statement will have been prepared by the party's lawyers, which can be obvious to a greater or lesser extent. While it is uncommon to see a statement which blatantly restates a party's legal case, there is certainly a tendency for witness statements prepared by highly professional teams of lawyers to track the factual position most supportive of their legal case very precisely, and indeed it is common for statements to look as if they have been drafted by a lawyer, in terms of their formatting and style. Theoretically, this could be avoided in part by a return to the use of direct oral examination in place of a witness statement, which as discussed was not uncommon until as recently as the 1990s.<sup>54</sup> Realistically, however, this is not likely to happen in international arbitration, as 'the notion of oral direct examination is, at this stage, largely a United States jury artefact that runs against not only civil law procedural approaches but also other common law approaches to the presentation of cases at evidentiary hearings'.<sup>55</sup>

The drafting of a witness statement is usually done by lawyers for a number of good reasons. It ensures the most effective, consistent and advantageous presentation of a party's case as the lawyer can present the witness' information in a way which supports its legal position, and allows a party's lawyers to manage or minimise less advantageous elements of the case. It is often necessary from a practical perspective too. A client's primary focus is rarely the arbitration (or court proceedings) in which it finds itself giving evidence, and clients rarely have the time or the inclination to prepare their own statements. It must be noted, however, that this is all very much part of the 'game': witness statements are prepared by lawyers in order to best present a case which they know will be tested in cross-examination by the other side's lawyers, and which will form part of the materials which the judge or arbitrator will consider in rendering their decision. It is a process which operates within the confines of the legal system.

However, as much as one might find it useful and convenient, the client is unlikely to want to 'kill all the lawyers' if it means they must prepare their own witness statement. This process of taking the witness evidence carries with it inherent problems with the integrity of the evidence which is produced, as described above.

Moreover, witness statements drafted by lawyers are rarely a vehicle for establishing the facts. Recently, the Civil Procedure Rules in England and Wales (CPR) were amended to impose a higher standard on witness statements in the English courts, which must be 'in the intended witness' own words and must in any event be drafted

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53. *IBA Rules on the Taking of Evidence in International Arbitration 2010*, Art. 4.5(b).

54. Khodykin and Mulcahy *supra* n. 17 at 7.60; 233.

55. Laurence Shore, *Do Witness Statements Matter: And If So, How Can They Be Improved?* in Albert Jan Van den Berg (ed.), *Legitimacy: Myths, Realities, Challenges, ICCA Congress Series*, vol. 18, 302-314 (ICCA & Kluwer Law International 2015).

in their own language'.<sup>56</sup> The requirement for a statement to be in a party's own words is not new, but the requirement for the statement to be drafted in the witness' own language is a recent update which came into force on 6 April 2020.<sup>57</sup> It is matched with a corresponding amendment to the requirements for a statement of truth, which now needs to include 'a statement by the intended witness in their own language that they believe the facts in it are true'.<sup>58</sup> This seeks to avoid circumstances where a witness giving evidence in their second language struggles with the linguistic aspect of cross-examination, thus affecting the quality and probative value of their evidence further. Clearly, the English judiciary is seeking to address the problem of over-lawyering witness evidence.

In contrast, the main sets of arbitration rules and soft law are yet to grapple with this problem. Many of the same issues identified by the Business and Property Courts equally affect arbitration, but the updated 2020 IBA Rules did not include any requirement for the witness statement to be in the witness' own words. Indeed, the international nature of English-seated arbitrations means that witnesses frequently prepare and give evidence in languages other than English, so the problem is a pertinent one. However, the 2020 IBA Rules continue to permit considerable latitude as to how a witness' evidence is presented. Clearly, it will have an impact on the credibility of the witness in the arbitrator's eyes if multiple witness statements in the same proceedings read identically, and generally '[a]llowing the witness to tell the story in his or her own words will not only maintain the integrity of the evidence but, under cross-examination, the witness is more likely to tell the same narrative and, as a result, contribute to his or her credibility before the tribunal'.<sup>59</sup>

It is very common, however, for witness statements to be highly curated pieces of quasi-legal drafting. Where a particular witness statement sits along this scale rarely prevents parties and their lawyers placing heavy emphasis on the comments, phraseology and observations (or misobservations) made in that evidence. This reliance on the 'truth' (or otherwise) of the statement may be misplaced to varying degrees depending on the level of input of a party's lawyers, but it is likely to ultimately affect the tribunal's view of the witness and the evidence's probative value. This is sometimes worsened by the evidence having been made in a witness' own language and then translated, or if the witness chooses to testify in their second language, this can result in disparities between the ability of witnesses to cope with cross-examination. There is also a tendency to have a witness comment on every document in the case, which seems to arise from a sense that the witness' value lies in giving colour to the documentary record, rather than providing statements of opinion or speculation as to intention.<sup>60</sup> This is not helpful to the tribunal and may even detract from their assessment of the probative value of the new evidence which a witness gives. In the

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56. Civil Procedure Rules, Practice Direction 32A, Rule 20.1, [https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part32/pd\\_part32#witness](https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part32/pd_part32#witness).

57. *Ibid.*, 113th Update: Practice Direction Amendment, <https://www.justice.gov.uk/courts/procedure-rules/civil/pdf/update/cpr-113th-pd-update.pdf>.

58. *Ibid.*, Practice Direction 32A, Rule 18.1.

59. Khodykin and Mulcahy, *supra* n. 17 at 7.95; 241.

60. *Ibid.*, at 7.99; 214-278.

view of the authors, perhaps there is scope for similar reforms to those introduced by the Business and Property Courts in Practice Direction 32A to be fed into English-seated arbitrations in due course.<sup>61</sup>

There is another interesting common law tradition which affects the conduct of arbitration in England. In English civil procedure, witness evidence has often been used for a purpose other than to convey a witness' recollection of the facts of a particular case.

