

Virtual Hearings Interview

Anna Masser and Dr Ula Cartwright-Finch

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Anna

Hello and welcome to A&O's fourth podcast in our series on virtual hearings. My name is Anna Masser; I head A&O's arbitration practice in Germany. In the previous three episodes we covered first how virtual hearings are shaping the present and the future, second whether these virtual hearings are here to stay, and third we had an expert's view on hearings in a virtual setting.

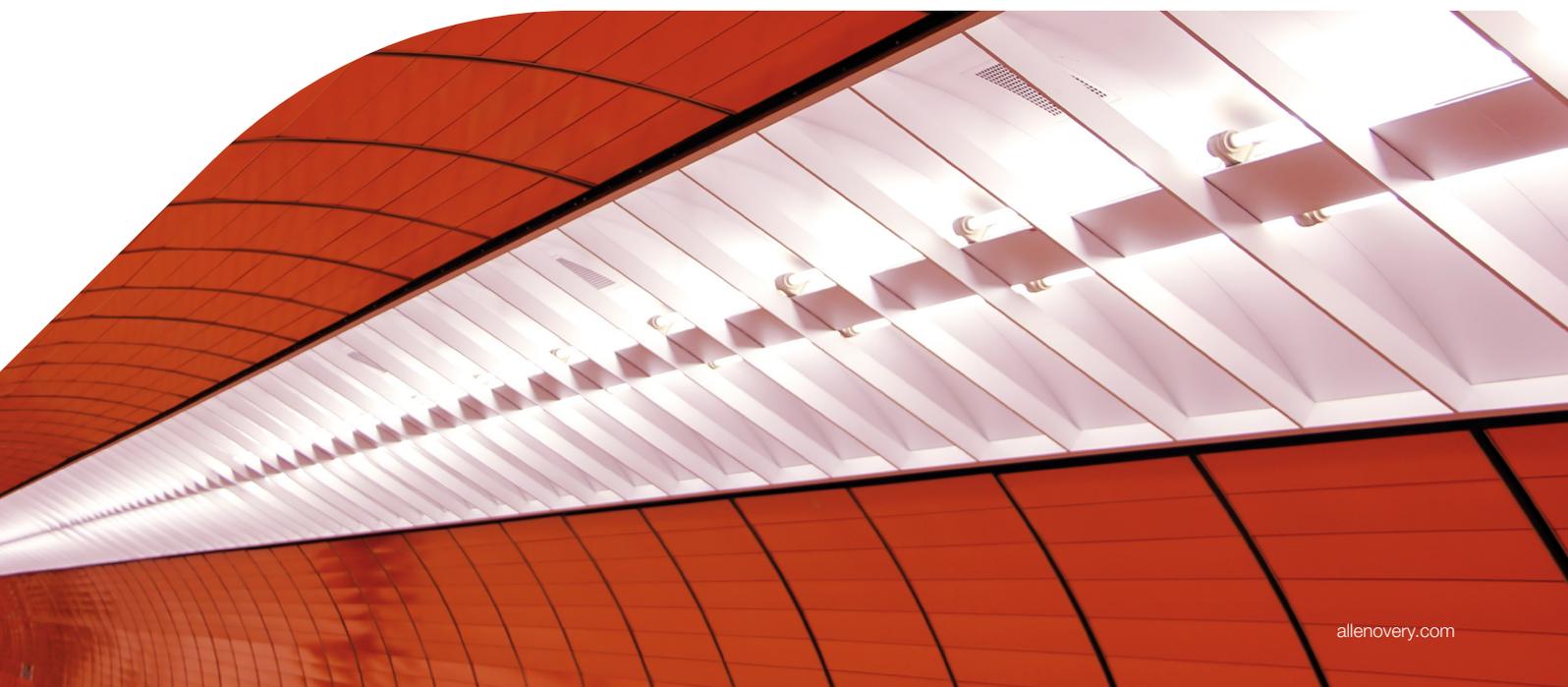
In this fourth episode, we are going to focus on psychological aspects, in particular with regard to witness testimony and how virtual settings might have an impact. To address this topic, I have the personal and professional pleasure to talk to Dr Ula Cartwright-Finch. Welcome Ula.

Ula

Hi, it's lovely to be speaking with you today.

Anna

Thanks for being here. Maybe before diving into the issues, Ula, a bit of background on yourself. I have obviously read your CV and seen that you were in Big Law for about 11 years, first with HSF and then with Linklaters, before founding your own firm - and you are now Managing Director at Cortex Capital. Maybe for the virtue and the pleasure of our listeners, why did you leave Big Law and what are you doing now as Managing Director at Cortex Capital?



