Chapter 10

IDENTIFYING AND AVOIDING PITFALLS AND MISTAKES IN CROSS-EXAMINATION

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Nothing can be more devastating than delivering to one's adversary a major concession or point of proof because a cross-examination has gone wrong. In crafting her or his cross-examination, the international arbitral practitioner must first and foremost follow the "Silver Rule"–"Do No Harm." As one keen observer of the process noted over a century ago: "More cross-examinations are suicidal than homicidal. There are two reasons for this: mistaken conception as to the function of cross-examination, and faulty technique."[1]

What follows is a series of reflections intended to prompt the newcomer to the international arbitral process to step back before lunging forward into what is typically the heart of every merits hearing—challenging the adverse party's testimonial evidence through cross-examination of its witnesses. It would be wrong to assume that these observations are of no relevance to seasoned litigators who have only recently ventured into the world of arbitration. Those litigators, even experienced ones, who want to "try an arbitration" the same way they would try a court case are frequently criticized by experienced arbitrators for failing to adjust their (sometimes formidable) courtroom techniques to take into

[1] Emory R. Buckner, *Comments on the 'Uses and Abuses' of Cross-Examination*, *in* Francis E. Wellman, THE ART OF CROSS-EXAMINATION WITH THE CROSS-EXAMINATIONS OF IMPORTANT WITNESSES IN SOME CELEBRATED CASES 204 (The MacMillan Company, 4th ed. 1936) (1903).

account the different dynamics of the arbitral hearing room. In fact, this criticism is central to the growing expressions of concern that the "litigification" of arbitration has put its very utility at risk.

Because establishing an arbitral record requires a different approach from establishing a record in a trial court, this analysis seeks to identify those aspects of the process which should be kept in mind by the arbitral practitioner when he asks himself before every hearing (as should be done regardless of experience level) whether the projected cross-examination has been best calibrated to have the maximum impact with the arbitrator(s) hearing the evidence. In a world where, to an increasing extent, a premium will be placed on streamlining the arbitral process,[2] the practitioner's ability to develop a keen sense of when and how *less* will be more may be the most valuable cross-examination skill of all.

The author well remembers trying his first ICC arbitration with the then Chairman (and leading trial lawyer) of his firm. After several days of hearings devoted to cross-examination of the Claimant's witnesses, the hearings had reached a midday recess upon the conclusion of a lengthy cross-examination of the Claimant's last witness, an engineering expert, who had been examined for a half a day on his book-length mathematical calculation supporting his expert conclusion that the multimillion dollar component supplied by the Respondent was defective.

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[2] "Time is the most important cost factor. The real costs in arbitration are not plane tickets, hotels, restaurants, or even court reporters. What is expensive, is the time spent by lawyers and management on the case." Pierre Karrer, *We Need Speed: Time Management in International Arbitration,* 12 V.J. 271, 272 (2008). On average, 82% of the cost of an arbitration proceeding results from the parties' presentation of their cases. Peter M. Wolrich, *Preface to* REPORT FROM THE ICC COMMISSION ON ARBITRATION: TECHNIQUES FOR CONTROLLING TIME AND COSTS IN ARBITRATION, ICC Pub. No. 843 (2007), available at http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf. *See also* Robert B. Davidson, *The Pressing Need to DO Something about Excessive Time and Cost in Commercial Arbitration*, 23-6 Mealey's International Arbitration Report 53, 53 (2008) (noting that, with the increase in size and complexity of disputes subject to arbitration, "the grumbling about excessive time and cost is beginning to get louder and more strident.").

At lunch, the senior lawyer expressed his satisfaction with his junior's cross-examination by announcing that he had decided not to put on Respondent's own expert, something the junior protested in vain. "It's over," the senior said. "There's nothing left of that report that will be given credence by the Tribunal. Claimant has the burden of proof, and it would be foolhardy to put at risk the record we now have by allowing the other side to do to our expert what we have done to theirs."

It is significant that such a bold step would have been unthinkable for the junior lawyer, who had spent weeks preparing the Respondent's expert for his own examination. After all, it was that expert's careful analysis of his counterpart's work that had made the cross-examination of Claimant's expert possible in the first place. Surely Respondent's expert was the best person in the room to expand on and explain the points that the initial cross had been intended to highlight. But as experience teaches, a keen and dynamic understanding of how the evidentiary record is balanced at any point in the proceedings is the touchstone for determining whether asking another question (or exposing one's own witness to questioning) is worth the risk. This determination must be made not just on a witness-by-witness basis, but on a line-of-questioning-by-line-of-questioning, and ultimately, on a question-by-question basis.

I. The Nature of the Beast: Why the Nature of the Arbitral Process Itself Matters to Cross-Examination Technique

Most of the elements typically identified as making arbitration superior to litigation will, on close consideration, tell us something about how we should approach cross-examination in the arbitral setting. Chief among arbitration's advantages is the parties' ability to influence the choice and profile of one, and often two of the individuals who will decide their dispute. In the context of international arbitration, this, in turn, typically results in a cross-cultural panel of arbitrators who, if they are serious in discharging their function, will strive to maintain the flexibility, efficiency, and reduced cost of arbitration. If these goals fail, the purpose of

arbitration fails, and the cross-examiner who charges ahead to design an examination that is at cross-purposes with these aspects of the process will likely limit his effectiveness as an arbitral advocate.

The dynamics and uncertainties of cross-cultural dispute resolution in a highly flexible procedural environment gives rise to a host of challenges that the cross-examiner will find less acute in a courtroom setting. These challenges, discussed below, begin with principles of KYT (Know Your Tribunal), and include considerations of burden of proof and other procedural dynamics that derail the unsuspecting examiner, such as the looming backlash against over-discovery in international arbitration, as well as the problem of the "Ugly (Anglo-) American."

II. KYT: Why the Design of the Cross-Examination Begins with Knowing Your Tribunal

The special characteristics of international arbitration require that the preparation for cross-examination actually begin with the selection of the tribunal itself. It is critical that counsel conceive of his or her eventual questioning through the eyes of the tribunal's anticipated members. When short-listing arbitrator candidates, counsel should assess (in addition to the potential arbitrator's expertise, legal background and experience), her or his thinking on issues such as cross-examination, document disclosure, and even burdens of proof. It is permissible to interview the candidate on these matters generally, but both the potential arbitrator and the parties should exercise restraint, because the interview should not touch upon the merits of the arbitration or the way the candidate would likely decide preliminary or procedural issues. The interview should be used to determine whether counsel feels comfortable with the arbitrator, and whether the candidate is familiar with the legal issues involved and with the likely procedural rules involved.

Although it is seldom done, it may nevertheless also be appropriate to pose questions in the course of interviewing a potential arbitrator that not only elicit information relating to the candidate's views on cross-examination, but also sensitize him or her in a general fashion

(i.e., without discussion of specific aspects of the dispute) to the client's concerns about how the rest of the tribunal might view the process of cross-examination, particularly where one or more of the eventual arbitrators are not trained in a common law system.[3]

Counsel may also wish to discuss with the prospective arbitrator his or her practice of directly questioning the witnesses during the course of cross-examination. There is an exceptionally broad range in practices among arbitrators in this regard. Some arbitrators are comfortable interrupting cross-examinations whenever they find it appropriate to develop a point, while others are unwilling to interfere in any but the most exceptional circumstances.

Appointing counsel should also gather as much intelligence as possible on the approach of the remaining members of the tribunal well before the cross-examination begins. Indeed, the practitioner should not assume that all arbitrators, even those from a common law background, necessarily believe in the value of cross-examination in the arbitral context, particularly where the cross-examination is conducted in an aggressively confrontational style.