For instance, far too often in English civil procedure one sees a statement or an affidavit of a party's lawyer, even though the lawyer normally does not have a first-hand recollection of events. The lawyer provides a detailed description of other evidence and legal arguments in a coherent manner. This is in contrast with many civil law jurisdictions where even a party, let alone its lawyer, cannot be a witness in its own case, although it is worth noting that in Switzerland the situation is now under scrutiny.<sup>62</sup> In those countries, the parties may give evidence in a different form.<sup>63</sup> It is therefore important to ask whether a witness statement should be used to provide a description of facts and legal arguments, or not.

Another quirk is regarding applications in support of an English-seated arbitration. In an application for an interim injunction or freezing order under section 44 of the Arbitration Act 1996 (hereinafter '1996 Act'), for example, documentary evidence can *only* be added to the court record when appended to a witness statement or statement of case/application verified by a statement of truth.<sup>64</sup> The considerations mentioned above mean that the necessary supporting evidence is almost always exhibited to a witness statement given by a party's lawyer.

This is in contrast with many civil law jurisdictions where a document can be adduced to the case files without any supporting witness evidence. Endorsing a document with a statement of truth has been a sufficient reason for following this practice for many years. However, there are several arguments against such an approach. Crucially, a lawyer would rarely know whether a document is genuine or not; they rely on confirmation from their client in this respect. In these circumstances, the lawyer may feel uncomfortable signing a statement of truth, but it is not currently possible in English civil procedure to adduce the document in any other way.

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61. At the time of writing, the Law Commission is consulting on the fourteenth Programme of Law Reform, and has proposed the 'Arbitration Act 1996 and trust law arbitration' as potential areas for reform. It may be that similar amends to those introduced by the Business and Property Courts could be included in any potential updates to the Arbitration Act, if the topic is selected for reform.

62. Christian Oetiker, *Witnesses Before the International Arbitral Tribunal*, vol. 25 Issue 2, 254 (Association Suisse de l'Arbitrage; Kluwer Law International 2007). In ICC Case No. 7319 a German arbitrator refused to treat a board member as a witness. See ICC Award dated 30 October 1992 in proceedings No. 7319 in: *Clunet*, 1994, 1102.

63. See also Mauro Rubino-Sammartano, *International Arbitration: Law and Practice*, section 25.11 (2nd ed., Kluwer Law International 2001).

64. An application for a freezing injunction under Part 25 of the CPR Rules, for example, must be supported by affidavit evidence per rule 3.1. Under rule 3.2, applications for other kinds of interim injunction must be supported by evidence provided by way of a witness statement or a statement of case or application verified by a statement of truth ([https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part25/pd\\_part25a#3.1](https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part25/pd_part25a#3.1)).

This results in lengthy witness statements given by someone with no first-hand experience of the underlying facts of the case, but who has been engaged to plead its merits. A lawyer being cross-examined by the opposing party on the circumstances of his/her client's case is caught between a rock and a hard place: their first duty is to the court, but they are also retained by that client and throughout the proceedings have been seeking to present their client's case as well as possible. This tension recently came to a head when an experienced partner from a magic circle law firm was heavily criticised by the High Court in July 2020 for their client's application to have a Russian oligarch committed for contempt of court, in an alleged breach of undertakings given to the court in respect of a recent London Court of International Arbitration award. Baker J found that the witness evidence of the partner was presented 'in a heavy-handed, aggressively partisan fashion, that was inappropriate, vexatious and unfair', and that the partner saw her function in giving evidence 'as being to advance as forcefully as possible the best case she could argue for her client'.<sup>65</sup> While evidently these criticisms had some foundations in that particular case, this would have been avoided had there been a clear demarcation between witness evidence (provided by those who had first-hand account of events) and legal arguments (made by lawyers).

Although arbitrators practising in England are not bound by the CPR, the court's approach often affects the way cases are handled in arbitration. In particular, we are observing a very high and increasing use of witness evidence in international arbitration in England in particular, often containing legal arguments and repeating the gist of documentary evidence while rarely adding much beyond providing a (hopefully) neutral summary of the facts of a case. This could be achieved in other ways, for example, through the application itself or by pleadings. Such witness statements have little probative weight for the judge (or arbitrator). A coherent and logical description of facts and legal arguments is necessary for the tribunal to determine the case. The question is whether the time has come to ask whether these descriptions and arguments belong elsewhere.

### [C] 'I Solemnly Swear I Am Up To No Good': Oaths and Statements of Truth

Another creeping change is a steady and continuous decline in the number of oaths administered by arbitral tribunals.

A tribunal in an English-seated arbitration is empowered to require witnesses to give evidence under oath or affirmation by section 38(5) of the 1996 Act. In contrast, the 2020 IBA Rules make no reference to the possibility of a witness or expert giving evidence on oath, although they do not exclude the possibility. In some cases, parties may prefer that their witnesses offer evidence on oath. This may be because they believe the tribunal will give it greater weight or because the other party is proffering its witnesses on that basis, and it feels it will be at a disadvantage if it does not do the same. It is certainly true that in a number of jurisdictions the giving of evidence on oath

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65. *Navigator Equities Ltd and another v Deripaska* [2020] EWHC 1798 (Comm) at [158], [156].

may imbue the evidence with some additional weight. This may be because there are sanctions attached to the giving of false evidence.<sup>66</sup>