Ula

Yes, there have been a few plot twists in my career, as you have mentioned. I actually started studying psychology, I majored in neuroscience in my undergraduate degree and then I went on to complete a PHD in cognitive psychology before I switched tracks into Big Law. So now I have really come full circle and come back to where I started. My consultancy aims to combine those two fields in applying relevant areas of psychology and neuroscience to improve the practice of law. What I do day-to-day is a combination of original research, working with scientists, education for lawyers and in-house counsel, and also bits of consultancy on specific projects. A couple of the key areas I have been looking at are fact witness memory in civil disputes and also the psychological factors in virtual hearings.

Anna

That's so fascinating. So you are back on track to where you came from, but with a round tour in law and how you practise.

So, it is amazing to have you, Ula. In your capacity as Managing Director of Cortex Capital, you and your colleague Kimberley Wade were deeply involved in the recently launched ICC Commission Report 'The Accuracy of Fact Witness Memory in International Arbitration'. I watched the launch event where you presented. There are two Appendices to the ICC Commission Report; you were involved in both of them. If I understand correctly, the first one is a summary of scholarly writing on witness testimony. What were your main findings?

Ula

That review, Appendix 1 of that report, was really drawing together the most relevant experimental studies from the research in the field of memory and law, which is in itself quite enormous. Specifically [we] wanted to highlight the different ways that witness recollection can be altered or edited by the information they receive after an event. For example, we know that even very small changes in the way that you ask a question can influence what a person says to you. So if you ask a witness "*how fast were the cars going when they **smashed** into each other?*", they will give you a faster speed estimate than if you ask them "*how fast were the cars going when they **collided**?*", for example. There are also lots of other studies showing that memories for facts, or even entire episodes, can be distorted or corrupted by misleading information or doctored information that was given afterwards, and that is called the misinformation effect. It happens very easily and below our conscious awareness. That misinformation effect can extend far beyond remembering a particular detail about an event like the speed of a car or the presence of an object. Actually the studies have shown that you can implant a memory of an entire episode that didn't actually happen by, for example, asking somebody repeatedly about a particular event over the course of a number of interviews. Eventually some people take that memory on board, and even come to embellish it with their own details, and that's what the literature refers to as 'false memories'. So I guess in summary, our memories of events aren't fixed - it's not like a video recorder, that's not how our memory operates, but rather they are malleable and they can be changed by things that we hear afterwards, including, importantly for lawyers, the way you phrase a question, what somebody sees after an event, the way the witnesses talk to one another as well.

Anna

I think that is fascinating, both from a counsel as well as an arbitrator's perspective. The other question I remember from the Appendix is whether you ask 'how tall' or 'how short' was a basketball player - with everyone seeing the same basketball player, the responses had a 25cm difference. That is important from a counsel's perspective preparing for cross-examination, in how far do I phrase questions – or should I, should I phrase questions in a specific manner. As a tribunal member, being aware of what an impact these questions have on the answers that the witnesses give is just scary, in a way, I think.

Ula

Exactly, they really do produce significant effects. In that study that you just mentioned, I think the size of the [difference in] height estimates was really quite significant, so I think it is really important to really educate lawyers, arbitrators, judges on these sorts of effects, because they are not really covered in legal syllabi at the moment.

Anna

Certainly from a counsel's perspective I even think it is an ethical question, no? Should I actually make use of the knowledge that I can direct the witnesses in a certain manner? Another example from the Appendix, "*do you remember **the** smashed headlight*" or "*do you remember **a** broken headlight*" is going to produce different answers, just by substituting the "the" for an "a".

Ula

Exactly. Where I think I come down on this is always that as lawyers we are bound by professional obligations and ethical obligations. Once you are aware of these effects and these memory biases that you can produce, it is really incumbent on the lawyers to operate in a way that is in line with the ethical obligations and not to deliberately push a witness, or suggest a particular thing if you think that is likely to have an effect based on what the science says.

Anna

Based on what the science says, what do we do with witness preparation actually? At least in commercial arbitrations we are used to going through the questions, preparing the witnesses for potential cross-examination questions. How does that actually alter the witnesses' perception of what happened?



Ula That is really a significant part of the report. Section V of the ICC report sets out a number of measures that counsel can take as they are going through the different phases of an arbitration specifically to reduce the effect of memory biases, so there are very specific things we can do, and I would definitely direct people to look at the report for that very comprehensive summary.

Anna I can only second that, everybody who is working in arbitration should look at this very fascinating and important report.

