

549. Q: Does witness conferencing take away the initiative from the Party Representative?

A: Yes, to a large extent, but not unfairly so. It is a price worth paying.

550. Q: Still, should one discuss the process with the Parties in advance, and avoid it if any Party is adamantly opposed?

A: Yes.

551. Q: Do you apply the chess-clock in witness conferencing?

A: No. This would be extremely difficult. The Arbitral Tribunal should, however, make sure that no single witness, or Party Representative, monopolizes the process.

552. Q: By contrast, if witnesses are heard individually, a chess-clock system is applied?

A: Yes.

(g) Assessing the Evidence

553. Q: Now, let us switch to the viewpoint of the Arbitral Tribunal. Do witnesses ever lie?

A: Yes, but not as often as some cynically say.

One should be careful. Some people use the word “lie” too liberally. Lying means *knowingly* saying something that one *knows* not to be true. In other words, to pretend to have heard, seen, smelled, or said something that one *knows* one did not hear, see, and so on.

The testimony of an honest witness, however, is not necessarily true, because an honest person’s memory is not infallible. But honest testimony that is objectively untrue is not a *lie*.

554. Q: Can you tell whether a witness is lying?

A: This is difficult. It is easier to tell whether testimony is *subjectively truthful* or *honest*.

555. Q: How can you tell whether testimony is honest?

A: Honest testimony accords with the witness’ situation at the time in respect of the matters about which the witness is testifying. The witness may have been interested in

a particular aspect, and will remember that aspect more than any other, even if that particular aspect is legally irrelevant. Honest witness memory may be vivid and perhaps reliable about that particular aspect, but fuzzy about the rest.

556. Q: Do you have an example?

A: Some people pay particular attention to what they or others wear, and they will remember such details. In most cases, however, clothing is legally irrelevant. Good recollection about clothes does not mean that the witness has photographic memory about everything.

557. Q: By contrast, a lying witness will be fuzzy?

A: Not necessarily. A lying witness was not there and makes up his or her testimony. The liar is well-prepared to lie. The liar's testimony will perfectly fit the present need of the Party fielding that particular witness. The witness will not deviate from the program of lies. The lying witness will even repeat him or herself and appear to recite a lesson which he or she has learned. Which is exactly what lying testimony is.

From the testimony it will remain unclear, however, *why* the witness should have been interested back then in these particular aspects of the case, and in nothing else. One would expect certain emotions, but the lying witness will not testify about emotions. The witness has none to testify about. He or she was not even there.

So lying testimony will lack signs of subjective truth.

558. Q: An example?

A: Several pharmaceutical researchers once wrote in their Witness Statements, in identical words, that they were "outraged" by their opposite number's "unethical position." When asked about this incident, none of the witnesses showed any emotion. The Arbitral Tribunal concluded that the outrage had been supplied by the drafter of the Witness Statements.

559. Q: Is consistency a sign of truth?

A: That is what laypeople, and (fortunately) lying lay witnesses, believe. In reality, consistency is a sign of a lie rather than a sign of honesty or truthfulness. Our memory is not necessarily consistent, particularly about aspects that at the time did not appear interesting or important.

Objective compatibility with contemporary documents, and possibly other testimony, is another matter.

560. Q: If a witness claims to remember very well, and to be perfectly conscious that he or she must tell the truth, is this a sign of truthful testimony?

A: Rather the opposite. Often it is those who are lying who protest too much that they are telling the truth. They want to be believed.

Those who subjectively tell the truth just do their best. They worry about remembering and telling the truth, not about being caught lying.

561. Q: Is the demeanor of a witness useful to tell whether the witness is telling the truth?

A: Not really. Demeanor is vastly overrated. Lying is, of course, stressful, but testifying is itself often stressful even for a witness who is honestly trying to tell the truth. The stress signs may be exactly the same. Moreover, signs of stress differ in different people. Some people sweat easily, some remain cool in all situations, even when they are lying. Some are even, one might say, professional liars. Think of actors and perhaps politicians.

