The Examination of Factual Witnesses in English and EU Commercial Litigation: A Comparative and Critical Study

Abstract

This paper comparatively examines the effectiveness of factual witness examination in English and European Union commercial litigation systems. The English adversarial model emphasizes dynamic cross-examination conducted by advocates, employing rhetorical strategies of logos, ethos, and pathos to test credibility and construct persuasive narratives for judicial decision-making. Conversely, the EU inquisitorial approach centers on judge-led questioning with documentary evidence predominance, prioritizing procedural consistency and written submissions over oral confrontation. Through analysis of landmark cases including BSkyB v HP Enterprise and Sainsbury v Visa, the paper evaluates each system's strengths: England's psychological penetration versus the EU's objective stability. Drawing on advocacy scholarship by Iain Morley KC, Lord Sumption, and Peter Lyons, the paper concludes that neither system categorically surpasses the other; effectiveness depends on litigation context, with emerging hybrid models potentially integrating adversarial cross-examination within inquisitorial procedural frameworks.

Keywords

1. Factual witness examination
2. Cross-examination
3. Adversarial and inquisitorial systems
4. Commercial litigation
5. Judicial persuasion
6. European Union civil procedure

Introduction

Factual evidence questioning is the core of cross-examination of witnesses in commercial litigation in the courts of England and the European Union (EU). Although English courts have historically been lauded on account of their adversarial proceedings, during which oral arguments and the examination of witnesses have been presented as the supreme arts, EU member countries, with their background in civil law, tend to reiterate their distinctive

features: the inquisitorial process with its emphasis on systematic interrogation of witnesses, usually headed by the judge. In this essay, a critical evaluation of whether or not these systems provide sufficient effectiveness in factual witness questioning is attempted, and the varied structures of these systems are unwound, about whether they are more conducive to the truth, clarity, and judicial persuasion, within a commercial dispute.

The efficiency of witness handling, as interpreted in this context, embodies several rhetorical and procedural goals, viz., credibility, persuasion, consistency, and clarity, all of which are analyzed using the parameters of logos, ethos, and pathos. Most of the oral persuasion tactics in English litigation are framed using these classical modes of rhetoric.

The English Approach to Factual Witness Questioning: Structure, Psychology, and Strategy

Fact witnesses in English commercial litigation exist squarely within the adversarial paradigm, with the oral testimony and the cross-examination representing the last remaining means of testing the truth, consistency, and credibility[1]. The process generally proceeds through three phases which are examining-in chief conducted by party to bring the witness by making non-leading questions only (as provided by the Civil Procedure Rules), followed by cross examination by the opposing counsel (where leading questions are used and tactical), and eventually re-examination process used to raise any point of concern. Thematic development of this way of structuring indicates a wider preference towards the adversarial reasoning system, where the judge is not the protagonist in the creation of the facts presented in the court, but rather the Advocate.

The strategic logic of cross-examination is a means of undermining the story and affirmatively building the story of the opponent. It is equally psychological as it is logical, and each question does come with an opportunity and a risk at hand. The same lecture cites Iain Morley KC (in another of his legendary warnings, repeated by Simeon Reynard): “In witness handling, everything is an invitation to disaster”. His work of The Devil s Advocate carries the matter to the point of indicating that the art of questioning itself was to learn how to handle rhythm, restraint, and precision. The attorney warns of the application of excess or unbalanced questions as it tends to not only provide the witnesses with a go-ahead to cast their moves by regaining the grounds stagnated, but also risks misleading the judge. He

[1] Lazer, Susan. "The principle of orality: An analysis of the principles governing the prevalence of direct oral testimony in the English adversarial trial system and the impact of reforms to reduce its status." PhD diss., University of Huddersfield, 2021.

asserts that tactical control should be comprehensive, and insofar as leading questions are employed. They should be used to formulate desired responses that only support the theory of the case put forward by the Advocate.

This strategic framework also forms the foundation of the way Peter Lyons discusses the way oral advocacy should be done, where the significant focus is on how the Advocate has to build the case and capture the trust of the judge lawfully by using a clear and compelling schedule. The use of what has been called point-first advocacy as opposed to the theatre of confrontation. The comments of Lyons illuminate why English trial practitioners so frequently favour the closed, directive kind of questioning, not simply to obtain concessions by the witnesses, but to help the judge create the mosaic of the facts. This is important, especially in business matters, which tend to make matters complicated. As an example, in one of the landmark cases involving software misrepresentation, BSkyB v HP Enterprise (2008)[2], the position adopted by the court in the assessment of the credibility of witnesses was a key determinant of the outcome.