Turning to the second Appendix of the report, where you did an empirical study. You had people looking at a hypothetical scenario, you gave them specific documents, and they looked at it, and they had some time to reflect upon it, and then they were asked to remember, as honestly as possible, what happened. You asked some of the people to imagine they are a managing director of the claimant, and others imagine they are an employee of the respondent, and you had a control group which wasn't told anything. If I understand the findings correctly, even just imagining being on one or the other side, despite being told you should answer as honestly as possible, biases your answers to one side. Is that correct?

Ula Yes exactly, it is a brilliant study, I really loved this one. I worked with Kim and the team on designing it, and we are actually writing the results up at the moment. Those results, both the biased retelling effect and the effect of the misinformation, really replicate what has been found elsewhere in previous studies, usually in a criminal context. So in that sense the results were as we predicted and not a huge surprise, at least to us, based on the previous research. But what was really helpful, for a number of reasons, was that we found the same pattern of effects, the same impacts on memory, that researchers have found in the criminal sphere, but this time in the civil domain. Actually, there isn't really any reason to suspect our memory of evidence in civil disputes should operate differently, because we are talking about a fundamental cognitive process, but there was quite a healthy degree of scepticism amongst some task force members about how relevant these really are in arbitration. So the study, I think, was particularly helpful for highlighting that they do happen. Also it is really the first time that scientists have tried to measure those effects in a commercial setting, using a contractual dispute, a witness who was an employee of the company, rather than eyewitness testimony of a neutral observer watching a car crash, for example. We also used business people, rather than just students. So there is a number of reasons why I think the study is very helpful in showing a number of different effects in the civil domain, and highlighting this really surprising effect of biased retelling.

Anna I was surprised; it makes you look at witness testimony in another way after reading those Appendices. You have to factor in whatever you hear, where the person is coming from, what the person has seen after the event, what information they were supplied with after the event, just looking at what they are saying is not sufficient. You have to factor all of that in.



Ula Exactly. I think one of the measures that the report suggests is, when you are speaking to a witness, at the beginning you spend some time finding out what sources of information they have been exposed to, who they have spoken to, what documents they have seen, what conversations they have had, what interviews they have had already. Because then you can better weigh up the likely accuracy or potential sources of contamination.

Anna This is true in whatever setting we are looking at now. This is true in real life. Does that change in a virtual setting from your perspective? And if so how?

Ula These sorts of memory effects and memory biases that we've just been talking about would happen in exactly the same way in a virtual setting. If you are interviewing a witness over Zoom, for example, the same cognitive functions are happening when we are speaking to people. So there's no reason to suspect the memory effects would differ.

Anna You are also looking, if I understand correctly, at honesty/dishonesty of witnesses with your same colleague Kim Wade?

Ula Yes, that line of research actually is one that I'm looking at on my own at the moment, and it is part of a series of papers that I'm writing, called 'Justice Rebooted'. I'm looking at lots of different psychological angles relating to virtual hearings, and witness behaviour, particularly whether or not they are going to cheat or be coached, is definitely one of the juiciest topics I've covered in that series so far. It is also one of the key concerns that arbitration practitioners were talking about when virtual hearings first came up. Are people going to be coached off camera? There were big concerns about that. I think luckily for us and for the lawyers, social scientists have for some years now been studying the situational and social factors that make us more or less likely to engage in dishonest behaviour, like cheating on the witness stand. So my research analyses those factors and considers which are likely to apply in a virtual setting. Most importantly, how can we change procedures to reduce the chances of cheating on the virtual stand?



Anna In summary, what are your findings on that issue?

Ula Well it is a very big topic, difficult to summarise in a sentence. But as an example, scientific studies have shown that people are more likely to cheat when they feel a greater psychological distance between the act and the outcome of their dishonesty. So we are more likely to cheat on a test if we are rewarded with tokens that we later exchange for cash, than if we are immediately rewarded with cash. Perhaps because we find it easier to rationalise our behaviour in that setting and we feel less conflicted about it. I think applying that to virtual hearings, perhaps a witness may feel more removed from a case – they're not in a physical hearing, they are not in front of three arbitrators, they might find it easier to justify or rationalise to themselves - "maybe I'll just have my notes up on the screen. I don't feel like that is cheating because it is just reminding me what I knew already". Whereas, actually, that is breaking the rules in many proceedings. All of this has come about so quickly and the science just hasn't caught up yet, so this is definitely one of the areas where scientific research will be done quite urgently to answer these questions.

Anna Absolutely, I could not agree more. I think we were all thrown into this a year ago now and we've been trying to struggle our way through but we are getting better and better at it. I think these studies only help. In the Rebooting Justice series, what else are you covering?