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[3] Party-appointed arbitrators have traditionally viewed their role to include ensuring that the positions of their appointing parties are understood by their fellow arbitrators, and in the author's view such an attitude is fully consistent with the moves by various arbitral institutions such as the American Arbitration Association (AAA), the International Bar Association (IBA), and the International Chamber of Commerce (ICC) to require "tribunal-wide" neutrality. *See* Thomas E. Carbonneau, *At the Crossroads of Legitimacy and Arbitral Autonomy*, 16 Am. Rev. Int'l Arb. 213, 231-32 (2005). As part of this recent evolution, the process for interviewing potential arbitrators has come under increasing scrutiny. Regardless of whether viewed under the traditional or "tribunal-wide neutrality" standard, the exploration of these issues with potential arbitrators seems fully appropriate. The fact that parties from divergent legal traditions select arbitrators who understand their procedural customs should preserve, rather than endanger, the impartiality of the tribunal. *See* James E. Meason & Alison G. Smith, *Current Issues in International Commercial Arbitration: Non-Lawyers in International Commercial Arbitration: Gathering Splinters on the Bench*, 12 NW. J. Int'l L. & Bus. 24, 41-42 (1991) (arguing that party-appointed arbitrators play a "natural and useful function," since they are in the best position "to appreciate and explain to the other arbitrators the legal theories, cultural assumptions, and general approach of the party that appointed them.").

In conducting a cross-examination before culturally diverse arbitrators, counsel must constantly reevaluate whether her examination technique is having a maximum impact on the members of the tribunal. This is often particularly difficult given the common circumstance that counsel continue to develop their instinct on how one or more members of the tribunal view such issues even as the testimony unfolds. The key here is to maintain a dynamic understanding of the expectations of the tribunal, including the specifics of how the cross-examination will be conducted.

As in their domestic courtroom practices, seasoned international practitioners develop a strong sense of how best to "stay out of the way" of arbitrators who take an active role in putting questions of a generally favorable nature during the course of cross-examination, since, where the arbitrators have seen an inconsistency in a witness' testimony, they are far more likely than the cross-examiner himself to lead the witness into making concessions.[4] When a member of the tribunal is active in putting questions to a witness in a manner that evidences skepticism with the client's position, the examiner's skills will be tested to the limit, for she must, through her own questions, get the cross-examination quickly back on track with low key formulations intended both to advance the record and to demonstrate tactfully how the questioning arbitrator has gone astray.

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[4] *Cf.* Wellman, *supra* note 1, at 171 ("[A]ccidental testimony always makes a greater impression on [the finder of fact] than that deliberately and designedly given."). In his chapter devoted to the "Personality of the Examiner, etc.," Wellman offers the following instructive description of the most successful English barrister of the early Eighteenth Century:

> Sir James Scarlett used to allow the jurors and even the judges to discover for themselves the best parts of his case. It flattered their vanity. Scarlett went upon the theory ... that whatever strikes the mind of a juror as the result of his own observation and discovery makes always the strongest impression upon him, and the juror holds on to his own discovery with the greatest tenacity and often, possibly, to the exclusion of every other fact in the case.

Id. at 170.

III. Uncertainties Surrounding the Burden of Proof

International and institutional rules in arbitration are generally silent on the question of burden of proof.[5] The general practice of international arbitration tribunals is to require that a party prove the facts on which it relies to support a claim or defense. This practice is recognized in Article 24 of the UNCITRAL Rules. No rule, however, including Article 24, can identify for counsel which facts have to be proven and by whom, even though Article 24 does presuppose the existence of legal presumptions and rules governing the shifting of burdens. To decide those questions it is necessary to refer to the applicable procedural law.[6]

Complicating the problem of meeting one's burden even further is the frequent uncertainty concerning the appropriate standard of proof. The standard by which the arbitrators assess the evidence is typically assumed to be close to the "balance of probability." This standard is to

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[5] *See* Alan Redfern, *The Standards and Burden of Proof in International Arbitration*, 10 Arb. Int'l n.3, at 320 (1994), available at http://www.kluwerarbitration.com/arbitration/DocumentFrameSet.aspx?ipn=9118. *But cf.* Arno L. Eisen & Felix Lautenschlager, *I Like Jams on My Toast: The JAMS International Arbitration Rules in a Nutshell*, 11 VJ 187, 207 (2007) (noting that the general rule in arbitration, that each party proves its own case, should apply only where the applicable substantive law does not stipulate a burden of proof rule); Robert H. Smit & Nicholas J. Shaw, *The Center for Public Resources Rules for Non-Administered Arbitration of International Disputes: A Critical and Comparative Commentary,* 8 Am. Rev. Int'l Arb. 275, 294 (1997) ("[the rule requiring that each party proves its case] fails to define what the burden of proof is. It improperly withdraws the burden of proof from matters determined by the applicable law of the case. Finally, it prevents the Tribunal from shifting the burden of proof in light of the particular circumstances of a case, or where appropriate, to encourage compliance with the Tribunal's orders with respect to discovery and evidence") (citations omitted). For a reflection on the practical problems that may arise when arbitrators fail to appreciate the delicate balance between disclosure and burden of proof, *see* Steven A. Hammond, *Spoliation in International Arbitration: Is It Time to Reconsider the 'Dirty Wars' of the International Arbitral Process?,* 3(1) Disp. Resol. Int'l 5 (2009).

[6] *See* Andreas Reiner, *Burden and General Standards of Proof*, 10 Arb. Int'l n.3, at 332 (1994), available at http://www.kluwerarbitration.com/arbitration/Document FrameSet.aspx?ipn=9118.

be distinguished from others, such as "preponderance of the evidence" and "clear and convincing evidence" present in American civil and commercial law. But a precise definition of the standard of proof also requires consideration of the applicable procedural law.

The uncertainty that surrounds the precise nature of each party's burden and standard of proof is often the *quid pro quo* for a truly international panel of arbitrators.[7] In some cases, what each party must demonstrate to satisfy its burden is straightforward and evident, so that this uncertainty has little impact. The seasoned cross-examiner is acutely aware, however, that this is often *not* the case, and she therefore must remain sensitive to the need to craft her questioning to match the burden of proof expectations of *each* of the

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[7] Indirect evidence of this problem can be found in Professor Wälde's observation that arbitral awards, particularly in the commercial context, are often "confusing and contradictory":

> Arbitrators – from a tradition of trying to accommodate the parties which appointed them – tend to affirm as much as they can of the legal and related views contributed by both parties, often through extensive (and for a decision absolutely unnecessary) obiter dicta. The true "ratio decidendi" – relevant for a theoretical rule of precedent and its practical application – is therefore often hidden in confusing and contradictory (though arguably client-pleasing) language. ... [Arbitrators are often] quite unclear about the "real reason" and the key holding in their awards. This may be perfectly apposite for confidential awards in commercial arbitration, but it is no longer appropriate when awards de-facto become precedents [as in the case of investment arbitrations]. A new discipline of writing awards more with the judicial skill of judges is therefore required, but also seems to be quite far off.

Thomas W. Wälde, *Investment Arbitration under the Energy Charter Treaty: An Overview of Selected Key Issues Based on Recent Litigation Experience*, in 19 ARBITRATING FOREIGN INVESTMENT DISPUTES: PROCEDURAL AND SUBSTANTIVE LEGAL ASPECTS 193 (Horn ed., Kluwer Law International 2004).