A few decades ago, it was common for witnesses to swear an oath or make an affirmation before giving oral evidence before an arbitral tribunal. Nowadays, it is very rare.<sup>67</sup> Audley Sheppard QC suggests that there may be various reasons for this, including increased secularisation of society generally, recognition that oaths/affirmations are unlikely to cause a witness to be more honest, and the influence of arbitrators from countries where oaths/affirmations are rarely administered (or, in some jurisdictions, not allowed).<sup>68</sup> Another reason, more cynically, may be that the only person in the room actually seeking objective truth is the arbitrator, which is reflected in the decline in the use of oaths.<sup>69</sup>

Under English law, an arbitrator is allowed to administer an oath in the course of arbitral proceedings.<sup>70</sup> In arbitral proceedings in England and Wales, if the evidence of a witness given under oath proves to be untrue, the witness may be held criminally liable under the Perjury Act 1911, for which offence the maximum sentence is seven years' imprisonment.<sup>71</sup> In the UAE (whether involving domestic or international parties), however, fact and expert witnesses must give testimony under oath. When making the oath, these witnesses must also use the specific language stipulated in the UAE Evidence Law.<sup>72</sup>

A very different approach is taken in Sweden. Under Articles 25 and 26 of the Swedish Arbitration Act 1999, the arbitrators may not administer oaths or even affirmations of truth. Where a party wishes a witness or an expert to testify under oath, or a party to be examined under an affirmation of truth, the party must submit an application for permission to the District Court, after first obtaining the consent of the tribunal.<sup>73</sup>

As far as England is concerned, Professor Susan Edwards conducted a review about those who stood trial for perjury in the Crown Court in the period from 1991 to

66. Khodykin and Mulcahy, *supra* n. 17 at 11.81-11.82.

67. Audley Sheppard, *Oaths and Perjury* in Julio César Betancourt (ed.) *Defining Issues in International Arbitration: Celebrating 100 Years of the Chartered Institute of Arbitrators*, 197-206, para. 20.03 (Oxford University Press 2016); Robert Merkin and Louis Flannery, *Arbitration Act 1996* (6th ed., Informa Law from Routledge 2020), 408; David Sutton and others, *Russell on Arbitration*, 23rd ed., para. 5.154 (Sweet & Maxwell, 2007).

68. *Ibid.*, 20.03.

69. See also Michael Schneider, *Twenty-Four Theses about Witness Testimony in International Arbitration and Cross-Examination Unbound*, 63 in Marcus Wirth, Christina Rouvinez and Joachim Knoll (eds), *Search for Truth in Arbitration: Is Finding the Truth What Dispute Resolution Is About?*, ASA Special Series 35 (JurisNet 2011).

70. Arbitration Act 1996, s. 38(5) and Art. 20.8 of the LCIA Rules.

71. Perjury Act 1911, s. 1.

72. Federal Civil Procedure Code No. 11 of 1992 and the UAE Evidence Law. See also Sami Tannous, Samantha Lord Hill and Sarah-Jane Fick, *National Report for the United Arab Emirates (2018)* in Jan Paulsson and Lise Bosman (eds), *ICCA International Handbook on Commercial Arbitration* (Supplement No. 101, Kluwer Law International 2018).

73. Swedish Arbitration Act 1999, s. 25(3); Finn Madsen, *Commercial Arbitration in Sweden: A Commentary on the Arbitration Act* 116 (Oxford University Press 1999); *The Rules of the Arbitration Institute of the Stockholm Chamber of Commerce* 178 (2nd ed., Oxford University Press 2006).

2000. She found that out of 1,024 defendants, 830 were convicted (i.e., 81% of all prosecutions) with 437 sentenced to imprisonment for up to 18 months.<sup>74</sup> More recent statistics indicate a decline in prosecutions but an increase in conviction rates and lengths of sentence.<sup>75</sup>

However, the authors have not been able to find any examples of prosecutions for perjury in arbitrations conducted under the 1996 Act. Prosecution for perjury in international arbitration is almost unheard of. In a rare example, two witnesses were prosecuted in Switzerland for perjury. Under Swiss law, a witness can be prosecuted for perjury even if they have not been sworn in, as long as they were asked to tell the truth and warned about potential liability.<sup>76</sup> The High Court of Zurich confirmed that a witness could be liable for perjury even if they had not signed any documents, and the prosecution was reinstated on that basis.<sup>77</sup>

Oath and perjury, as the vehicles used to establish the truth, seem to be falling out of fashion in the context of international arbitration. Arbitrators and parties are not using these mechanisms to seek to enhance the probative value of witness evidence which is, strictly speaking, in line with the general decrease of the probative value tribunals attach to witness evidence nowadays.

## §16.05 TESTING EVIDENCE AND CROSS-EXAMINATION

The next proposition is whether the way witness evidence is tested has changed recently.

The ability to test witness evidence, by way of cross-examination or otherwise, is an important part of any case. Although the need to test witness evidence is equally important to civil and common lawyers, the mechanisms by which the evidence are tested are different. In common law traditions, the task of testing evidence sits, broadly, with counsel, while in civil law traditions, the tribunal plays a more inquisitorial role and seeks to verify the credibility of any testimony.<sup>78</sup> However, are the methods available to counsel and the tribunal the same? Are they seeking to test evidence for the same purpose?

As Mr Robert Goff QC stated in his presentation at a symposium held by the Institute of Arbitrators in February 1974:

It is a strong conviction of English practising lawyers that, on a contested question of fact, the most satisfactory way to get to the bottom of the matter is, if possible, to see and hear the actual witnesses and to test their evidence

74. Susan S. M. Edwards, *Perjury and Perverting the Course of Justice* (Criminal Law Review 529 2003).

75. See also *supra* n. 67, para. 20.27.

76. Thomas Müller and Mladen Stojilković, *Switzerland: Perjury in Arbitral Proceedings* (13 January 2021), [www.globalarbitrationreview.com](http://www.globalarbitrationreview.com).