Another critical aspect of the English approach can be depicted in the psychology of handling witnesses. Both Lyons and Morley admit that questioning is performed as keenly observed by the witness as it is by the judge. The demeanour, tone and the resistance to aggression coupled with the destruction of testimony, which the advocate displays, is also key to judicial perception. This is reiterated in the essay by Lord Sumption entitled The Art of Cross-Examination[3], whose argument is that the purpose of cross-examination is not just to turn the witness into an untruthful set of statements but to create a picture of the case the witness is presenting that makes internal sense and is credible. Sumption views cross-examination as a last resort in persuasive theatre, and the success of the same depends on whether the judge is swept away by the logic and style of their Advocate. When a barrister loses their temper, no matter how strong the case is, they may lose the trust of the judge.

These principles also exist even in highly publicized cases. The Depp v Heard[4] trial may not fit the description of a strictly commercial trial, but portrayed elements of witness management in a trial at a peak performative level. Cross-examination was highly felt and was carefully prepared, which shows just how much attention English-trained lawyers pay to

[2] *BSkyB Ltd v HP Enterprise Services UK Ltd* (2008)

[3] Tom Cross and Christopher Knight, 'Public Law in the Supreme Court 2017–2018' (2019) 24(1) *Judicial Review* 40–65.

[4] *Depp v Heard* (2022)

dominating the courtroom discourse[5]. But the same trial also brought into play the spectacle versus the substance, which compelled the legal scholars to wonder whether these storytelling advocates occasionally blur the objective of the judges.

Sainsbury v Visa[6] held somewhat straitened perspective of business law. Over there, the Supreme Court has emphasized the need to resort to oral witness testing in determining not only fact but intent that is paramount in antitrust cases. The case reasserted that written evidence can be the basis of a commercial claim. Still, an advocate can cross-examine witnesses who can unravel unclear motives and the commercial practices. English model goes on, therefore, valuing the cross-examination of factual witnesses as a means of persuasion and judicial education, wherein lies its adversarial essence, but within which lies as well a high level of sensitivity to judicial psychology.

The EU Approach to Factual Witness Questioning: Judicial Control and the Inquisitorial Model

The English system puts cross-examination at the centre of courtroom persuasion[7]. In contrast, the commercial litigation environment in the European Union, with its tradition of civil law, goes in quite a different direction[8]. Such jurisdictions, as Germany, France and the Netherlands, are predominantly arranged in an inquisitorial structure of factual witness treatment in most EU jurisdictions. In this case, the judge is more active in questioning, and the control that the Advocate has over the story is much less. Instead of the dramatic clash of wits between conflicting lawyers, EU trials can look more like an exercise in gathering evidence, where the court is trying to find objective truth using written submissions, document-intensive preparation, and little oral confrontation. This change of emphasis is not simply procedural--it is an epistemological difference between adversarial and inquisitorial conceptions of justice.

The cross-examination, in the English legal sense of the term, does not take up an equivalent cultural or strategic space in the civil law tradition[9]. More often than not, judges sit over a

[5] R Doak Bishop and Edward G Kehoe (eds), *The Art of Advocacy in International Arbitration* (2nd edn, Juris Publishing 2010)

[6] *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2020] UKSC 24

[7] Tom Decaigny, 'Inquisitorial and Adversarial Expert Examinations in the Case Law of the European Court of Human Rights' (2014) 5(2) *New Journal of European Criminal Law* 149–166.

[8] Rachel A. Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance* (Cambridge University Press 2007)

[9] Dina Hadad and Livia Holden, 'Cultural Expertise in Common Law and Civil Law Legal Systems' in Livia Holden (ed), *Cultural Expertise: Theories, Laws, and Practices* (Routledge 2025) 155–175

dossier-based system, where evidence, such as the witness statements, is looked into before any hearing is allowed. Witnesses can be called to make their intentions clear, but not to be used as a rhetorical tool by the advocates. Instead, the court plays the role of seeker of truth and has a comparatively low tolerance for adversarial intervention.

