Chapter 1: The Importance of Witnesses: Where the Documents End

Source

- **Chapter 1: The Importance of Witnesses: Where the Documents End** in Ragnar Harbst , A Counsel's Guide to Examining and Preparing Witnesses in International Arbitration, (© Kluwer Law International; Kluwer Law International 2015) pp. 1 - 4

Witnesses play a crucial role in international arbitration. This statement seems so obvious that it is very hard to challenge; who would think that witnesses are not important? However, these instances of doubt happen since commercial arbitration is heavily paper-based. To a large extent, the parties will rely on documents to argue their respective cases. Arbitration is therefore different from, let us say, a typical personal injury litigation where the first contact between the parties was when A hit B with his car. For such cases, it is obvious that what people saw and heard is of utmost importance. But in commercial arbitration, the situation is very different.

First of all, the parties are linked by a contract. In most cases, this will be a complex contract with a vast array of annexes and appendices. On top of that, the parties will have exchanged a plethora of faxes, letters, emails, memoranda, etc. It is not rare therefore for parties and their counsel to deal with literally thousands of documents. Accordingly, the parties share a common history that is well documented in writing. So where is the need for witnesses then? If everything has been recorded and put into writing, there should be no need for additional oral testimony. But in practice, this is not true. There is always some point where the documents end, some detail or arrangement that was not put into writing. Or things may have been put into writing, but the parties have different opinions on the meaning of this written record. Or there are conflicting documents, because the parties have documented their respective, differing opinions in the correspondence that they exchanged. And this may be the very reason why parties enter into arbitral proceedings.

When the parties wish to find out who among them is right, witnesses serve an important purpose. They can be the weight that tips the scale into one or another direction. Where the documents end, the parties offer witnesses. Beyond that, another important area where witness testimony comes into play is expert witness testimony. Taking as an example a typical construction project, parties will often argue over allegedly defective construction works, or a delay that occurred in the project. While page "1"doing so, the parties will frequently rely on expert witnesses to prove that the works are/are not defective, or that certain acts or omissions by the other side caused a critical delay in the project. Similarly, arbitrations that evolve after a mergers and acquisitions (M&A) transaction often include expert witnesses, for example, to analyze whether an adjustment to the purchase price is required. In both cases, expert witness testimony often becomes the lynchpin of the entire arbitration.

There is a second reason why witness testimony is important: the live testimony of a witness can paint a much more vivid picture of what has happened than any document could. It provides the tribunal with firsthand information, directly from the people who were involved when the seeds of the dispute were first planted. Arbitrators who have read hundreds of pages of pleadings and reviewed hundreds of exhibits look for indicators that will enable them to decide which of the versions presented to them is the correct one. In this situation, the spoken or written word of a witness stands out from the multitude of documents before them in terms of

uniqueness and authenticity. In this regard, the salience of oral testimony cannot be overestimated. To state an example: A person is planning her summer holiday and she eventually picks a nice five-star hotel on a picturesque Greek island. Her decision was preceded by solid research. Three travel guides were checked, which all recommended the hotel without reservations. A recent issue of a travel magazine praised the hotel to the skies. She also consulted an online rating platform for hotels, which contained hardly any criticism for the hotel (and this is rare). On the way to the travel agent, she meets a friend and mentions her chosen vacation spot. The friend looks at her, slightly shocked, and gives her a five-minute, nonstop account of her last holiday in this very hotel. Unremarkable food, overpriced drinks, bad service, dirty linen and walls that are anything but soundproof. Quite clearly and ardently, the friend sends the message that it was the worst holiday that she and her family had taken, ever. Will the traveler-to-be still go to the travel agent and book the hotel? Odds are that she will not. Even if the dissatisfied traveler is not her best friend, and is not an experienced traveler, it is likely that she will at least have second thoughts, if not cancel the trip completely. The reason is that the vividness and emotional impact of the friend's "live testimony" renders her report credible.