One major contributing factor to the lack of clarity that Prof. Wälde decries stems from arbitrators' frequent lack of precision in evaluating the parties' respective burdens of proof. The "new discipline" that Prof. Wälde seeks in the drafting of awards would be more readily achieved by arbitrators providing more vigorous guidance and transparency on the nature of each party's burden, a development that should in turn have a direct and immediate impact on the way cross-examinations are conducted before them.

arbitrators, as well as understand the risks of just how this uncertainty may influence the decision of where to draw the line in asking only necessary questions.[8]

The significance of this too-often neglected aspect of designing an effective cross-examination is best summed up by Yogi Berra's admonition that: "If you don't know where you're going, you might wind up someplace else." At its most basic level, an artful cross-examination "winds up" with a tribunal persuaded of the correctness of the client's position. But the examiner, in addition to facing the traditional challenges of crafting the kind of examination that would be effective in his or her own domestic court, must effectively reinvent that approach with each new arbitral proceeding because of the variable composition of the tribunal and the flexible parameters of procedure. The best approach to accomplishing this result requires the examiner to develop as best a notion as possible of what the tribunal or more precisely, each of its members expects the prevailing party to prove, and then to work backwards, even to a pre-arbitral stage of the proceedings, in constructing the shortest path to get there. Once the merits stage is reached, counsel will, *for any given issue in the case*, have sought to develop an instinct from pre-hearing interactions with the tribunal, questions posed by the arbitrators at or before the merits hearing, and each arbitrator's reaction to testimony, among other considerations, for how each member of the panel is reacting to the evidence on that issue as the record develops. The cross-examination of each witness will thus be matched against counsel's understanding of how each arbitrator is reacting and what

[8] Thus, a seasoned trial team may spend the evening before a cross-examination debating how a given arbitrator is likely to react to key questions, or to the approach taken in questioning an important witness. Has one of the arbitrators displayed a clear skepticism on the point at issue? Even though there is little hope of persuading that arbitrator of the correctness of the client's position, does he or she appear to be in a minority among the panel members? If so, would it be better not to risk pursuing the point with this witness? Often preliminary views on questions like these are adopted, and then tested with a few preliminary questions of the witness before examining counsel makes the final, on-the-spot determination of whether or how to proceed.

each arbitrator expects for the burden of proof to be met on that issue. Much of the challenge of cross-examination comes from counsel's need to constantly reevaluate this delicate balance within the dynamic of a developing record.

While arbitrators may explain to the parties the type of evidence they consider appropriate to prove or disprove a fact or set of facts, that is, whether documents, witnesses, agreements or contemporaneous letters, or expert testimony will be necessary, this dialogue as a practical matter often does not take place.[9] Indeed, at times the tribunal will not achieve a common view of the nature of the burden of proof until the arbitrators begin their deliberations, and as Prof. Wälde's observations suggest, they may in fact never fully do so.[10] As a result, communication between the parties and the tribunal as to how the burden of proof will be discharged can be difficult.[11] Because counsel cannot adequately design her or his cross-examination without a developed sense of the applicable burden of proof, consideration should be given to seeking the arbitrators' guidance at one or more of the following stages of the process:

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[9] Claude Reymond, *The Practical Distinction between the Burden of Proof and Taking of Evidence—A Further Perspective*, 10 Arb. Int'l n.3, at 323-24 (1994), available at http://www.kluwerarbitration.com/arbitration/DocumentFrameSet.aspx?ipn=9118.

[10] Wälde, *supra* note 7. These challenges are even greater given the fact that, unlike domestic practice, international arbitration generally lacks a developed use of procedural mechanisms, such as motions to dismiss or for summary judgment, which may exist in domestic systems as a means to sharpen the definition of each party's burden, or to better define the precise issues in factual dispute, prior to a trial on the merits.

[11] Reiner, *supra* note 6, at 337.

The author well remembers how he blushed at his own ignorance at the beginning of his first "solo" deposition, when his adversary instructed the court reporter to note that the testimony would be taken "subject to the usual stipulations." Swallowing his pride, the author asked counsel to explain what those "stipulations" were, only to find that his adversary had no clear idea of what this phraseology meant. As amusing as this anecdote may seem, it may fairly be said that a significant number of international arbitrations take place "with the usual stipulations" relating to burden of proof.

(i) during the process of interviewing arbitrators (exploring the arbitrators' views, *as a general matter*, on notions of burden of proof);

(ii) prior to the hearing, and particularly at the procedural conference typically held in the days or weeks before the merits hearing, to resolve any outstanding issues of procedure; and

(iii) at the hearing itself, particularly where there are questions from the arbitrators or other indications that may suggest that the members of the tribunal have not formed a common view of the nature of the parties' burden with respect to an important issue.

One example of how these notions may play out can be found in a recent ICC case tried to a successful conclusion by an American counsel before three European arbitrators. When American counsel for the respondent sought discovery of certain documentation plainly relevant to important aspects of the claimant's damages contentions (and, in the view of respondent, vital to the preparation of the cross-examination of the claimant's damages witnesses), the Tribunal demurred, and, as explained by the careful Swiss chairman, couched its denial of the request for disclosure in terms of the allocation of the parties' burdens of proof. Although the document request was unsuccessful, the battle to establish the risks to claimants of withholding this evidence was largely won, as demonstrated by this excerpt from the Tribunal's eventual award (dismissing in large part claimants' damages evidence):

> The Tribunal would like to note in this connection that it has provided the parties – and [Claimants] in particular – with ample warning regarding the burden of proof in this case and of the risks that [Claimants] were running by not providing the Tribunal and [Respondent] with further evidence of their claims. The Arbitral Tribunal have made it clear, on a number

> of occasions prior to the Hearing, that it was for each side to prove its case.[12]

Between the disclosure and the award phases of this proceeding, there was of course a trial and cross-examination of witnesses. As this case history demonstrates, the process of defining the appropriate scope of cross was brought into focus as the proceedings unfolded by recurring discussion of the parties' burden of proof, reinforced by a tribunal vigilant in warning the parties about their need, in Berra's words, to "know where they are going" with the evidence.

IV. Other Procedural Dynamics that Derail the Unsuspecting Examiner: *Caveat Probatur* (Let the Examiner Beware)

The uncertainties that often surround the exact nature of a party's burden of proof are magnified by an arbitral process that draws heavily on the views of the parties and the arbitrators in shaping the manner in which each party will be granted disclosure and expected to meet its evidentiary burden, often through cross-examinations that are subjected to increasingly strict time limitations. Unlike a courtroom setting, there is an inherent lack of formality in arbitration, a fact which further contributes to these uncertainties. It sometimes happens that procedural rules or standards change even in the course of a hearing as the tribunal revisits questions of efficiency and fairness once the trial is underway.[13] As a result, practitioners may be forced to confront additional procedural hurdles, such as additional scope limitations, after the merits hearing has begun, and

[12] Award in ICC Case No. 14414, ¶ 768 (2009).

[13] Such shifting terrain, in extreme circumstances, can raise questions of fundamental fairness, but the tribunal's broad authority to exercise control over the proceeding, as well as the practical need to deal with time constraints or other perceived problems of fair treatment of a party that were not anticipated before the merits hearing had commenced, mean that the advocate will likely have to live with the results of her response to such mid-course adjustments on the spot, with little practical ability to revisit the issue at the enforcement stage absent an abuse of the arbitral process itself.

adjustments will almost always be necessary whenever there is a series of examinations to be conducted under a chess clock or other time allocation scheme. Examiners must accordingly not only be flexible and able to adapt to the events as they unfold, but be disciplined in covering their key points before such problems develop.

A. Limited Disclosure

Cross-examining a witness on the basis of limited disclosure poses particular challenges for examiners from common law jurisdictions accustomed to rules that provide for broad discovery in civil litigation. As a consequence, the risk of surprise is far greater in arbitration than in domestic litigation, reinforcing the fundamental importance of the Silver Rule.

The traditional basic rule of cross-examination—do not ask a question to which you do not know the answer—can be much harder to follow in arbitration, where the examiner will often be called upon to make an on-the-spot determination of whether further questioning will be worthwhile, a determination that may well depend as much on instinct and experience as on other, more objective factors.