77. Case ZR 110 (2011) No. 27, 78-84.

78. Khodykin and Mulcahy, *supra* n. 17 at para. 1.6.

by cross-examination in the light of all relevant matters, including contemporary documents [...].<sup>79</sup>

Witness evidence, even if its future role becomes more limited than at present, will always need to be used in tandem with a mechanism for testing the truth. For centuries, cross-examination was the chief method of testing evidence. There is a plethora of English authorities endorsing the need to preserve cross-examination as the way to establish the truth. In *Berezovsky v Abramovich*, for example, Gloster J (as she then was) observed:

cross-examination is a very revealing process, particularly when it takes place over a number of days and requires the witness to face detailed and intensive questioning in respect of a large number of topics and documents. However well-prepared a witness may be, or however controlled he may appear to be, when giving his answers, it is very rare that the court is not able to reach a conclusion as to whether he is telling the truth or not.<sup>80</sup>

Does this way of challenging the testimony remain valuable in the current climate?

While one might be tempted to rely on the questionable certainty of methods such as a lie-detector or polygraph tests to determine the veracity of a witness' statement, there are other more credible methods currently being trialled.<sup>81</sup> One way to address the issue is, in essence, the acceptance of the fact that witness evidence is not completely reliable. The ICC Taskforce appears to have taken this approach, suggesting in the ICC Report that even honest witnesses are likely to fall prey to distortions of memory in a manner that may result in their being less useful than counsel or tribunals may expect.<sup>82</sup> The ICC Report gives advice to tribunals which includes steps one might take when evaluating witness evidence in light of such distortions, similar to methods including requiring the parties to set out the manner in which the evidence was taken and alerting the witnesses themselves to the possible pitfalls of distorted memories.<sup>83</sup>

There are a number of means by which a tribunal can test the veracity of a witness' testimony. A tribunal should not rely on the demeanour of the witness to assess their honesty or indeed credibility. As noted by Gloster J in her judgment in

79. Symposium held in London on 14-16 February 1974 on the theme *Analysis of Differences in the Way of Presenting Evidence in Arbitrations under Civil and Common Law Systems* published in *Arbitration (The Journal of the Chartered Institute of Arbitrators)* April 1974 (Special Issue).

80. *Berezovsky v Abramovich* [2012] EWHC 2463 (Comm), 2012 WL 3963559 [118].

81. Polygraph/lie-detector tests are not admissible as evidence in English criminal court proceedings, although there are some advocates for the use of mandatory testing of convicted sex offenders as part of ongoing monitoring efforts to reduce the likelihood of reoffending. There is a statutory ban on the use of evidence from polygraph sessions in any criminal proceedings against a released person under s. 30 of the Offender Management Act 2007. They are not expressly banned in the civil arena, but there is little to suggest they are commonly used. They are used more commonly in the US, although not in criminal proceedings. Interestingly, in Israeli civil proceedings a polygraph is admissible if the person being tested agrees to it in advance.

82. ICC Report, *supra* n. 33 at para. 1.5(a).

83. *Ibid.*, paras 5.34-5.38.

*Berezovsky v Abramovich*, ‘a court’s assessment of the credibility of a witness is not meant to be some sort of pseudo-psychological analysis of his character’.<sup>84</sup> In practice, it is inevitable that the arbitrator as an individual will form an impression of the witness based on their human view of their credibility.<sup>85</sup> Indeed, Gloster J went on to note that:

[o]n my analysis of the entirety of the evidence, I found Mr. Berezovsky an unimpressive, and inherently unreliable, witness, who regarded truth as a transitory, flexible concept, which could be moulded to suit his current purposes. At times, the evidence which he gave was deliberately dishonest; sometimes he was clearly making his evidence up as he went along in response to the perceived difficulty in answering the questions in a manner consistent with his case; at other times, I gained the impression that he was not necessarily being deliberately dishonest, but had deluded himself into believing his own version of events.<sup>86</sup>

*Berezovsky* is an interesting case in light of Gloster J’s view of Mr Berezovsky’s unreliability. She expressed:

some scepticism on the court’s part as to whether the lengthy witness statements reflected more the industrious work product of the lawyers, than the actual evidence of the witnesses. However, it would not have been practical, given the length and complexity of the factual issues involved, for the court to have required evidence in chief to have been given orally. It was for that reason that cross-examination, in particular of Mr. Berezovsky and Mr. Abramovich, assumed such a critical importance.<sup>87</sup>

Gloster J found Mr Berezovsky’s evidence to be deeply contradictory to that given in his witness statements, but as she put it, ‘his “I blame my lawyers” excuse was not convincing’<sup>88</sup> and did not absolve Mr Berezovsky of the need to take responsibility for his evidence.

Cross-examination was critical in teasing out these inconsistencies. This process picks up on a comment in the Business and Property Court’s Witness Evidence Working Group’s October 2020 report (hereinafter ‘2020 Report’), that witness evidence as currently presented:

[does] not always achieve best evidence. The experience in criminal trials, and of the position in civil trials before the introduction of witness statements, suggests that best evidence is often obtained by a traditional examination-in-chief, when witnesses are giving their evidence in their own

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84. *Berezovsky*, *supra* n. 80 at [98].

85. It is interesting to note that at the time of writing, during the COVID-19 pandemic, hearings have been almost exclusively virtual, further limiting the tribunal’s tools of assessment of the honesty or otherwise of a witness.

86. *Berezovsky*, *supra* n. 80 at [101].