This court precedent tends to reduce the number of factual issues which are exposed by questioning witnesses. In fact, in most EU systems, the authenticity of documentary evidence triumphs over oral evidence, which is considered as potentially subjective or unreliable. In that respect, proponents are educated to develop their cases based on contracts, letters, expert reports, and statutory interpretation, instead of emotionally and psychologically charged inquiry of witnesses. This procedural orientation has been argued to increase consistency and objectivity, two highly valued attributes in commercial litigation. Still, it can also be problematic in inhibiting the fact-finding possibilities that come with the clash of inconsistent narratives, particularly in complex litigation that involves issues of intent, fraud or misrepresentation.

The main drawback of this strategy is that persuasion is relatively invisible when questioning witnesses. Unlike advocates in English, who have to adjust their style to the demands of the judges continuously, EU lawyers are not that involved in the rhetoric of the courtroom. According to Peter Lyons in his analysis of English oral advocacy, a good deal of the persuasive power in the ordinary law jurisdiction lies in the fact that the interaction between judge, counsel and witness is in real time. That interaction is not replicated under the inquisitorial rules in the same way. Also, the methods exalted by Iain Morley, like the employment of silence, leading tone, or planned series, are mostly inconsistent with the procedural rules of the commercial courts in the EU.

However, it is not necessarily true that EU systems are ineffective. By contrast, a written-heavy process is favoured by many judges in civil law jurisdictions, because of its predictability and its immunity to performative excess. A fundamental principle of fairness of arms is based on the notion that the legal result should depend on the clarity of the written argument and not on the eloquence of counsel. Advocacy by word of mouth, such as the questioning of factual witnesses, is thus limited in scope to avoid the sort of distortion of justice that can occur when one or the other party to a dispute possesses superior oral dexterity or strategic playersman-ship.

However, these constraints do have disadvantages. Lack of sound cross-examination may permit statements of ambiguity or incompleteness to pass without challenge[10]. This is because the EU trials rely on the initiative of the judge, unlike in an English trial, where a seasoned advocate may expose inconsistencies with a light touch of linguistic pressure. Unless the judge puts the correct questions or does not recognize the subtlety of contradicting versions, crucial facts can remain unknown.

In addition, the passive nature of counsel during civil law questioning also limits the chances of immediate correction or narrative framing construction. English lawyers employ cross-examination to perfect case theory, to react on the fly to surprise admissions, and to adjust rhetorical focus according to how a witness is performing.

Comparative Evaluation of Effectiveness: Adversarial Dynamism vs Inquisitorial Control

In making the comparison of the efficiency of factual witness questioning in English and EU commercial litigation, the contrast between adversarial and inquisitorial approaches to the issue comes to the fore. The term effectiveness in this case should be measured in more than one dimension-credibility testing, clarity of fact-finding, procedural fairness, judicial persuasion and adaptability to changing legal environments.

The English model has obvious benefits in the form of dynamic persuasion and credibility testing. By cross-examination in real-time, experienced lawyers can unpick contradictions, reveal half-truths, and put the accuracy of witness testimony under stress. As Iain Morley and Lord Sumption stress, cross-examination is not merely a process of obtaining facts, but a psychological battle that shows the greater validity of a case presented by one of the parties. This capability to challenge and unsettle a witness is instrumental in business cases where there are claims of misrepresentation, fraud or inconsistent intent and where the motive and attitude count as much as the paperwork. BSkyB v HP Enterprise[11] is an example that proves the importance of oral testimony in the explanation of a disputed factual landscape. Moreover, Lyons and Morley underline the fact that the advocates use such moments to not only examine the witness but also influence the view of the judge, to form a narrative that is a combination of the legal reasoning (logos), credibility (ethos), and sometimes emotional flavours (pathos). This three-fold rhetorical persuasion, as explained in Lectures 1 and 2, is

[10] William D Dixon, 'Rulemaking and the Myth of Cross-Examination' (1982) 34 *Administrative Law Review* 389.
[11] *BSkyB Ltd v HP Enterprise Services UK Ltd* (2008)

usually lacking in the EU, where there is hardly any questioning permitted to develop in real-time.