Due to the disclosure constraints that parties face in international arbitration, it is particularly important that practitioners mine their own evidence. The old adage that a good cross-examiner must "shake hands with" or "get his hands dirty with" the evidence is especially important in international arbitration.[14] The fact that there typically are far fewer documents available for cross-examining an arbitral witness does not alter the basic fact that documents and the witness

[14] *Cf.* Wellman, *supra* note 1, at 169-70:

> One who has thought intently upon a subject which he is going to develop later on in court, and has sought diligently for "straws" to enable him to discover the true solution of a controversy, will, when the occasion arises upon the trial, catch and apply facts which a less thoughtful person would pass by almost unnoticed. Careful study of his case before he comes into court will usually open to an advocate avenues for successful cross-examination to the probabilities of a story, which will turn out to be his main arguments for a successful [outcome] in his favor.

statement, and especially inconsistencies between the two, will remain the backbone of any well done cross. As in domestic courtroom practice, maintaining control of the witness under cross-examination is vital to the success of the enterprise, and in a process where disclosure is typically limited, the challenge of doing so requires that counsel develop a keen understanding of just how far his own client's documents, together with the limited disclosure typically granted by the tribunal, can carry the process. As the international practitioner gains experience, she or he will develop an increased sensitivity to what, as a practical matter, can be achieved by cross-examination in the context of a procedure where discovery is limited and one or more members of the tribunal may be skeptical of the process of cross-examination itself. The most common, and deadly, mistake, however, is to assume that cross-examination is simply cross-examination, and that an effective approach in a domestic courtroom setting can be directly applied in an arbitral proceeding.

B. Time Budgets

Since the cost of international arbitration is largely a function of the length of the process, arbitrations tend to be time-limited, and it is increasingly common for arbitrators to limit the time for each side to cross-examine witnesses. As one prominent arbitrator has recently (and rightly) observed: "The parties want speed, and I believe that we should give it to them."[15]

The tribunal will, with increasing frequency, establish in advance of the hearing the amount of time that will be allocated to the examination of witnesses. A tribunal may allocate a fixed amount of time for each party to present its case and insist that all witness examinations be completed within the time budgeted. These time constraints provide a strong incentive for counsel to focus their arguments and examinations on core disputed issues and help make arbitration a more efficient process. Seasoned counsel will restrict their questions to the minimum even in the absence of time

[15] Karrer, *supra* note 2, at 271.

limitations, however. As Max D. Steuer noted over a century ago, "[t]here are two lurking, if not great, dangers. One is to cross-examine when it is quite unnecessary and the other to overdo the cross-examination."[16]

In order to avoid lengthy and off-topic answers, the cross-examiner should ask questions that can be answered by "yes" or "no" or "I do not know." Even where the witness insists on volunteering extended answers to such direct questions, the point will be made with the tribunal, which may well discount the testimony of a rambling, "speechifying" witness. Arbitrators are, however, inclined to look with even greater disfavor on counsel whose questions ramble.

Conducting the examination by use of "baby steps," or short questions, is an established technique for achieving an effective cross. Efficiency in cross-examination is key, and the wasting of time with irrelevant lines of questioning can only hurt counsel's (and indirectly his client's) credibility with the tribunal. An examiner may well decide, in light of the manner in which the evidentiary record has developed, to forgo cross-examination of a particular witness, or be forced to do so in the face of needed adjustments to his time budget.

Even in the absence of a tribunal-imposed time limitation, the use of an internal time budget that is constantly monitored and refined as the evidence unfolds is a critical component of constructing an effective "suite" of cross-examinations. Thus, seasoned practitioners will avoid overly scripted cross-examinations, and instead prioritize their questioning in such manner as to allow them to jump quickly to key points they wish to extract from the witness if the opportunity should arise. This is particularly important in light of the risk that a tribunal may impose (formally or otherwise) a heightened time limit with little advance notice. The cross-examiner must therefore be prepared instantly to reorganize or shorten questioning or even to drop an entire line of questioning.

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[16] Max D. Steuer, *Two "Lurking if Not Great Dangers" that Confront a Cross-Examiner*, in Wellman, *supra* note 1, at 193.

C. Scope Limitations

Experienced arbitrators control the proceedings and therefore actively administer the process of cross-examination. The scope of cross-examination is usually determined by the arbitrators. Where direct testimony on a written witness statement is allowed, some arbitrators may limit cross-examination to the scope of the direct. Arbitrators in international arbitration more typically will allow cross-examination to cover all of the issues presented by the witness in her written statement, and as a practical matter, it is often the case that the tribunal, in tendering a witness to counsel for cross-examination, will enforce no specific scope limitation, but rather seek to discipline the examination by formally or otherwise monitoring the length of the examination. The growing chorus of demands that arbitration return to its roots as a quick and less expensive method of dispute resolution means, however, that practitioners should expect to encounter more scope limitations from tribunals in the future, as arbitrators exercise ever more control over witness examination.

Cross-examiners should design separate lines of questions for each topic. Adhering to a rigid linear script is seldom effective in international arbitration (or for that matter, in domestic practice). Instead, examiners should create individual chapters that will prove each major point to be established by cross-examination, and allow the examiner to deviate from the prepared order of questioning if an unexpected answer from the witness opens the door in a favorable way to a new subject matter. Examiners should prepare alternative approaches to plan for potential difficulties as the hearing progresses. This approach helps reinforce the importance of flexibility in the examiner's approach, and avoids the common pitfall of overly-scripting a cross-examination.

V. The Problem of the "Ugly (Anglo-)American": The Risks of an "Overly Aggressive" Cross-Examination Style

English or American examination approaches or techniques often cause civil lawyers discomfort when used in arbitration. The rules and procedure in international arbitration today are generally evolving in

the common law direction, favoring counsel trained in the adversarial process. Although there is increasing acceptance of the Anglo-American practice of cross-examination by counsel, lawyers from common law countries should nonetheless carefully calibrate their approach to cross-examination, especially when one or more of the arbitrators are from non-common law backgrounds.

Perhaps the best guidance on how to calibrate the aggressiveness of an arbitral cross-examination can be found in observations made in a domestic courtroom context over a century ago. In 1903, Wellman astutely identified the different cross-examination techniques appropriate for *confronting* the lying witness, on the one hand, and *talking with* the misguided one, on the other:

> How shall we tell whether the witness has made an honest mistake, or has committed perjury? The methods to be used in his cross-examination in the two alternatives would naturally be quite different. *There is a marked distinction between discrediting the testimony and discrediting the witness.* It is largely a matter of instinct on the part of the trained examiner. Some people call it the language of the eye, or the tone of the voice, or the countenance of the witness, or his "manner of testifying," or all combined, that betrays the willful perjurer.[17]

Wellman's contemporary, Emory R. Buckner, explained how these two very different categories of witnesses (or more precisely, categories of their testimony, since even the witness perceived to be intentionally denying the truth may only be doing so as to specific facts, and therefore may be seen as a hybrid of both categories of witness), required a different approach in calibrating the aggressiveness of cross-examination:

> If the testimony of a witness is wholly false, cross-examination is the first step toward its destruction. If the testimony of a witness is partly true and partly false, cross-examination is the first step in an effort to destroy that which is false. One should

[17] Wellman, *supra* note 1, at 9 (emphasis supplied).

> willingly accept that which he believes to be true whether or not it damages his case. If the testimony of a witness is false only in the sense that it exaggerates, distorts, garbles, or creates a wrong sense of proportion, then the function of cross-examination is to whittle down the story to its proper size and its proper relation to other facts.[18]

As Wellman's many suggestions for how best to cross-examine the *mistaken* (versus *perjured)* witness indicate, subtlety will in any event almost always trump aggressiveness:

> If the cross-examiner allows the witness to suspect, from his manner toward him at the start, that he distrusts his integrity, he will straighten himself in the witness chair and mentally defy him at once. If, on the other hand, the counsel's manner is courteous and conciliatory, the witness will soon lose the fear all witnesses have of the cross-examiner, and can almost imperceptibly be induced to enter into discussion of his testimony in a fair minded spirit, which, if the cross-examiner is clever, will soon disclose the weak points in the testimony. The sympathies of the jury are invariably on the side of the witness, and they are quick to resent any discourtesy toward him.
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> * * *
>
> [The witness's] mistakes should be drawn out often by inference rather than by direct question, because all witnesses have a dread of self-contradiction. If he sees the connection between your inquiries and his own story, he will draw upon his imagination for explanations, before you get the chance to point out to him the inconsistency between his later statement and his original one ... Avoid the mistake so

[18] Buckner, *supra* note 1, at 204.