Psychologists talk about the concept of availability heuristics, which postulates that because an example is easily recalled, or is mentally immediately available, this example may be considered as representative of the whole, rather than just as a single example in a range of data.[1] In the above scenario, taking all the reports that our traveler had studied together, her decision was probably based on information by more than a hundred guests. Still, the vivid account of her friend, statistically only 1 percent, will have a greater impact on her final decision. The same is true for a witness' vivid account of past events. This type of account stands out from the documents and can have a great impact on an arbitrator's decision. Studies have shown that decision makers are more strongly affected by vivid information than by pallid, abstract or page"2"statistical information.[2] In this sense, witness evidence has commonalities with storytelling, not in the sense of fabricated information, but in the sense of an appealing account of real events. Well-presented witness evidence can motivate the arbitrators to come down on one side rather than on the other, and give them the comforting feeling that they have made the right decision.

There is a third reason why witness testimony is important in arbitration. Arbitral tribunals have a tendency to hear the witnesses proffered by the parties (rather than refuse to hear them due to, for example, lack of relevance). One of the fundamental rules in arbitration is that each party must be granted a reasonable opportunity to present its case. In fact, the denial of *natural justice*is one of the very few reasons that a losing party can use to attack the award. Arbitrators are therefore careful, sometimes overly careful, to avoid accusations that the right to be heard was not granted; no arbitrator likes his or her decision to be quashed. In practice, tribunals therefore tend to hear most of the witnesses named by the parties,[3] even though the testimony may not be strictly relevant in order to decide the case. And here, a second psychological phenomenon is employed. Human beings strive for consistency. Once a choice is made, humans show a tendency to behave in a way that is consistent with, and justifies, this earlier decision.[4] So, if a tribunal decided to hear a witness, it will tend to justify this decision by attributing at least some evidentiary weight to the testimony in their decision-making. In other words, it is difficult for a tribunal to hear witnesses in the first place and then ignore their testimony as irrelevant.

These described tendencies reinforce each other. First, arbitral tribunals are likely to hear witnesses that are offered by the parties. Second, a vivid, live testimony can influence the arbitrators, irrespective of the large amounts of documents. Third, the tribunal is likely to attribute some evidentiary weight to the testimony. A handful of individual testimonials can outweigh an avalanche of documents. Against this background, any counsel in arbitration is well advised to take the task of preparing and examining witnesses seriously.

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[1] Amos Tversky and Daniel Kahneman: *Availability: A Heuristic for Judging Frequency and Probability* (1973) in *Cognitive Psychology 4*, 207–232; Scott Plous, *The Psychology of Judgment and Decision Making* (1993), 225.
[2] Plous, *The Psychology of Judgment and Decision Making* (1993), 126.
[3] Michael Bühler and Carroll Dorgan, "Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbitration," in the *J, of Intl Arbitration,* Issue 1 (2000), 17.
[4] Robert Cialdini, *Influence: The Psychology of Persuasion* (1993), 57.

Chapter 6: Direct Examination

Source

- **Chapter 6: Direct Examination** in Ragnar Harbst , A Counsel's Guide to Examining and Preparing Witnesses in International Arbitration, (© Kluwer Law International; Kluwer Law International 2015) pp. 35 - 66

After it Happened, it Becomes a Story

Direct examination is a neglected art. Today, oral evidence-in-chief is frequently replaced by witness statements. If this is the case, the written witness statement simply stands as direct evidence, without the witness presenting his or her testimony during the hearing. The witness' oral examination then starts directly with cross-examination. It is therefore fair to say that the skill of drafting a witness statement is today more essential in terms of direct testimony than the skill of carrying out an oral examination-in-chief;[(1)] still, this chapter will look into the neglected art of live direct examination.

Direct examination is often regarded as easy and/or boring. After all, the lawyer carrying out the direct examination more or less knows what the witness is going to state, and the arbitrators are aware that the direct testimony is most likely prepared. As a result, quite a few arbitrators pay little attention to direct examination; they anticipate that direct testimony is scripted and to a large extent influenced by what the party offering the witness expects the witness to testify. This is one of the reasons why "live" direct testimony is often dispensed with in favor of written statements. And if a direct examination is carried out, it is often cut down to a small amount of time, say fifteen or thirty minutes. In contrast, cross-examination is more challenging, more dynamic and exciting, both for the cross-examiner and the arbitrators (not to mention the witness). While this is certainly correct, it is also true that cases are rarely won on cross-examination. Lawyers should always strive to win their cases with their own witnesses rather than with the other side's witnesses. If a lawyer presents direct testimony in a way giving rise to the impression that the direct examination is a staged, compulsory exercise, it will neither be understandable, nor convincing, nor memorable. But this is exactly what the presentation of direct evidence has to be.