562. Q: Is this why an Arbitral Tribunal should not be particularly worried about having some people testify by video link, Skype or even by simple telephone link?

A: Indeed, you do not miss much when people testify over a distance. Their testimony is as good or as bad as it would be in the hearing room.¹⁴⁷ A telephone line is often just as good as a video line.

563. Q: Are there other ways to spot dishonest testimony?

A: Not necessarily in the act, but once the Arbitral Tribunal and the Party Representatives receive the *verbatim* Transcript, they should analyze the *structure* of the testimony.

Just imagine the position of a lying witness. The liar feels uncomfortable. He or she must insert a program of lies into otherwise truthful testimony also rendered. This often shows at the seams in the Transcript.

564. Q: In which way?

A: The truthful testimony about peripheral matters will show signs of subjective truthfulness.

147. See Annex (L), Procedural Order No. 1, para. 71.

By contrast, the lying testimony about the core matters will simply reproduce the program of lies, and this portion of the testimony will show *no* signs of subjectively truthful testimony.

The structure of both parts may be different.

People who are not used to lying will try to lie as little as possible, and become careful about what they say when they are lying.

You often can observe in the Transcript that a lying witness first plays for time before lying. Sometimes one sees this pattern: Unwelcome question, procrastinating answer (“What do you mean exactly?” “Sorry, could you repeat?” “Do you mean, down to the last 10 centimeters?”), same question, lie. Next question. Same pattern again. Over pages of Transcript.

Lying witnesses may also worry about whether they have lied well enough. So, at the next occasion, they will revert and reinforce their original testimony (“As I testified, I recognized this person at this cocktail party. *I am sure of this. I was standing very close.*”)

Once the subject is again outside the program of lies, the witness breathes visibly again, and may become prolific about irrelevant matters.

565. Q: So the Transcript of testimony should be fully verbatim?

A: Yes. Discuss this with the Court Reporter.

566. Q: Are there parts of honest testimony that are particularly unreliable?

A: Yes. People’s honest memory of time and time periods is particularly poor. When did something happen? Five years ago or four? How much time elapsed? Three days, or a week, or two?

Sometimes people honestly lump two occurrences together, or even remember that something happened at different times, twice, when in fact it happened only once.

By contrast, a lying witness may claim an unusually good memory of time: “Why do you remember that this was on 6 August of that year?” “I just remember it that way.” A more credible answer would be: “My birthday! Because of this stupid thing I was late for my own party.”

567. Q: How does an Arbitral Tribunal go about assessing the evidence?

A: Remember that the documentary evidence is the backbone of the facts, and particularly of the dates. How does the testimony of fact witnesses fit with the

documentary evidence? Might something about which testimony was given have in fact happened at another time? When?

568. Q: Does what we have just discussed about assessing the truth of the testimony of fact witnesses also apply to other types of evidence?

A: Yes.

569. Q: If it is alleged that a document is a forgery, or if you suspect that it is a forgery, what do you do?

A: You discuss it with the Parties.

If the suspicion comes from you, state the reasons for it. For instance, the photostat copy of a letter has paragraphs that are not properly aligned. Was the letter pasted together? Are there tell-tale-signs of sloppy photocopying? Or the letterhead does not fit the ostensible date of the document. Perhaps the telephone number on the letterhead is longer than it was when the document is supposed to have been written. Tell the Parties that this appears odd to you.

It has happened that such a document has then been withdrawn.

570. Q: Do you write about this withdrawal in the Award?

A: Yes.

571. Q: Do you write in the Award that a particular witness lied?

A: If you have to, write: "In the Arbitral Tribunal's view, this witness did not testify *ex propriis sensibus*." "This testimony was surprising in view of documents ... and" But there are many occasions when you can simply say that the testimony of different witnesses diverged, that the evidence was at best in equipoise, and that the burden of proof was against this Party (the one that you think fielded a lying witness). This must of course be legally correct.

(h) Party-Appointed Experts

572. Q: Should Party Representatives submit models, primers, demonstrative exhibits, or even provide testimonials early in the arbitration?

A: Yes. The arbitrators will be most grateful. They should ask for these things.