> common among the inexperienced, of making much of trifling discrepancies.[19]

Wellman's depiction of the most effective cross-examination techniques as practiced over a century ago serves in many ways as a model for a more well-balanced and effective examination in 21st Century international arbitration.

Cross-examination, particularly in a cross-cultural setting, is in every sense more art than science, and the perfection of its techniques requires a healthy respect for just how easily the process can go awry. It is not surprising that such respect is developed best through experience, not admonition. Cross-examination calls for more creativity on the part of the advocate than any other area of the practice of law because it requires the skillful exercise of judgment on the constantly and rapidly changing field of the evidentiary record that unfolds at trial. This is nowhere more true than in confronting a witness in a cross-cultural setting before arbitrators trained in different legal traditions, a challenge that in many ways represents the apex of international advocacy.

[19] Wellman, *supra* note 1, at 22.

Chapter 11

DISASTROUS CROSS-EXAMINATION

Rory Millson

This chapter is at best brave. It is reminiscent of a professor's response to a proposed topic for a paper – the topic too big for a lifetime of study, but perfect for a sophomore term paper.

There is vast literature on how to avoid disasters in cross-examination, including the excellent first edition of this book, which I mine liberally for nuggets, albeit in support of my own views.

This literature does not address in a systematic way how we know that the particular incident was a disaster (either in causing a case to be lost or in making it harder to win).[1] The focus here instead is on the authors' recommendations – the rules, the Commandments, the techniques, whatever – that provide you, the practitioner audience, with a safe harbor to Do No Harm.[2]

The common lore on cross examination – the dos and (even more so) the don'ts – is derived from practice in jury trials in the United States.[3] However, it is not self-evident that this received wisdom

[1] The gladiatorial mythology of cross-examination may explain the notion that your cross-examination can cause you to lose the case. Indeed, the mandatory quote from Emory R. Buckner in 1936 is that: "More cross-examinations are suicidal than homicidal." Although that is wit worthy of Oscar Wilde – brief, hyperbolic and, in the end, overstated – the more modest approach suggested here is that a disaster in cross-examination is an event that makes it harder to win the case than to lose it.

[2] *See* Ben H. Sheppard, Jr., *Taking Charge – Proven Tactics for Effective Witness Control*, *in* TAKE THE WITNESS: CROSS EXAMINATION IN INTERNATIONAL ARBITRATION (hereinafter "Take the Witness") 3, 4 (Lawrence W. Newman & Ben H. Sheppard, Jr. eds., 2010); Steven A. Hammond, *Identifying and Avoiding Pitfalls and Mistakes in Cross-Examination, in* TAKE THE WITNESS, 93 93 (Lawrence W. Newman & Ben H. Sheppard, Jr. eds., 2010).

[3] "[T]hese tactics have served generations of American trial lawyers for whom effective cross-examination is critical to courtroom success." Sheppard, *supra* n. 2, at 3.

should be automatically applied to the different context of international arbitration. Since juries do not explain how they reached their result, let alone whether a particular cross-examination was a disaster, the evidence comes largely from the perception of counsel, pejoratively, their "war stories."

Bench trials before a judge in the United States could provide better guidance for several reasons. In the first place, any decision should be public and reasoned, and may include an analysis of the effect of the cross-examination. In the second place, judges frequently will provide relevant guidance during a trial, and this information too may be publicly available. In the third place, there is a growing literature on unconscious biases in decision-making, which may have a bearing on how judges (and arbitrators) reach decisions.

Applying this judge analogy to international arbitration would, however, have to take into account the many differences between US trial practice and international arbitration. For example, arbitration is confidential, which means that the reasoned decision is generally not available. Similarly, hearing guidance from the arbitrator(s) – even if given – is also generally not available. Likewise, there are usually three arbitrators rather than one judge. That makes the very necessary Know Your Audience analysis much harder. And these arbitrators may not share a common legal heritage[4] – civil lawyers are said to place less weight on cross-examination because any testimony from party witnesses is inherently unreliable, while some refer to an unwelcome Americanization of international arbitration. Moreover, the practice in international arbitration differs from US practice in important respects, such as the prevalence of written rather than the oral direct testimony that is customary in US trials.[5]

This long introduction, stressing the limits of what is known about how decisions are reached, including the effects of disastrous

[4] The parties and the arbitrators may not even share the same principal language. *See* James H. Carter, *The Perils of Cross-Examination in Language Other than the Language of the Proceeding*, *in* TAKE THE WITNESS 305 (Lawrence W. Newman & Ben H. Sheppard, Jr. eds., 2010) (illustrating one set of issues relating to this problem).

[5] *See* Sheppard, *supra* n. 2, at 3-4 (detailing a fuller list of these differences).

cross-examinations, ends with an apology. Since these issues are insoluble,[6] I apply Occam's razor: the simplest solution is the right one.

The simplifying assumption is to think of cross-examination as a "conversation" in which you are speaking (through the witness) with the Tribunal in support of your client's case. I discuss the nature of this peculiar "conversation" in Section I and then explain in Section II how this conceit, plus some stated biases, can help you understand what may be a peril and how to avoid it.

I. The Function and Conduct of Cross-Examination

You are at the hearing, and opposing counsel conducts a short examination to supplement the written testimony and then passes the witness to you. Now it is your opportunity to cross-examine.

As a threshold matter, there are two aspects of international arbitration that might indicate that you should not cross-examine at all.

First, there is the query of the civil lawyer as to whether cross-examination is "worthwhile" at all.[7] Since the hearing is going to involve questioning of some sort on the direct testimony,[8] however, I do not engage in discussion on this as a separate point.

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[6] There is no unanimity on these various analyses; indeed, some are contradictory. Moreover, several of them are wrong, but the way that I know that is my own anecdotal war stories, and you may have a different experience than mine. Moreover, we often tend to prefer the system that we grew up in (and make our living in), and view other systems with suspicion (and perhaps misunderstand what they entail). This cultural divide is real, no matter whose view (if anyone's) is correct.

[7] *See* Bernardo M. Cremades and David J.A. Cairns, *Cross-Examination in International Arbitration: Is It Worthwhile?*, *in* TAKE THE WITNESS 223 (Lawrence W. Newman & Ben H. Sheppard, Jr. eds., 2010). "The faith of common lawyers in cross-examination as a good way of getting to the truth arguably lacks any scientific basis, particularly in a cross-cultural context." *Id.* at 237. Cross-examination "is not a concept that is easily detached from its common law context and transplanted into international arbitrations, and [sic] nor is it desirable to attempt to do so." *Id.* at 241.

[8] For this, the "starting point is an entirely neutral concept of witness questioning," *id.* at 241, that is not linked to the characteristics of common law cross-examination "with its long . . . history, its emotive appeal to common lawyers, its underpinning

Second, the practice surrounding the written direct testimony means that you can consider not cross-examining at all.[9] This is because witnesses who submit written statements often testify live at the hearing only if the cross-examining party requests cross-examination (although the Tribunal can always require the witness). In this case, the disaster could be that you cross-examine the witness at all.[10] However, I think that is largely theoretical, at least for important witnesses. Not only are you likely to require the witness for cross, but it is entirely possible – a possibility supported by anecdotal "evidence" – that the Tribunal will require the witness's presence if you decide not to call a witness for tactical reasons.

So you turn to the written testimony. Put nicely, these statements "are usually products of a collaborative effort between the witness and the lawyer," so that "there is usually an opportunity to challenge the orderly, possibly artificial version of the facts."[11] "With the growing prevalence of written witness statements . . . cross-examination has become more important than ever."[12]

The conventions of cross-examination allow you to choose the topics for each witness. Since the witness is supposed to answer your questions rather than make speeches, you have the ability to limit the topics by the questions that you ask. (Your adversary, of course, has an opportunity for redirect if you choose not to cover certain topics.)