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Understandable, Convincing and Memorable

The presentation of direct evidence is a unique opportunity to present the client's case, or better, the client's story. The word "story" is not used in the sense of fabricated fiction. It is self-evident that no lawyer must influence a witness, put words in his or her mouth, or make him or her omit important information. But the same truth can either be presented as an incoherent,

boring and instantly forgettable jumble, or it can be brought about as a structured, interesting, meaningful and even captivating piece of information.

In an arbitration, the setting for direct testimony is quite different from the direct testimony in common law courtrooms. There, the witnesses traditionally play a major role in informing the factfinder, be it a judge or a jury, of the facts of the case. Prior to the hearing, the parties often set out their case in the form of skeleton arguments only (a bare bones summary of the case in which there is little room for storytelling). When the judges or the jury meet the witnesses, this is often the first time they are confronted with the case story (which is why witness examination in the common law system traditionally covers more than just the contentious issues that are relevant or the case).

In arbitration, the hearing phase is generally preceded by the exchange of extensive written submissions, in general, two submissions by each party. A good submission will already tell the case story. The direct testimony is therefore not intended to present the story for the first time, but to confirm and to corroborate it. At this stage, it is important to pause and reflect on some psychology of decision-making. It has been shown that humans are subject to certain *cognitive biases* (a cognitive bias is the tendency of humans to think in certain ways that can lead to deviations from rationality and deductive decision-making). An important cognitive bias is the so-called *confirmation bias*, i.e., the tendency to search for or interpret information in a way that confirms one's beliefs and hypotheses. Once an individual, in this case an arbitrator, has a certain picture in his or her mind, he or she will rather look for information that fits into this picture than for information falsifying the image. This phenomenon is called *positive hypothesis testing*.[2]Accordingly, humans display a confirmation bias, i.e., they try to generate arguments confirming a hypothesis. Waites and Lawrence have aptly described what goes on in the arbitrator's mind as follows:

A typical arbitrator concludes the initial phase with a single dominant story in mind… a sizeable percentage of arbitrators have established a clear leaning by the end of the opening statement (prior to any exposure to witnesses or evidence). This would mean that for most arbitrators, the actual arbitration presentation is a process of filtering through the evidence to test their individual hypothesis about the case – to either confirm or to alter their original notion of what the case story really is... Arbitrators…will make every effort to fit their perceptions of the facts and circumstances of the case into the story they have formed… Once a narrative has become firmly visualized, arbitrators will rarely change their opinions about page "36"what happened although they will occasionally change their minds about how the events in the case should be legally classified.[3]

Waites and Lawrence are common lawyers, and therefore refer to the opening statement as the point of time after which the arbitrators will have framed an opinion. In civil law arbitration, the arbitrator will establish a clean leaning not only by the end of the opening statement, but already after having read the parties' written submissions. It is therefore vital to compose readable and persuasive submissions because both parties are competing to present the story that will settle in the arbitrators' minds. If the arbitrator prefers one side's submission, this story will function as a case hypothesis in his or her mind. A person with a certain hypothesis in his or her head, though, is more likely to search for information confirming this story than for information falsifying the story. In his book *Thinking, Fast and Slow*, Kahneman relates the following example of the confirmation bias. A person vaguely knowing another person called Sam will think differently depending on whether the question asked is either "*Is Sam friendly?"* or "*Is Sam unfriendly?"* As Kahneman states:

A deliberate search for confirming evidence, known as positive test strategy, is also how System 2 tests a hypothesis. Contrary to the rules of philosophers of science, who advise testing hypotheses by trying to refute them, people (and scientists, quite often) seek data that are likely to be compatible with the beliefs they currently hold.[4]

This is the objective every trial lawyer must try to achieve: get the arbitrators to search for information corroborating one's own story rather than for information corroborating the opponent's story. Naturally, if the case is hopeless, even a splendid submission will not effect a

change and will most likely not win the case. On the other end, if the case is watertight on the facts and the law, even a badly drafted brief will not ruin it. But in most cases, the odds will be more balanced; otherwise, the parties would not go the length of arbitration proceedings. If so, the lawyer's drafting skills may well make a difference.

