

YCAP 2021 PARIS ARBITRATION WEEK EVENT: Post Event Report

On 22 September 2021, YCAP held a virtual event as part of Paris Arbitration Week, in conjunction with CFA-40. Following the release of the ICC Report on the accuracy of fact witness memory, the topic was on “Circumventing the natural limitations of witness evidence”.

The opening remarks were delivered by CFA-40 representative, Julie Spinelli (Le 16 Law, Paris). The topic was then introduced by YCAP Board of Directors Member, Philippe Boisvert (Borden Ladner Gervais, Montréal), who noted that, as revealed in the recent ICC task force report, the very arbitral process may distort witness memory.

The event featured a distinguished panel, consisting of Jose Astigarraga (Reed Smith LLP), Dr Kimberly Wade (University of Warwick), Michael Kotrly (One Essex Court), and Rory Wheeler (rory.legal). It was moderated by Anastasia Bondarenko (Vannin Capital) and Pierre-Olivier Savoie (Savoie Laporte).*

Presentations

Mr Astigarraga presented the works of the ICC taskforce and the Report’s objectives. He referred to the “steps” identified in the Report that tribunals, counsel, and witnesses may take to increase the accuracy of witness evidence. Mr Astigarraga explained that these are not “rules” or “guidelines” that must be followed in all circumstances; rather, they are tools to be assessed on a case-by-case basis. He specified that the Report made no recommendation on the effect of cross-examination on the value of witness evidence, because scientific studies on this issue were sparse.

Dr Wade, a professor of cognitive psychology specialising in issues related to memory, summarised the study that she conducted as part of the ICC taskforce. She explained that, while there are 50 years of research on the reliability of witness memory in a criminal setting, her study was the first conducted in a commercial setting. Finding that witness memory is liable to error in one as in the other, Dr Wade suggested that increasing awareness of the scientific findings on witness memory will enhance practice and improve the probative value of witness evidence in international arbitration.

Mr Kotrly addressed the ICC Report’s recommendation that inquiries may be made in appropriate circumstances about how counsel assisted witnesses preparing their evidence. He asked, among others, whether tribunals should be more charitable when assessing the credibility of a witness who did not review a document in advance of the hearing. Mr Kotrly also compared the recommendation with the 2021 Practice Direction PD57AC in the United Kingdom, which set forth detailed rules on the preparation of witness evidence and extensive sanctions in case of non-compliance with them.

Mr Wheeler discussed the effect of language on witness evidence. He summarised the findings of a study, which analysed the perception of credibility of native speakers, non-native speakers with *mild* accents, and non-native speakers with *strong* accents. While study participants found non-native speakers with mild accents less credible than native speakers, the study showed that this bias was corrected when the participants were conscious of it.

Questions

Ms Bondarenko and Mr Savoie asked the panellists various follow-up questions about the impact of the arbitral process on witness memory, as did a few virtual attendees.

One question concerned the purpose of witness evidence as compared to document evidence. The panellists agreed that witness evidence is key in certain cases (for instance, when the background of projects is complex), while in other cases witness evidence could be parted with (for instance, when it is used to set out advocacy points). The panellists also agreed that the advantages of document evidence vary between cases. In this context, they opined that the parties are best placed to determine how to use each type of evidence, and that tribunals benefit from being open-minded and flexible about this use.

Another question concerned how “extraneous” factors, such as the unconscious cognitive biases of arbitrators or the technical issues occurring during virtual hearings, may impact the perception of reliability of witness evidence. The panellists discussed scientific research on “processing fluency” showing that when things come to mind easily they are seen as more reliable or credible. While the mandate of the ICC taskforce was narrower than the issues raised by extraneous factors, the panellists opined that awareness of these factors is crucial, because it can reduce their impact. As such, they suggested that members of the arbitration community should educate themselves better about them.

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* While some panellists were part of the ICC taskforce, all views expressed were solely their own.