So what are the topics?

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in often obscure evidential rules, and its dynamic of partisanization of witnesses." *Id.* at 241-242.

[9] In a jury trial, you would probably not waive cross-examination after the witness's direct. Such a waiver is less likely to raise an adverse inference in international arbitration, especially since procedural orders frequently address this issue.

[10] *See* John Fellas, *Cross-Examination in International Arbitration*, N.Y.L.J. 1 (2015), which explains how the presence of the witness can improve the effectiveness of the direct testimony over the written statement, despite your cross-examination.

[11] David Haigh, *When to Be Friendly and When to Impeach*, *in* TAKE THE WITNESS 17, 23 (Lawrence W. Newman & Ben H. Sheppard, Jr. eds., 2010).

[12] Arthur W. Rovine, *Polite Cross-Examination: A Symbolic Step Toward Further Uniformity in International Arbitration*, *in* TAKE THE WITNESS 77, 78 (Lawrence W. Newman & Ben H. Sheppard, Jr. eds., 2010).

Cross-examination must have a purpose.[13] As Ben Sheppard notes well:

> Determine the aims of your cross-examination. Do you intend merely to discredit the testimony of the witness? Can you use testimony of this witness to corroborate favorable testimony of other witnesses? Can you use the witness to contribute independently to the favorable development of your own case?[14]

Since you have already crafted an overall story for your client's case, cross-examination must choose topics from that story, adapted for the individual witness. "Each witness must be assessed in terms of what can be accomplished and in the context of who the arbitrators are."[15]

Lawyers often view cross-examination as solely an attack on a witness's credibility. *My Cousin Vinny* and many other movies have glamorized cross-examination. We apparently love *mano a mano* battles with a climactic outcome, winning or losing. That is a mistake.

The topics cover much more than "lying."

First, you can use cross-examination to advance your client's case other than witness "error." Think of your analysis of which witnesses to call on direct – you may have decided against calling one or more because they have downsides, and you are nervous about others. Think whether your opponent's witnesses may have similar problems. As a general rule, all witnesses have at least one point that can help your narrative. Even your opponent's party witnesses can be forced to concede points useful to your case, either by their documents, prior statements or logic, which they will have to concede to appear to be testifying truthfully. So make sure that you bring out those points on cross. In short, in the context of international arbitration, with its hearing reliance on contemporaneous

[13] Haigh, *supra* n. 11, at 17.
[14] Sheppard, *supra* n. 2, at 5.
[15] Haigh, *supra* n. 11, at 21.

documents, you should "explore ways in which the witness can be used to buttress your client's documents or discredit the opposing party's documents or buttress your client's position on the meaning of those documents."[16] It is a "peril" not to take advantage of such opportunities, even though this is a peril of commission rather than omission.

Second, witness "error" does not necessarily mean lying. The witness can simply have made a mistake.

Once you have chosen the topics, these conventions also allow you to pick the sequence of your cross-examination.[17] This includes the selection of the first topic, which is often one of your most important choices.

Now we come to the device that has helped me think of potential perils of commission in cross-examination.

You obviously "speak" directly to the Tribunal in written submissions – the demand for arbitration and the response; pre-hearing submissions; written direct testimony; and post-hearing submissions. Similarly, your live direct examination involves your speaking to the Tribunal, this time through the witness under the conversations established for direct examination (no leading questions, etc.) Likewise cross-examination is your speaking to the Tribunal through the witness.[18]

Section II illustrates how the conversation device informs the understanding of what will constitute a disaster in cross-examination.

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[16] Laurence Shore, *Cross-Examination without Discovery: Not Blind, but with Blinders*, *in* TAKE THE WITNESS 55, 67 (Lawrence W. Newman & Ben H. Sheppard, Jr. eds., 2010).

[17] As discussed below, following the sequence of the direct is a disaster that you will never inflict on your client.

[18] In addition, I refer to "conversation" because one of my goals as counsel was to try to get judges or the Tribunal to reveal what was on their minds, even/especially if what is on their minds is not favorable (until properly explained!) Thinking of cross-examination as a "conversation" between the lawyer and the Tribunal, with the witness as your medium, promotes this goal of finding out what is on their minds.

First, I address the failed credibility attack. You have "told" the arbitrators that the witness is lying. When you fail to show that, you have made a false statement to the Tribunal. Telling the Tribunal something that is "false" is obviously a problem.

Second, you are rude in your "conversation" with the Tribunal. This covers (a) excessive cross-examination, knowing when enough is enough, and (b) belligerence towards the witness, including tactics such as interrupting the witness or insisting on "yes/no" answers.

Third, you forget that you are telling your client's story. Arbitrators are not in favor of "needless or meandering, ineffective cross-examination."[19] I address two examples. The first is conducting the cross-examination in the sequence of the direct, which runs counter to your ability to structure your cross-examination to promote your client's case. The second is a failure to connect the documents that you are using on cross-examination – not too many please – to your narrative.

II. The Disasters

A. Failed Credibility Attack

The truth, in addition to setting you free, will win cases for your client. Not just because that your client is believed, but if the opposing client is disbelieved. The effect of the disbelief is not limited to the issue at hand. Demonstrated dishonesty can have a widespread effect on your adversary's case. The "principle" – actually more a possibility – from the US jury instruction that "one who testifies falsely about one material fact is likely to testify falsely about everything"[20] does, in my view, apply to how people, including

[19] Haigh, *supra* n. 11, at 25.

[20] The standard civil jury instruction in US cases includes a passage like the following:

> If you find that any witness has willfully testified falsely as to any material fact (that is, as to an important matter) the law permits you to disregard completely the entire testimony of that witness upon the principle that one who falsely testifies about one material fact is likely to testify falsely

arbitrators, decide issues. Do not believe any scholar who tells you it is a logical fallacy to believe that a successful credibility attack will not affect your adversary's case generally.[21]

But that "principle" can work against you just as powerfully. "A failed impeachment is usually worse than no impeachment at all."[22] Actually it is worse than that. Not only will "the lawyer who has unsuccessfully attempted the impeachment look ineffective or overbearing,"[23] but he has told the Tribunal something that was untrue.

Thinking of cross-examination as a "conversation" with the Tribunal has a direct benefit in addressing the peril – you should see readily that if you tell the Tribunal that the witness is lying, you will lose credibility if you fail to demonstrate that in a way that is obvious to the Tribunal. The failed credibility attack is *the* number one peril, in that it undermines your credibility as counsel.

> about everything. You are not required, however, to consider such a witness as totally unworthy of belief. You may accept so much of the witness' testimony as you deem true and disregard what you feel is false. As the sole judges of the facts, you must decide which of the witness you will believe, what portion of the testimony you accept, and what weight you will give to it.

[21] Permit me a "war story" from a bench trial to illustrate this point. The defendant misappropriated two technologies – the first misappropriation was easy to prove (because of the documents, despite the lying testimony) but the damages were low, while the second was more subtle but the damages were very large. In mediation, a scholar in the field explained that it is fallacious to reason that the proof of lying about one issue helps the proof of lying on the second issue. The mediation failed. After cross-examination of the defendant's witness on the first misappropriation, the judge in the bench trial told the defendant that it would be a good idea not to call any of the subsequent defense witnesses on this claim. The next witness, the first on the second misappropriation, answered the first question on cross in a way that differed slightly (but only slightly) from his deposition testimony. In response to a "question" "Well that's not quite what you said at your deposition?", the witness started, "Well, you have to . . . .", the judge cut him off, with a lecture on the importance of the oath, telling the truth and more.

[22] J. William Rowley et al., *Confrontation – Techniques for Impeachment*, in TAKE THE WITNESS 31, 38 (Lawrence W. Newman & Ben H. Sheppard, Jr. eds., 2010).