When it comes to the hearing, the witnesses will, hopefully, testify in a manner consistent and compatible with the story frame presented in the submissions. If they do, the confirmation bias will work in the lawyer's favor. If the witness presents live direct testimony in a persuasive manner, such evidence serves as the hypothesis against which further examination will be tested. Before the evidentiary hearing, the tribunal was a distant observer and only obtained information in writing. There may have been a case management conference, or a pre-hearing conference, but these focused on procedural aspects and did not go to the substance of the case. Now, the tribunal is to meet the players who were there when the events in issue unfolded. The arbitrators are going to receive firsthand information, bringing the transaction, the project, the deal, etc., to life. If the lawyer is permitted to carry out a live direct examination, it must be the counsel's objective to create a vivid, detailed and lasting page "37"picture in the arbitrator's minds. To do so requires careful preparation. What renders this task so difficult in arbitration is that the story that is to be told in the direct examination is, to a large extent, the same as it was in the written submissions. But this time, it is not the lawyer who is telling the story, it is the witness. During direct examination, the witness is the source of information, and all eyes are on him or her. Just like a prompter in a theatre, the lawyer is there to provide the right cues and to prevent the witness from wandering off track or from leaving out important information. The witness will not always conduct him- or herself according to the lawyer's wishes. Sometimes, he or she may be inarticulate, evasive, apologetic, snobby or arrogant, frightened, argumentative etc. In such a situation, presenting direct testimony is both challenging and exciting.

As said, a good direct examination has a lot in common with the art of telling a good story. But before getting into advice on developing the story, it is necessary to look at some basics of direct examination.

1. THE TOOLS OR THE TRADE: TECHNIQUES IN DIRECT EXAMINATION

1.1 . Non-leading Questions for the Crucial Parts of the Examination

The ground rule for asking questions during the direct examination is simple: Use non-leading questions. A non-leading question is open-ended and does not suggest or contain the information that the examiner is looking for. While a leading question can be answered by "yes" or "no," an open question requires the respondent to provide information. Non-leading questions usually begin with one of the following words:

How?

When?

What?

Where?

Why?

Who?

In common law jurisdictions, one finds rules of evidence that govern the admissibility of questions during direct examination. For instance, 611(c) of the US Federal Rules of Evidence provides:

Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony.

In arbitration, there is no provision such as 611(c) Federal Rules of Evidence, although some guidance can be obtained from the IBA Rules. According to Article 8(2) IBA Rules, the questions to a witness during direct and redirect testimony may not be unreasonably leading. But the IBA Rules are not binding unless they are incorporated in the arbitration by agreement. Why is it still advisable to follow the "no unreasonably page "38"leading questions during direct examination" rule? The rationale behind the rule applies also in arbitration: A leading question is suggestive of its answer, or rather, of the answer that the questioner wishes to obtain:

Q. Isn't it correct that you used all reasonable efforts to prevent any further damage by informing the authorities immediately?

A. Yes.

The evidentiary value of such witness testimony is limited because the real "testimony" is the lawyer's leading question, not the witness' "Yes" answer.

Irrespective of whether the IBA Rules are incorporated in the proceedings or not, lawyers are therefore well advised to heed the IBA Rule's advice not to ask questions during direct examination that are unreasonably leading. To put it the other way around: It is fine to ask reasonably leading questions during direct examination. What is reasonably leading then? First, asking leading questions is reasonable when the information that the question concerns is not in dispute. The opposing counsel would look foolish if he or she objected to the following leading question during a direct examination: "*Mrs. White, you live in 24 Oxford Street, correct?"*Asking leading questions on non-contentious issues simply saves time and thus furthers procedural efficiency. To give another example: Assuming that the witness examination centers on certain statements that allegedly were made during a meeting on April 4, 2002, and assuming further that the date of the meeting is not in issue. If the witness refers to "*the meeting*," the lawyer may clarify the answer by asking "*You are referring to the meeting of April 4, 2002, correct?*" This question is clearly leading, but clearly unproblematic, since it simply helps ensure that everybody is on the same page.

