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# Waiving examination of witnesses and experts

*ASAbelow40 Spring Seminar on Strategic Questions in Arbitration*

Eliane Fischer, 12 May 2017

# Witness testimony – a quest for truth?

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## Inability to detect lies

Research has shown that people's ability to detect lies is about as accurate as chance or flipping a coin.



## Unreliability of human memory

Various factors corrupt our recollection, for instance:

- Witnesses may incorporate information they have gleaned from a co-witness
- Witnesses may develop false memories for events they had earlier been forced to confabulate
- Witnesses may not detect manipulations of the summaries of their witness interviews – and may even shift their memories in the direction of the manipulated summaries.

# Consequence of waiving witness evidence

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## IBA Rules on the Taking of Evidence (2010)

### **Article 4 Witnesses of Fact**

8. 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.

## *Versus*

### **Brown versus Dunn (1893)**

If a witness gives testimony that is inconsistent with what the opposing party wants to use as evidence, the opposing party must raise the contention with that witness during cross-examination.

# Little Red Riding Hood and the Big Bad Wolf

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## The Smart Liar

The Big Bad Wolf is a notorious liar who successfully tricks Little Red Riding Hood and her grandmother.

- He will likely perform well in cross-examination and might leave a good impression with the tribunal. His oral testimony is therefore potentially very harmful.
- He covers the important points of the story which must be refuted.
- The arbitrators may want to hear / question him.
- There is likely no other way to correct his written witness testimony.



**Unsuccessful cross-examination will be disastrous**



# Hänsel and Gretel

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## The Loyal Siblings

Hänsel and Gretel have been together through thick and thin. They escaped from the witch's house through a ruse and never want to return again.

- They testify to the same set of facts, with statements that are likely closely aligned. Would time therefore be better spent cross-examining another witness?
- How many witnesses appear for each side?
- Despite their loyalty towards each other, oral testimony might reveal contradictions. If it becomes apparent that the second witness bolsters everything that was already said, ask no further questions.



**Know when to stop**

# The experts: the Grimm brothers

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## The unchallenged authorities

- The Grimm brothers are the masterminds behind the fairy tales. Study their report thoroughly to detect any shortcomings.
- If there is a considerable risk that their expert testimony will remain unchallenged, avoid giving them a platform for presenting it.



**Can you win your case despite their testimony?**



# Conclusion

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## Some criteria to be considered in decisions on waiver

- Is the witness likely to leave a good impression with the tribunal?
- Do you have good points for challenging the witness testimony?
- Is cross-examination likely to be counterproductive?
- Is the witness harmful to your case?
- Is the evidence relevant to your case?
- Can it be refuted otherwise?
- Could time be better spent cross-examining another witness?
- How many witnesses appear on each side?

# Thank you

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