87. *Ibid.*, at [92].

88. *Ibid.*, [100]-[101].

words and give a more genuine version of their recollection. The common experience of witnesses ‘not coming up to proof’ in oral examination-in-chief is/was a reflection of the fact that evidence elicited orally in courtroom surroundings is often more reliable than that which a witness is prepared to sign up to in a pre-trial written statement.<sup>89</sup>

A tribunal’s method of assessing a witness’ evidence largely relies on compelling the cross-examination of the witness and, subject to asking their own questions, on the strength of counsel’s cross-examination – for example, compelling witnesses to deliver oral testimony in circumstances where such evidence might have been delivered in the form of a witness statement. The 1996 Act permits a witness to be compelled to appear in support of an arbitration (which does not have to be seated in England),<sup>90</sup> although such a step would have to be taken by application of a party to the court with permission of the tribunal, so it is not a power which the tribunal can exercise of its own accord. Some arbitral rules contain provisions regarding the hearing of witnesses: Article 20.5 of the LCIA Rules 2020, for example, permits a tribunal to ‘request that a witness, on whose written testimony another party relies, should attend for oral questioning at a hearing before the Arbitral Tribunal’. If the witness does not attend, the tribunal is entitled to disregard their evidence as appropriate. This is in a similar vein to the recent updates to the CPR in the Business and Property Courts in England and Wales, whereby the court may decide to strike out a witness statement that does not accord with the requirements set out in CPR Practice Direction 57C.<sup>91</sup>

But if the tribunal also relies on the results of a party’s cross-examination of a witness to test that evidence, are parties free to seek to undermine evidence of a witness if they have not been subject of a cross-examination? In English court proceedings, counsel is limited in its ability to allege a ‘lie’ unless a particular allegation has been put to the witness in cross-examination. This approach is founded upon the familiar decision of the House of Lords in *Browne v Dunn*, whereby Lord Herschell LC commences by saying:

Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit.<sup>92</sup>

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89. Business and Property Court, *supra* n. 52, para. 13.

90. Arbitration Act 1996, ss 2(3) and 43(1).

91. See section §16.07.

92. *Browne v Dunn*, *supra* n. 7, [70]-[71].

More recently, this has been emphasised by the Court of Appeal in *Markem Corp v Zipher Ltd*, where Jacob LJ refers to the fact that ‘procedural fairness not only to the parties but to the witnesses requires that if their evidence were to be disbelieved they must be given a fair opportunity to deal with the allegation’.<sup>93</sup>

The rule appears to be recognised in a number of other common law jurisdictions including South Africa, Canada, Ireland and Australia, where it is ‘taken very seriously’.<sup>94</sup> The rule does not, however, appear to be of universal application across common law systems: for instance, it does not appear to extend to the US.<sup>95</sup>

The rule has two aspects. The first is procedural fairness. The witness must be given the opportunity to deal with the case that will be relied upon in contradiction of their evidence (including any inferences that it is said can be drawn from other evidence), and the party presenting the witness testimony must have the opportunity to call further evidence either to corroborate what the witness says or to contradict any inference relied upon by the other party. These requirements are said to be rules of conduct ‘which are essential to fair play at the trial’.<sup>96</sup>

The second aspect relates to weight and cogency of evidence. Although a failure to put points in cross-examination will not always concede the truth of the evidence presented,<sup>97</sup> the weighing of the available evidence by the court on the relevant point may be affected. In the Australian case of *Bulstrode v Trimble*, the point was made in these terms:

In this aspect the rule says no more than that if a witness is not cross-examined upon a particular matter, upon which he has given evidence, then that circumstance will often be very good reason for accepting the witness’ evidence upon that matter. If I may say so, this is little more than common sense.<sup>98</sup>

Despite these factors, the rule has been criticised for the uncertainty around its application, the risk that cautious counsel will lengthen hearings unnecessarily by exhaustive cross-examination on minor points, which cross-examiners ‘feel (or fear) they have to cover’,<sup>99</sup> and because the rule hinders the ability of counsel to control cross-examination and to make tactical decisions about how far to push a witness on

93. *Markem Corp v Zipher Ltd* [2005] RPC 31, para. 56.

94. See Colin Tapper, *Cross & Tapper on Evidence*, 314 and 446 (12th ed., Oxford University Press 2010); and *Markem Corp v Zipher Ltd* [2005] EWCA Civ 267 [57]. See also *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation* [1983] 1 NSWLR 1; *Bulstrode v Trimble* [1970] VR 840; and *Chen v NG (British Virgin Islands)* [2017] UKPC 27.

95. Khodykin and Mulcahy, *supra* n. 17, para. 7.176.

96. See the Judgment of Lord Herschell in *Browne v Dunn* (*supra* n. 7). The substance of the rule may also be found in professional conduct rules. For example, see BSB Code of Conduct Rule C7, which states that: ‘You must not make a serious allegation against a witness whom you have had an opportunity to cross-examine unless you have given that witness a chance to answer the allegation in cross-examination.’

97. See Tapper, *supra* n. 94, 314.

98. *Bulstrode v Trimble* [1970] VR 840, [849].

99. Business and Property Court, *supra* n. 52, para. 18.

a particular point.<sup>100</sup> Indeed, the Business and Property Court’s Witness Evidence Working Group has recently commented that ‘[t]he time pressure on trials in the [Business and Property Courts] often requires guillotining of cross examination time, such that it is the cross-examiner who can choose the battleground covered in the oral evidence. This results in a skewing of the oral evidence before the Court which is undesirable’,<sup>101</sup> which appears to pick up on this problem.