Is it permissible to ask leading questions on contentious issues that go the heart of the case? As said, there is no steadfast rule disallowing leading questions. Even if the IBA Rules are incorporated, there is only the soft provision in Article 8(2). At the end of the day, it will depend on the arbitral tribunal whether it will interfere with leading questions on direct, in particular if an objection by the other side is raised. A tribunal is more likely to do so if it comprises common law practitioners. But even then, arbitral tribunals tend to give questioners some leeway in this regard. Rather than formally disallowing such questions, most arbitral tribunals prefer to let the examination continue and take the leading nature of the questioning into account when assessing the evidentiary value of a certain statement. And the evidentiary value is certainly reduced if the crucial testimony is, in essence, provided by the "asking" lawyer.

What should the lawyer do if the other side is leading the witness throughout the direct examination and the tribunal does not step in, should he or she object? As so often in arbitration, in the absence of strict rules, the lawyer needs to rely on his or her instincts. Will the tribunal be sympathetic to such an objection, or will it be puzzled because the tribunal itself is not familiar with the "no leading questions on direct" rule? In any event, histrionically rising from the chair and shouting "Objection!" ought to be avoided. Rather, the lawyer should step in politely and draw the tribunal's attention to the fact that the opposing counsel's questions are suggestive of the answers. The lawyer can further respectfully invite the tribunal to take such continuous use of page "39"leading questions into account when evaluating the evidence. Whether the tribunal will do so then remains to be seen. But at least, such soft objection helps raise the tribunal's awareness of the direct examiner's style of questioning.

Why use leading questions at all during direct examination? Sometimes, a leading question is the kind of guidance that a witness needs to stay calm, on track and concentrated. If he or she

is suddenly overcome by stage fright or has a blackout, a leading question can help the witness refocus. Sometimes, the lawyer may also want to make sure that a certain issue is reflected in the transcript so that the statement can be quoted in the post-hearing submission. If so, it is arguably better to have the statement in the transcript as an affirmed leading question rather than not at all.

If the lawyer has reason to believe that the tribunal dislikes the use of leading questions, or if he or she has used some leading questions before, pseudo-non-leading questions can help. Instead of asking:

Is it correct that you notified the disruption immediately to the engineer?

the following question can be asked:

Did you inform the engineer immediately after the accident or did you wait until the next monthly site meeting?

If one defines a leading question as a question that suggests its own answer, this is also a leading question, because it clearly points to an immediate information (if the witness is familiar with the facts of case and knows that a timely notification is of essence). But in other people's definition, a leading question is only one that can be answered by "yes" or "no," by which standard the above question qualifies as non-leading.

If the lawyer feels confident that the witness will understand the "hint," he or she can also go for an incomplete leading question, i.e., one that does not include the answer, even if it is still suggestive of the answer:

Q. When the disruption occurred, did you wait until the next site meeting before you informed the engineer?

A. No, I didn't. In fact I wrote to the engineer the next day.

There are four basic patterns of asking questions, and making use of all of them will render the examiner's style of questioning less monotonous (especially when reading the transcript at a later point in time):

Direct: When did you leave the meeting?

Invitation: Would you please tell us when you left the meeting?

Command: Tell us when you left the meeting.

Asking for confirmation: You left the meeting at 11 a.m., is that correct?

The last question, of course, is leading, but as said, a reasonable use of this format is fine.

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Starting each question with "*and*" (*And when did you leave the meeting? And what happened afterwards? And what did you do next?*) should be avoided. It is easy to forget about this in practice, and one will only find out when receiving the transcript how dull and repetitive the questioning sounded.

1.2 . Keeping One's Eye on the Witness and Listening Carefully

Direct examination is different from normal conversation, or a normal question-and-answer situation. During a direct examination, the examiner usually knows the answer in advance. While this fact is known to all participants, including the arbitrators, it is still necessary to respect the typical setup of a regular Q&A scenario. Otherwise, the examiner will damage the credibility of the direct examination. He or she must therefore avoid the temptation to go back to the pad and prepare for the next question while the witness is still in the midst of his or her answer. Once the examiner has put a question to the witness, he or she must listen attentively to the answer. When doing so, it is best to keep one's eyes on the witness, not only on the arbitrators. An examiner who constantly focuses on the arbitrators during direct examination underlines that he or she already knows the answer and is now all too eager to find out what kind of impression the witness' answer is making on the tribunal. What is more, if the examiner does not listen attentively, a slip of the tongue or an ambiguity in the testimony may escape his or her attention. If it is noticed that the witness made a mistake (e.g., confused a date or a figure), one should let the witness finish the sentence and afterwards gently step in:

A: We agreed on a price of 30 million Euro. After the terms were agreed, we met again two weeks later to negotiate the draft contract.