[23] *Id.*

B. Enough Is Enough

Knowing when to stop cross-examination, either on a particular point or completely is hard (like picking where to start).[24]

You should not belabor points (especially small points) once the Tribunal has understood them. Don't be a bore in your "conversation." The stopping point is when the Tribunal has understood the point made, before you have belabored it too much. "Moreover, by repeatedly hammering the same point you risk presenting the witness with opportunities to qualify, clarify or otherwise dilute an otherwise favorable answer."[25]

In particular, you should not belabor even a successful credibility attack. Many people are very uncomfortable in watching cross-examination that demonstrates the witnesses lying, sometimes especially when he is.

The limit is not easy to gauge even in a bench trial, where there is a single judge. Indeed, judges run the gamut on this issue. For example, one judge thought of cross-examination as a positive

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[24] *See* Hilary Heilbron and Klaus Reichert, *When to Cross-Examine and When to Stop*, *in* TAKE THE WITNESS 127. There is another aspect to the timely ending of cross-examination, namely using up too much time when there are limits on the duration of the proceeding. *See* Richard Kreindler, *Cross-Examination Against the Clock*, *in* TAKE THE WITNESS 113 (Lawrence W. Newman & Ben H. Sheppard, Jr. eds., 2010). My "war story" here involves a vigorous cross-examination and a successful one too – the judge was fascinated and the witness gave up. But when I sat down, I realized that I had used up more of our limited time than I should have. Mea culpa.

[25] Sheppard, *supra* n. 2, at 12.

An interesting topic – not covered by this chapter – is how concerned you should be that the witness "takes back" an "otherwise favorable answer." The "don'ts" of the Commandments presume that such testimony represents a failure on the part of the cross-examiner. But that is true only if the testimony is believed. I shall not recite war stories here to indicate that such testimony can provide a great opportunity. Your own experience may involve seemingly endless minutes when one of your witnesses faces renewed cross-examination (or re-cross-examination) on what seemed like a good "take back" at the time.

benefit,[26] another cut the examination promptly;[27] and yet another never looked up and indeed asked only one question over many years.

It is even harder in the context of international arbitration where those are usually three arbitrators and often the Chair is the primary speaker on the conduct of examination. Moreover, "international arbitrators often attempt to avoid making unnecessary determinations about the credibility of a witness."[28] Even common-law arbitrators "will want to avoid, where possible, explicit declarations that a witness lied or is untrustworthy – especially if that witness is a representative of a party that appointed [the] arbitrator."[29]

You must "effectively reinvent [your] approach with each new arbitral proceeding because of the variable composition of the tribunal and the flexible parameters of procedure."[30] This "reinvented approach" should take into account the "politeness" requirement on your "conversation" as discussed in the next section, but also the obvious "fact" of arbitrator uneasiness of credibility challenges that I have posited here.

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[26] This judge announced: "I find this witness to be totally incredible. Do you have any more questions?" Before I could sit down, he added: "Go on. You will need more support for my credibility findings in the Court of Appeals."

[27] This judge, once the cross point was understood, cut off that particular line. The judge had just been appointed and so this information was new. But the judge informed counsel in chambers at the end of the first day that this was going to be the practice for the entire trial and it was for several subsequent trials over the next many years.

[28] Rowley et al., *supra* n. 22, at 41. I am skeptical of the view that you can obtain information about (one of) the arbitrator's views on cross-examination by an interview before appointment (*See, e.g.,* Hammond, *supra* n. 2, at 96) or by asking the arbitrators after the examination.

[29] Rowley et al., *supra* n. 22, at 41.

[30] Hammond, *supra* n. 2, at 101.

C. Do Not Be Rude

Your "cross examination should be conducted in a civil and respectful manner."[31] You should "ease [your] tone and words."[32]

Polite cross-examination is *not* an oxymoron, even if only because your concern is with your "conversation" with the Tribunal, not with the witness's own feeling.

For the witness, there is little that is satisfactory about the experience. The witness is faced with a series of short, pointed leading questions that are actually simple statements of fact; the witness's answers are topics on which the examiner already knows (and can prove) the answer; the prepared lawyer compels the witness to give those answers, if they are not given; and all the answers are adverse to the witness in some way, such as showing the witness is lying or that he is mistaken, or requiring testimony favorable to the examiner's client. From the witness's point of view, the whole process is very impolite.

But the witness is not the frame of reference in this polite conversation model.

The required politeness relates to the interaction with the Tribunal. You must conduct yourself in a "civil and respectful manner" even as you put the witness through what he views as an inherently intrusive process. You should "test the witness's evidence without worrying about offending the witness – as long as you are not offensive in your manner."[33]

All arbitrators – not just those from the civil-law tradition – will be "put off by aggressive cross-examination," although those from the common-law tradition will give more leeway in the calculus of "fairly aggressive cross-examination when warranted."[34] Cross-examination is "fairly confrontational" – never friendly – but it

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[31] This is quoted as Rule 1 in Rovine, *supra* n. 12, at 89. This Rule and my prohibition against a failed credibility attack should perhaps get joint top billing.

[32] Rovine, *supra* n. 12, at 79.

[33] Shore, *supra* n. 16, at 66.

[34] Haigh, *supra* n. 11, at 19.

should not be "even hostile if necessary"[35] if that hostility violates the civility rule. Forget "arm-waving theatrics."[36] Not only does the witness's hostility "seldom" enhance his credibility, but "for counsel, vitriol should be left for television drama."[37]

I just told you that vitriol does not work in judge litigation in the United States. However, I do not need to convince you of that for this chapter on international arbitration.

Assume that the *mano a mano* model of cross-examination reflects a reality that all American trial lawyers are rude to witnesses in court on cross-examination. Do not follow those base instincts in international arbitration. Do not be one of the experienced litigators who fail "to adjust their (sometimes formidable) courtroom techniques to take into account the different dynamics of the arbitration hearing room."[38] Do not encounter the "well-known difficulties . . . confronted by many common-law advocates in cross-examining witnesses in international arbitrations" in "how aggressive and confrontational a tone and words they should use."[39] Avoid "the approach so often seen in American judicial settings, with lawyers trying their best to destroy the credibility of witnesses, and using harsh words and tones to accomplish that goal"[40] because "many arbitrators, even many with common law backgrounds, may become irritated by what they perceive to be overly aggressive cross-examination."[41] Such irritation – although not a matter of "substance" – may make "a difference in the ultimate disposition of the case," even if that is "perhaps not likely":[42]

> If the arbitrators disfavor harsh tactics, they may also begin to believe, at least as a psychological matter, that the substance

[35] *Id.* at 18.
[36] *Id.* at 21.
[37] *Id.* at 22.
[38] Hammond, *supra* n. 2 at 94.
[39] Rovine, *supra* n. 12 at 77.
[40] *Id.*
[41] *Id.* at 78.
[42] *Id.*

> of the witness's testimony . . . has not been demonstrated to be weak or non-credible.[43]

Accept advice akin to Pascal's wager:

> Certainly the prudent common law advocate should take no chances or risks that are totally unnecessary in any event.[44]

I dwell on this alleged contrast, not because of the system I grew up in, but to defend the conceit I have put forward. Rudeness of the type assumed of a trial lawyer is not an effective trial tactic – it is inconsistent with the conversation with the Tribunal that you are trying to have. The "irritated" arbitrator(s) are, at best, not listening as carefully as they would otherwise have been.

Indeed, I would go further to advise you against two further habits that fail the politeness requirement.

As mentioned above, cross-examination has its own communications protocols designed to "control" the witness. What should you do if the witness does not follow the protocol, and volunteers something in response to your leading question, which presumed a "yes/no" answer?

First, lawyers often interrupt a witness's answer on the ground that it goes beyond the answer sought in the leading question. Do not do this.