There is debate on the precise scope and application of the rule in *Browne v Dunn* across jurisdictions, but it appears to be widely accepted that: (i) in practice, it may be unrealistic in light of restrictions on allocated court hearing time for cross-examination to extend to each and every statement made by the witness with which issue is taken, although the substance of any evidence that it is intended to challenge should be raised; and (ii) where the witness (and the party presenting that witness) is already on clear notice (e.g., by means of pleadings or written evidence) that the evidence is challenged, cross-examination may not be required under the rule. Note the comments of the Privy Council in the judgment delivered by Lord Neuberger and Lord Mance in *Chen v NG (British Virgin Islands)* that:

In a perfect world, any ground for doubting the evidence of a witness ought to be put to him, and a judge should only rely on a ground for disbelieving a witness which that witness has had the opportunity to explain. However, the world is not perfect, and, while both points remain ideals which should always be in the minds of cross-examiners and trial judges, they cannot be absolute requirements in every case. Even in a very full trial, it may often be disproportionate and unrealistic to expect a cross-examiner to put every possible reason for disbelieving a witness to that witness, especially in a complex case, and it may be particularly difficult to do so in a case such as this where the Judge sensibly rationed the time for cross examination [...]<sup>102</sup>

The approach adopted in international arbitration generally is different from the *Browne v Dunn* approach adopted in English courts. In particular, Article 4.8 of the 2020 IBA Rules (which is widely adopted as a useful yardstick for international arbitration) reads: ‘if the appearance of a witness has not been requested pursuant to Article 8.1, none of the other Parties shall be deemed to have agreed to the correctness of the content of the Witness Statement’.

Article 4.8 of the 2020 IBA Rules allows the parties to seek to challenge witness evidence even if, for whatever reason, they decided not to cross-examine a particular witness. It may be that those tasked with drafting the 2020 IBA Rules – intended to be a set of rules on evidence that can be accepted by lawyers from both civil and common law traditions – had in mind that, in the interests of clarity, it would be prudent to include express provision in the terms of Article 4.8 (and its predecessor provisions).

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100. See Hugh Kennedy, *Putting the Case Against the Rule in Browne v Dunn*, *The Bar Review*, *Journal of the Bar of Ireland* 39 (2006).

101. Business and Property Court, *supra* n. 52, para. 15.

102. *Chen v NG (British Virgin Islands)* [2017] UKPC 27 [52].

In relation to the first-mentioned rationale for the rule – that a witness must be given the opportunity to address the case relied on in contradiction of the evidence given by that witness – it may be relevant that in international arbitration, greater emphasis is placed on written submissions, and that those submissions are generally more discursive and leave parties in little doubt about which parts of the factual case are challenged and on what basis.

An important point to note is that the wording of Article 8.5 of the 2020 IBA Rules (previously Article 8.4 of the 2010 Rules) makes no distinction between matters of minor or no importance to outcome, and evidence on which the outcome of the dispute might turn. It applies to all of the written evidence of a witness not called for cross-examination. An opponent party may still tender its own witness to give evidence contradicting that of the ‘opposing’ witness not called, or make submissions as to the unreliability or lack of weight to be attributed to the evidence of the absent witness, perhaps by reference to other witness or documentary evidence available to the tribunal. Some practitioners regard this as unfair. If an opposing party chooses not to cross-examine a witness, why should the written evidence of that witness not be deemed accepted? An IBA survey report on use of the 2010 IBA Rules notes this concern and a comment from one respondent that ‘parties engage in the “unfair practice” of not calling a witness while making attempts to undermine his or her credibility through their written submissions’.<sup>103</sup>

However, the situation is not entirely clear as far as London-seated arbitrations are concerned. There is a raft of academic writing suggesting that *Browne v Dunn* is not applicable in international arbitration.<sup>104</sup> In particular, some authors believe that the rule is outmoded as it was conceived over a century ago, when witnesses only gave evidence orally on the stand.<sup>105</sup> It is further suggested that the rule in *Browne v Dunn* may not be suitable for international arbitration, especially when the parties come from different legal backgrounds and cultures. As observed by the Singapore court: ‘to a businessman from a civil law country, concepts like the parol evidence rule, the hearsay rule, common law discovery or the rule in *Browne v Dunn* (1893) 6 R 67 do not make much sense’.<sup>106</sup>

However, in *P v D* [2019] EWHC 1277 (Comm), Sir Michael Burton, sitting as a High Court judge, set aside an arbitral award under section 68 of the 1996 Act on the basis that a failure to cross-examine a witness on a key issue was a breach of the *Browne v Dunn* principle and section 33 of the 1996 Act. He relied, *inter alia*, on *Okolo v Revenue and Customs Commissioners* where Arnold J applied the principle in the

103. 2016 IBA Report, para. 98.

104. Jeffrey Waincymer, *Procedure and Evidence in International Arbitration*, 917, fn. 99, in Sapna Jhangiana and Gerald Leong (eds), *Why Are We Still Not Done with the Rule in Browne v Dunn?* (9 September 2019), <http://arbitrationblog.kluwerarbitration.com/2019/09/09/why-are-we-still-not-done-with-the-rule-in-browne-v-dunn/>; Sam Luttrell and Peter Harris, *Confronting the Incredible: Revisiting the Applicability of the Rule in Browne v Dunn in International Arbitration*, <https://kluwerlawonline.com/JournalArticle/Arbitration:+The+International+Journal+of+Arbitration,+Mediation+and+Dispute+Management/86.3/AMDM2020029#:~:text=Abstract,their%20evidence%20in%20cross%20examination.>

105. Jhangiana and Leong, *supra* n. 104.

106. *BQP v BQQ* [2018] 4 SLR 1364 at [126].