Q: Let me stop you here for a second, what was the agreed price you said?

If the witness does not get the "open" clue, the examiner may have to use the pseudo-non-leading question:

A: As I said, 30 million.

Q: Is that three-zero, or rather one-three, as in thirteen?

A: Yes, sorry, my mistake. 13 million it is.

Cutting short a witness ought to be avoided to the extent possible. In particular during the direct examination, where time is usually scarce and where the examiner can anticipate the answers, there is a danger that he or she will jump to the next issue prematurely in order to make good time. While the examiner knows the answer, the tribunal does not, and only the tribunal counts. The examiner must therefore let the witness finish and give the tribunal some time to breathe and to digest the answer before moving on.

1.3 . Avoid Getting Ahead of the Tribunal: Keep a Leisurely Pace

Pace is important. The examination must be carried out at a speed with which the witness feels comfortable. But it is also important to choose a tempo that the tribunal is comfortable with. Almost every speaker underestimates the amount of time the audience required to understand the information and to have it sink in. Virtually no speaker goes too slowly when presenting, but going too fast is a common disease. The danger of over-pacing is even higher in situations where the presenter knows the subject matter of the presentation all too well; and this is exactly the situation during the direct examination. The witness knows the events he or she is referring to extremely well, which is why the person was chosen as a witness in the first place. The witness therefore usually overestimates how much the tribunal already knows. Consequently, the witness is likely to adopt a speech rhythm that is too fast for the arbitrators. The examiner cannot simply count on the witness to get the pace right; rather, the witness must rely on the examiner to determine the right pace. The primary place to deal with speech rate is the preparation before the hearing. But it may also be helpful to agree on a pointer with the witness, signaling him or her to go slower. Such a pointer can be, for instance, a reference to the court reporter ("*Sorry to interrupt you, Mr. Smith, but your answers are probably too fast for the transcript. Please try to go slower*."). The most natural way of controlling the witness' tempo is to be his or her role model. If the lawyer is able to build *rapport* with the witness, the witness will mirror the examiner's behavior. In psychology, rapport describes a harmonious relationship in

which the people concerned understand each other and communicate well. Research has shown that a person will get into a rhythm with another person to whom he or she is linked by rapport and mirror that person's behavior.[5] Mirroring can, for instance, affect a person's posture. A person who converses with another person with whom he or she enjoys a close and trusting relationship will notice that the other person will "copy" his or her posture, i.e., the way he or she stands, crosses his or her arms, touch his or her face, etc., during a conversation. The same holds true for tone and tempo. If the examiner manages to build rapport with a witness, he or she will match the tone, tempo, inflection and volume of the examiner's voice.

1.4 . Identifying Relevant Documents Properly

It is often the little things that can add to the nervousness of a witness, the things the examiner may not think about in advance. One of those issues is the proper introduction of and referencing to exhibits. In a direct examination, it frequently occurs that the witness – and thus everybody else in the room – will look at certain documents that were submitted to the record (new documents will usually not be allowed). The examiner may do so because he or she would like the witness to explain his or her interpretation of a certain document. Or the examiner may simply want to bring the contents of the document to the arbitrators' attention. In larger arbitrations, there may page "42"be hundreds or even thousands of exhibits. Even if the examiner took great care in introducing and explaining relevant documents in the submissions, he or she cannot count on the arbitrators having fully read and understood the significance of all the documents. In direct examination, the lawyer has another chance to revisit certain key documents and to make sure that the arbitrators will look at them, and put them into the proper context. However, hearing transcripts abound with episodes of confusion between the arbitrators, opposing counsel, the court reporter and witnesses about the identity of the document referred to by the examiner. Depending on the witness' state of mind, such minor perplexities unnecessarily increase his or her level of anxiety (and the examiner appears confused and lacking control). The danger can be avoided by establishing a routine for introducing documents. In larger cases, it is often impractical to refer to documents in the original files, simply because there is a large number of such files. Even if the examiner clearly identifies a document that he or she wishes to look at, such as in the below sentence, the ensuing search for the document will waste precious time:

Can I direct your attention to what is marked as Exhibit C 214?