You may find that your Tribunal (like some judges) does not appreciate your taking on the traffic-cop role. In which case, your recalcitrant witness will start to "misbehave" more after the Chair has admonished you. Moreover, you are likely going to get an objection from opposing counsel, with a claim that you are harassing the witness. This may lead to colloquy that distracts from the flow of your examination. The issue may then go from a partisan witness to a rude cross-examination, not a good trade-off. In addition, an interruption makes you look scared of the volunteered information,

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[43] *Id.*
[44] *Id.*

which is also a mistake. Quarrelling with the witness is "ineffective;" signals that "the evidence is important and damaging;" and "risks alienating the tribunal and may find the tribunal sustaining [the] . . . objection that the questions were 'argumentative.'"[45] Most importantly, interruption is rude and is inconsistent with the model of polite conversation with the Tribunal.

You deal with the witness who volunteers by immediately asking the same question again. You are trying to show that the witness is a partisan who is not following the rules. You get that by focusing the Tribunal on the non-responsiveness rather than shutting the witness up.[46]

Second, do not instruct the witness to give only "yes/no" answers. This is a special case of the interruption error – and even more obviously wrong.

You are even more likely to draw an adverse comment from the Tribunal if you give a "yes/no" instruction. That is because the tactic will often be viewed as unfair. Moreover, you are even more likely to draw an objection from opposing counsel (or the witness). If you tell the witness, please answer any questions "yes" or "no," what do you do if the witness says, "I'll try, provided that the 'yes/no' gives a full and fair answer?" Do you say, "Give me an answer that is not full and fair and your counsel can expand on redirect"? The answer to that question had better be "no" rather than "yes." Do not do it. Controlling the witness or cross-examination is important, which is why you usually use leading questions. (Note the word "usually"!) If, however, the witness, despite your skillful examination, does not give a "yes" or "no" answer, you will be thought to be unfair (and perhaps presumptuous) to interrupt or if you give instructions to the witness

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[45] Sheppard, *supra* n. 2, at 11.

[46] The volunteered information is presumably not helpful, which brings us again to the worry about the risk of "inadvertently eliciting damaging testimony from an adverse witness during cross-examination" *See id.* at 4. As discussed above, this chapter does not address the opportunity for further cross-examination that a new "explanation" can provide. But you might take that opportunity here, after you have brought out that the witness is partisan.

to answer with only "yes" or "no." It is more important to ask follow-up questions (including sometimes to repeat the question) to establish that the witness is being evasive if that is indeed the case.

So I would go further than to identify a "potentially delicate issue to be weighed in each case" because the Tribunal may "believe it fair to allow the witness to offer an explanation at the time rather than to wait for follow-up questions from opposing counsel."[47] Asking the question again, rather than fighting with the witness, is much more likely to get you to the result you want – namely a "witness who repeatedly volunteers more than she/he has been asked" and thus tries "the patience of the tribunal and lose[s] credibility in the process."[48]

In short, you are trying to get to the Tribunal through the witness. Your goal is not to argue *with* the witness (or opposing counsel), which is what the interruption and, the "yes/no" instruction will deteriorate into – a digression from your conversation with the Tribunal.

Your focusing on the "conversation" with the Tribunal may provide another benefit. An underappreciated facet of cross-examination is getting an arbitrator to ask questions; "seasoned international practioners develop a strong sense of how best to 'stay out of the way' of arbitrators who take an active role in putting questions" to the witness.[49] Although arbitrator questions are not cross-examination,[50] they have several great advantages. They are generally not objected to by opposing counsel; witnesses tend to answer those questions more openly; and arbitrators tend to weigh the answers more heavily. Such questions often (but not always) lead to interesting answers. For example, they avoid the narrow structures of the Commandments, such as, Never Ask a Why Question. The colloquy to this should be very careful in following up on a topic that has involved arbitrator questions that produce satisfactory testimony

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47 *Id.* at 7-8.

48 *Id.* at 8.

49 Rovine, *supra* n. 12, at 98.

50 Cremades & Cairns, *supra* n. 7, at 223.

on the point. Do not display your superior technique to go from a satisfactory answer to a great one. Remember the perfect answer is the enemy of the good answer.[51]

D. Do Not Follow the Sequence of the Direct

Opposing counsel has structured the witness statement in a way to maximize the impact for the opposition. The framework of the direct is generally "unfavorable to your client's position."[52]

Following the sequence of the direct is like asking the witness to repeat the direct testimony – it is "counter-productive because it emphasizes and strengthens the direct testimony."[53] Since the sequence of cross-examination is in your control, you would *not* structure your cross-examination to follow that sequence, as you would be using repetition to underscore your adversary's points. Repetition is an important rhetorical device of persuasion.[54]

Indeed, a perhaps obligatory war story, it illustrates this point. The purpose of the repetition was to alert the judge, who knew this principle, and came to understand that the expert had omitted a vital part of his opinion, which actually refuted his direct testimony. The upshot was the question, "You were trying to deceive the Court

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[51] Another "war story." The Chair, after discussions with the other two of us, told the claimant that the Tribunal did not think that a proposed witness would be useful. The claimant called the witness anyway and the respondent started cross-examination. The Chair interrupted and asked a few questions to elicit the answers that underlay the view that the witness would not be useful. Respondent's counsel resumed cross-examination with what probably would have been better questions than the Chair's. Fortunately, one of his colleagues pulled on his jacket to get him to sit down before the Chair spoke again.

[52] Shore, *supra* n. 16, at 67.

[53] Sheppard, *supra* n. 2, at 11.

[54] My old boss, a great trial lawyer, used to talk about the Baptist preacher whose sermon was structured as follows:

> I am going to tell you the sky is blue;
> I am telling you the sky is blue; and
> I have told you the sky is blue.

weren't you?"; no objection from counsel, an answer, and a comment from the judge, "I don't hear a very convincing denial."[55]

Forget any such black swan. Never follow the order of the direct.

E. Do Not Overwhelm the Tribunal with "Paper"

Paper (if I may refer to an obsolescent technology) is everywhere in dispute resolution. Contemporaneous documents are important in international arbitration. Indeed, the literature suggests that the civil law tradition places greater weight on the business records than on party testimony.[56]

Technology in the workplace – is copying, word processing, email and other technologies that grandchildren could help us with – has vastly increased the number of "documents" (and the cost of proceedings).

Do not allow the ready availability of "paper" to undermine your communication with the Tribunal in the cross-examination. Make sure that the Tribunal is following your case of documents with the witness – they are your audience! Given the volume of documents, it may take some time and effort to follow your questions about particular exhibits.[57] Have they found the document?

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[55] The trial had lasted many weeks and was finally scheduled to end on a Friday. On the Thursday, the plaintiff provided a rebuttal expert report, addressing eight financial factors in two interlinked models, each of which was necessary under the expert's theory, and provided numerous trial exhibits in sequence. By the time of the testimony, the witness realized the error in one model and testified only on the other (with the result that the trial exhibit numbers were not sequential.) The cross-examination took the witness through his direct step-by- step, stressing the non-sequential trial exhibit numbers. The judge became increasingly restive and then on upon the question, "Where are the missing exhibits?", the judge interjected, "What missing exhibits? Excuse me. I suspect I am about to find out."

[56] "[B]ecause most witnesses in commercial arbitration are representatives of the parties, there is less need to demonstrate the bias of those witnesses to civil law arbitrators who are accustomed to presuming such bias among party representatives." Robert H. Smit, *Cross-Examining Witnesses before Civil Law Arbitrators*, *in* TAKE THE WITNESS 243, 249.

[57] Shore, *supra* n. 16, at 68.

But more importantly, do not overwhelm the Tribunal by using far too many documents. Keep in mind that "arbitrators can read and may resent wholesale readings from documents during cross-examination."[58]

Although American trial lawyers love documents, the good ones will really tell you that a few excellent documents are of much more use than numerous marginal ones to make clear the purpose you are reading the document for.

– Did you show an inconsistency?

– Did you try to refresh the witness' recollection?

– Did you get the witness to adopt the passage read?

You may well lose the attention of your arbitrators when reading from the documents without one of the above purposes.

[58] Sheppard, *supra* n. 2, at 15.