Upper Tribunal (Tax and Chancery Chamber), on the basis that ‘the principles of natural justice [...] apply in all courts and tribunals’.<sup>107</sup> At the time of writing, *P v D* has not received any substantial judicial treatment, but it will be interesting to see whether the decision is followed in the coming years. Notably, commentators have suggested that it may be necessary for a judge or tribunal to take up the mantle of testing the evidence themselves if the information they require is not being teased out by counsel.<sup>108</sup> Of course, it is commonplace for an arbitrator to ask questions, but the arbitrator is unlikely to take over the questioning entirely and this way of probing evidence is likely to raise eyebrows with common law lawyers.

It appears that the significance of cross-examination, which was doubted by civil lawyers for a long time, is declining in common law jurisdictions too. The *Browne v Dunn* principle has not been followed in many other jurisdictions. The 2020 IBA Rules clearly allow a different approach, not least because the notion of cross-examining on each and every point does not sit comfortably with the promotion of arbitration as a fast and cost efficient method of dispute resolution. Indeed, it has been argued that cross-examination serves little probative purpose beyond seeking to undermine a witness’ credibility or getting them to agree with what the cross-examiner puts to them.<sup>109</sup>

Common themes running through the main arbitral institutions rules are that the tribunal and parties may request that witnesses attend for oral questioning/cross-examination, but there is no requirement that cross-examination of witnesses must take place. Indeed, under the LCIA Rules 2020, the tribunal has discretion under Article 20.5 to request that a witness attends for oral questioning at a hearing, and under Article 20.9, parties and the tribunal may question the witness, but such questioning is not obligatory. There is no suggestion that any evidence presented by a witness which is not refuted in cross-examination is accepted as true, suggesting the erosion of the *Browne v Dunn* rule within international arbitration.

## §16.06 DOCUMENTARY EVIDENCE

A further trend that runs alongside the discussion around witness evidence in international arbitration (including the scepticism regarding its probative value and the decline in the administration of oaths) is the rise in the importance of documentary evidence. This has always been central to international arbitration, and of course reliance on it is a key feature of civil law procedure.<sup>110</sup> The cliché has been that in civil law traditions, there is no need for witness evidence because the ‘documents speak for

107. *Okolo v Revenue and Customs Commissioners* [2013] STC 906 [34].

108. Paul Toms, *P v D and the Dangers of Failing to Cross-examine Witnesses* (20 September 2019), <http://arbitrationblog.practicallaw.com/p-v-d-and-the-dangers-of-failing-to-cross-examine-witnesses/>.

109. See, e.g., Michael Schneider, *supra* n. 69.

110. It is of course important not to oversimplify the civil law position. As Laurence Shore writes:

to be sure, there are many cross-currents in civil law systems – for example, the significance of ‘good faith’ in contract performance and interpretation, and, at least in

themselves'. In the age of information, this is more problematic than it was even twenty years ago, with thousands of emails and documents created in the course of a transaction or deal, which might ultimately end up in front of a tribunal. Indeed, as to the extent of a document production exercise in a large-scale arbitration, it has been described as a 'Herculean task' to gather all relevant e-documents.<sup>111</sup>

Part of the drift in English court decisions in relation to the issues of memory in witness evidence is that judges and tribunals are advised to rely on documentary evidence over and above witness evidence of questionable probative value:<sup>112</sup> this appears to be the flip side of the rise of doubts around witness evidence.

The document production stage of a large-scale commercial arbitration is expensive and time-consuming. It is uncommon to find a 'smoking gun' during the course of this review, which is often used as an argument against extensive document production. However, the sheer volume of data and correspondence in most large transactions means that it is common for most things to be written down in emails, and there are often relevant documents to be found once the review is undertaken. The value of witness evidence, with all its unreliability, takes a back seat in the face of such correspondence.

Does this mean that the value of witness evidence will, in the coming years, be limited to cases where there is a conspicuous absence of written information, or to gap-filling exercises, such as in cases of fraud or dishonesty?

The above discussion would suggest not, but we must also proceed with a degree of caution as to the assumption that a contemporaneous document will be more honest and less self-serving than a witness statement. Documents can of course be tampered with, but they can also be unreliable in a less dishonest way, and a party must not 'presume that documents are inherently accurate, honest and without ambiguities'.<sup>113</sup> We are all familiar with the concept of the unreliable narrator, from F. Scott Fitzgerald's Nick Carraway to Gillian Flynn's Amy in *Gone Girl*, and documents in an arbitration are often no different, even if they are contemporaneous. Minutes of meetings can be drafted to omit details; records of phone calls can be incomplete, or made with one eye on an impending dispute. It remains crucial to continue to test documentary evidence even if judges or arbitrators inherently trust it more than they might an unsatisfactory witness.

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French contract law, the view that the intentions of the parties are 'a pure question of subjective fact' – that render a 'documents only' characterization far too simplistic.

from *Do Witness Statements Matter: And If So, How Can They Be Improved?* in Albert Jan Van den Berg (ed.), *Legitimacy: Myths, Realities, Challenges*, ICCA Congress Series, vol. 18, 302-314 (ICCA & Kluwer Law International 2015).

111. Reto Marghitola, *Chapter 5: Interpretation of the IBA Rules in Document Production in International Arbitration*, *International Arbitration Law Library*, vol. 33, 33-116, §5.13[A] (Kluwer Law International 2015).
112. See *Gestmin*, *supra* n. 26; see also *Lachaux*, *supra* n. 30.
113. Jeffrey Maurice Waincymer, *Part II: The Process of an Arbitration, Chapter 11: Documentary Evidence in Procedure and Evidence in International Arbitration*, 825-884 [827] (Kluwer Law International 2012).