Nevertheless, the resilience of the English model is its weakness too. The reliance on oral performance threatens to make justice a competition in rhetoric, particularly when the advocates are wildly disparate in talent or resources. As the Depp v Heard[12] case shows, the process of cross-examination may turn into a performance in which the spectacle is more important than the content. In somewhat less aggressive commercial contexts, the adversarial model can also result in distorted results, in that judges may be more style- than content-influenced. The adversarial system also imposes a significant cognitive load on judges to integrate high-velocity testimony with enormous documentary evidence, frequently in limited time frames. This begs the question of efficiency and mental load, particularly as commercial disputes become more complex and large in scale.

Conversely, the inquisitorial system of the EU focuses on the stability of the procedure and written clarity. By governing the presentation of evidence, judges make sure that trials are focused and legal. It is less prone to diversion into theatrics, and the emphasis on written submissions arguably results in increased predictability and consistency. This system provides transparency and protection against advocacy disparities, to many judges--and to litigants who want efficient resolution. In addition, the English courts too have started to adopt more written pre-reading and case management tools, as Justice Lightman and Lord Justice Vos have observed in their speeches, reflecting some EU efficiencies.

But the strengths of the EU model have a price. There is a lack of probing cross-examination, which restricts the system from responding to ambiguity and nuance. The statements, however fully detailed, cannot replace the insights which are born of the artfully constructed questioning--in particular when facts are in dispute, or intentions are cloaked. The strict organization also does not allow the Advocate to be flexible in responding to unforeseen events or using rhetorical openings. By doing so, the EU system threatens to disregard psychological signs and silent confessions, which are only disclosed in the pressure of the live situation.

Also, the questioning by the judges can bring in implied bias since it is done by the judges and not the parties that decide on the areas to be questioned. This can create blind spots, especially with factually complicated or industry-specific controversies where the level of

[12] *Depp v Heard* (2022)

judicial expertise on a topic is uneven. Although the aim of neutrality is laudable, it can be counterproductive to vigorous fact-finding if judicial inquiry is not as forensically incisive as the adversarial cross-examination.

Another issue is the changing legal landscape, which is influenced by the processes of digitization, pre-trial disclosure and remote hearings. According to Lord Pannick[13], the English advocacy is evolving. Courts have become more efficiency-oriented, require detailed written submissions, and hearings are shorter. In Online Courts and the Future of Justice, Richard Susskind[14] has suggested that this tendency can marginalize oral questioning altogether. However, the same evolution confuses the boundary between adversarial and inquisitorial systems. English courts, as they adjust, will tend to become more written-oriented. In contrast, other EU jurisdictions are trying to see whether they can permit a little adversarial intervention in oral proceedings[15]. The difference is no longer as pronounced as it used to be.

Finally, both systems are characterized not only by the balance of efficiency and engagement, but also by formality and flexibility. The English style is more rhetorically effective and psychologically penetrating, but can go into excess or imbalance. The EU model provides judicial control and documentary rigour, but can be insensitive to nuances that tend to come out in a stress situation[16]. The best system, possibly, is not wholesale preference, but selective integration--the procedural reliability of inquisitorial review, combined with the adversarial advantages of active cross-examination.

Conclusion

The questioning of witnesses of fact in commercial litigation in the English and EU systems is very different, and both systems represent different approaches to law. The English adversarial system favours the active cross-examination in which the Advocate gets the opportunity to question credibility, create a narrative and affect judicial impression. With the backing of such thinkers as Morley and Sumption, this is a rhetorically effective approach that may jeopardize theatricality and advocacy disparity.

[13] David Pannick KC, *Advocacy* (Cambridge University Press 2023)
[14] Richard Susskind, *Online Courts and the Future of Justice* (Oxford University Press 2019)
[15] Liisa Helena Leppävirta, 'Procedural Rights in the Context of Restrictive Measures: Does the Adversarial Principle Survive the Necessities of Secrecy?' (2017) 2 *European Papers* 649–669.
[16] Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart Publishing 2013)

In comparison, the inquisitorial approach of the EU provides procedural stability and efficiency where evidence is collected and judges ask questions. Though this fosters objectivity and curbs advocacy distortion, it decreases the chances of testing the credibility of witnesses in real-time, which may miss nuances that may be brought out by oral questioning.

Neither system is always better. The English model is excellent in terms of persuasion and psychological probing, whereas the EU system is sound in terms of consistency and judicial control. With more substantial adoption of digital tools and procedural reform in the courts, aspects of both traditions are merging. The answer could be the hybrid model that retains the adversarial advantages in a more organized and efficient system, making witness examination effective, fair, and truth-seeking in complicated commercial litigation.