Ula There's a whole range really, I start off talking about the environment itself, the virtual hearing environment, the cognitive load factor, the fact that we are kind of squeezing the whole universe of a hearing room onto one screen and how that is quite difficult for our cognitive processing abilities. We have limited capacity to process information, and looking at a screen that is very busy, that has lots of visual clutter, makes it then harder for us to process not just what is going on on the screen but what we are actually hearing, so impacts of the environment on the decision maker's ability to process information, for example. Similarly, the challenges that advocates face, those sorts of things.

Anna What are the main challenges for advocates, in your view?



Ula

I think there are quite a number; it is quite difficult to choose just one. I think I would caveat my response in a truly lawyerly way by saying it is also going to depend on factors like the complexity of the dispute, the arbitrators or judges, what time zone they are in, the advocate's level of empathic capacity, how much time they spend trying to read the tribunal, trying to read the room - those things will vary and impact on what the particular challenge is. But I think, considering the issue very broadly, one of the biggest challenges for advocates is that they have to adapt their usual personal style of advocacy to quite a significant degree, to suit the psychological profile of the online environment. So talking about the cognitive load factor, what advocates are going to have to face is that it is harder to deliver the message, because the arbitrators have an already full mind dealing with scrolling through documents, worrying about the connection, all these sorts of things. There's also a whole lot less human data, or social intelligence, available in the form of body language or non-verbal cues that we can't easily give to the tribunal or judge to amplify our submissions. I think it is thinking about the steps that advocates can take to overcome those limitations, to make sure their message is going to be communicated and heard.

Anna

Maybe as a final question, we have heard in other interviews that the virtual setting could have some impact on diversity and inclusion issues - do you have a view on that? To what extent the virtual surrounding might be beneficial for these issues?

Ula

I haven't landed on an answer on this one yet, it is one of those questions which has so many different factors feeding into it. It is going to depend on the type of diversity that you are talking about and the particular situation. I think it is difficult to say it will help or it won't help, the context will definitely depend. But there are definitely points where the impressions are slightly different online. For example, I'm a woman, I'm quite short and small, so standing next to a large man, the differential impact of two advocates who have a physical difference like that might be immediately quite different to the arbitrators and the decision makers. Obviously, in an online setting no one knows how tall I am, or any of those things, there are far fewer visual markers in that way that might raise or trigger certain biases. Then on the other hand, there are lots of other ways it might play out differently, that was just one humorous example that I think about.

Contacts

Interviewer



Anna Masser

Anna Masser is a partner in our Frankfurt office and leads the international arbitration practice in Germany. A recognised leader in international arbitration, Anna acts as lead counsel in international commercial arbitrations and advises on disputes under long-term contracts. Anna was previously qualified in Switzerland and advises on Swiss law issues as well as German law. She has experience conducting arbitrations under a wide range of rules including ICC, SCAI, DIS, LCIA, SCC, as well as in ad hoc arbitrations under UNCITRAL rules. In addition to representing clients in arbitration cases, Anna deals with issues relating to the recognition and enforcement of arbitral awards and judgments. She is also regularly appointed as an arbitrator.

Interviewee



Dr Ula Cartwright-Finch

Dr Ula Cartwright-Finch is Managing Director of Cortex Capital, a consultancy that uses psychology and neuroscience to solve challenges in business and law. Her work spans sectors and continents. Ula trains and advises lawyers, arbitrators and experts on topics including virtual hearings, witness memory & interviewing, negotiation and decision-making. She also works with a range of corporate and banking clients on leadership, diversity & inclusion and wellbeing programmes.

Ula's professional background and experience are unique. Her commercial knowledge stems from 12 years as an international lawyer specialising in international arbitration, based in London, Hong Kong and Madrid. She also has first-hand experience in regulatory, risk and compliance in investment bank and telecoms firms. This experience is framed by a deep understanding of psychology and the science of human behaviour. She holds a MA in Psychology from the University of St Andrews and a PhD in Cognitive Psychology from University College London. She is an Honorary Research Fellow at Warwick University where she conducts original research which informs her training and consultancy with the most cutting-edge ideas.

Ula served as Scientific Advisor to the ICC Task Force on the Accuracy of Fact Testimony in International Arbitration. She is also a Visiting Lecturer at Queen Mary University of London and Humboldt University of Berlin, and she speaks regularly at international conferences.

Click here to read the miniseries 'Justice Rebooted' which examines the psychological side of virtual hearings: www.cortexcapital.org/justicerebooted



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