**§16.07 KEY TRENDS IN WITNESS EVIDENCE IN THE NEXT TEN YEARS**

The world has changed. In medieval times, as the use of witness evidence began to develop in common law systems, many people were illiterate; they did not write letters and documentary evidence was scarce. That is why witness testimony became the main vehicle to establish the truth. Those times have long gone. Now all steps are documented in hundreds of documents and thousands of emails. The civil law naturally moved away from witness statements but the English law approach, prevalent in English-seated arbitration, is still fond of this tradition.

From the analysis above, it seems that the following trends in arbitration in England have emerged over the years with respect to witness evidence:

- Courts and tribunals are more and more doubtful of the probative value of witness testimony because psychological research shows that human memory is malleable and even an honest witness' memory can be easily manipulated by events outside of his control.
- Oaths and perjury are no longer widely used in English-seated arbitrations to enhance the probative value of evidence, making the assessment of 'honesty' a difficult task for the arbitrator.
- An arbitrator's tools in establishing whether a witness is honest are limited. Recent authorities suggest that demeanour, body language and other signs of lying in the popular imagination are not very reliable.
- Judges and arbitrators criticise witness evidence for being 'over-lawyered', but it is not clear whether there is an easy answer to that. It is unlikely that lawyers will drop out of the process of preparing statements for their clients, but the traditional English approach of using witness statements of lawyers as vehicles to convey matters of which they do not have first-hand knowledge may well be subject to increasing scrutiny in light of the High Court's comments in *Navigator Equities Ltd and another v Deripaska*,<sup>114</sup> and the new requirements for preparation of witness statements under Practice Direction 57AC, mentioned below.

Having analysed recent trends, what then are the likely trends and direction of witness evidence in English-seated arbitrations over the next ten years?

The analysis above invites the question of how valuable witness evidence is at all: it is an expensive and time-consuming element of international arbitration practice on which a case rarely turns. Is it time to admit that the use of witness evidence in international arbitration should be substantially curtailed to instances where there are no other means to prove a proposition?

Interestingly, the ICC Taskforce seems to have concluded that it will continue to advise judges, arbitrators and practitioners to proceed with 'business as usual', while keeping a weather eye open to the fallibility of a memory when considering or drafting a witness statement.

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114. *Navigator Equities*, *supra* n. 65 at [158], [156].

We believe that over the next ten years, the legal profession in England (and indeed beyond) should try to implement a set of measures to salvage the credibility of witness evidence. While we think it unlikely that an Orwellian future of constant surveillance, microchip tracking or the video recording of every meeting will be in place within the next ten years and drastically alter the landscape of witness evidence, measures such as protocols for conducting witnesses' interviews and cross-examination of witnesses should be introduced and become uniform. There may well be utility in changing the format of a witness statement to a question and answer format or a video interview (which would not be dissimilar to the direct examination of the twentieth century), but which continues to be prepared in advance to avoid the 'ambush' problem associated with examination-in-chief. A factual list of issues could also be submitted alongside the statement in order to narrow and direct the evidence, as posited by the English Business and Property Courts Witness Evidence Working Group.<sup>115</sup>

To this end, the first step has already been taken by the ICC. Similarly, a new reform in the English Business and Property Courts effective in April 2021 requires trial witness statements to be accompanied by a list of the documents which the witness was referred to in the course of an interview. It also requires them to contain only: (i) evidence as to matters of fact that need to be provided at trial by the evidence of witnesses in relation to one or more of the issues of fact to be decided at trial; and (ii) the evidence as to such matters that the witness would be asked by the relevant party to give, and the witness would be allowed to give, in evidence-in-chief if they were called to give oral evidence at trial.<sup>116</sup> Further, statements must now set out only matters of fact of which the witness has personal knowledge that are relevant to the case.<sup>117</sup> Witnesses must make a confirmation of compliance with the new requirements under new paragraph 4.1, and there are significant sanctions for failure to comply, including having the witness evidence struck out, or making an adverse costs order against the non-complying party.<sup>118</sup>

These changes are made with the stated aim of enhancing the overriding objective to help the court deal with cases justly, efficiently and at proportionate cost.<sup>119</sup> However, it is not clear whether the proposed measures will achieve the required result. In particular, the proposal to attach to every witness statement a list of documents to which the witness was referred has already raised some serious concerns. One of these is the following question: what if the witness is also a client who has seen the documents in the course of giving instructions – is it still necessary to have them all listed in the witness statement?<sup>120</sup> Should privileged documents also be listed?

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115. Business and Property Court, *supra* n. 52 at paras 53-56.

116. CPR, 127th update, Practice Direction 57AC, 3.1, <https://www.judiciary.uk/wp-content/uploads/2021/02/127th-CPR-PD-Update-FINAL-SIGNED-28-01-21.pdf>.

117. *Ibid.*, at 3.2.

118. *Ibid.*, 5.2.

119. *Ibid.*, 2.2.

120. Podcast of 39 Essex Chambers, *Part 2. Witness Statements in the Changing World*, [www.39essex.com](http://www.39essex.com).

If these measures prove to be impracticable or unsuccessful, the role of witness evidence, as well as cross-examination, will continue to decline significantly. The documents will take primacy as the chief method of proving a case. Obviously, there are circumstances which will have to be proven by witness evidence only (for instance, where a documentary record does not exist). For these instances, the witness evidence will remain indispensable (as well as cross-examination, as the only proven method of testing this evidence). However, the great cost associated with witness testimony will likely drive users towards a more limited use of witness statements where only testimony of the key witnesses will be there to fill in gaps in the documentary record.