All participants will have to locate the correct file. And once they have done so, they will have to find the correct exhibit. Even if the files are neatly paginated and organized, it will take time until everybody is, literally, on the same page (especially taking into account that the opposing side has no interest in being particularly fast in finding the page). The weakest link in the chain counts; if just one of the individuals turns out to be particularly inept in finding the document, the examiner will lose minutes. All this confusion adds to the witness' nervousness, and eats into the time available for the examination. Unless the number of documents the examiner intends to use is limited, it is advisable to prepare a witness bundle. A witness bundle is a binder containing a collection of those documents on the record (no new documents) that the examiner intends to use during the direct examination.[6] For ease of reference, the documents should be filed under tabs that are continuously numbered (not the exhibit numbers, but "ordinary" numbers starting at "1"). Printing the bundle in the A5 format is also worth considering. Space on the desks in the hearing room will be limited and A5-sized documents are easier to handle.

In order to avoid squabbles about the bundle's contents, it is advisable to include a table of contents and a synopsis at the beginning of the binder, linking the tab numbers to the documents and the exhibit numbers. This can look as follows:


ABC Ltd.

Table 6.1 Table of Contents of a Witness Bundle

Tab	*Document*	*Exhibit Number*
1	Letter by Claimant to Respondent dated May 6, 2013	C 5
2	Email by Respondent to Claimant dated June 7, 2013	C 11
3	PowerPoint Presentation given during Site Meeting on July 4, 2013	R 5
4	Minutes of Meeting for High Level Management Meeting dated August 7, 2013	C 85

It is necessary to prepare copies of the witness bundles for all relevant participants (the arbitrators, the witness, one or two copies for the other side, one for the court reporter). Using these bundles, all participants will be able to locate the relevant documents in no time. Still, it is advisable to properly introduce the document. If a reference is simply made to "Tab 5," it will take some time until everybody realizes which document the witness is looking at. An introduction along the following lines is more suitable:

Please turn to Tab 2 of the witness bundle. This is an e-mail by Respondent to Claimant dated June 7, 2013, submitted as Exhibit C 11.

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Or

If you could turn to tab 4, please. For the record, these are the minutes of meeting for the High Level Meeting dated August 7, 2013, submitted as Exhibit C 85.

Even if an introduction such as this takes a bit more time, it eventually saves time because the arbitrators will be able to locate the document faster. This method also has the following advantage: After the hearing, the parties will usually be given the opportunity to comment on the evidentiary hearing by way of post-hearing submissions. The main purpose of post-hearing submissions is to show that, and how, the hearing has confirmed the own case theory. One of the most convincing strategies with which to do so is to quote from the hearing transcripts.[7] The most convincing quotes are those that do not have to be explained, completed and redacted (e.g., by square brackets explaining what document tab 5 actually is), but can be quoted in full. If the transcript clearly explains and identifies the document that was examined, no further explanations outside the quote are necessary.

Some tribunals, in particular in arbitrations with a strong common law link, instruct the parties to prepare core bundles including the most relevant documents that were submitted to the record from both sides. If such core bundles are reasonably succinct and neatly arranged, they can be used in lieu of witness bundles. Experience shows, however, that such core bundles also eventually assume proportions that render them unsuitable as witness bundles. Still, some arbitrators prefer to use the same source, e.g., core bundles, throughout the hearing for all witnesses in order to be able to make notes on the same copy of the document if such a document is testified on by more than one witness. The advantage – for the arbitrator – is that all notes are then contained in one set of documents, and not several sets of witness bundles prepared by both parties. Still, the overriding objective ought to be that the examination is not disrupted by the organization of the documents. If neatly arranged witness bundles serve this purpose, no arbitrator should object.

1.5 . "Can I Just Clarify with the Witness … ": Being Prepared for Interruptions

In a by-the-book direct examination, the stage should be filled by the witness and the examiner. The examiner provides the prompts, the witness provides the answers. But practice can turn out to be different. Depending on the arbitrators' nature, there may be no interruptions, just some interruptions, or quite a few of them. There is no rule that would prevent arbitrators from asking

additional questions; to the contrary, the IBA Rules provide in Article 8(3)(g) that "*the Arbitral Tribunal may ask questions to a witness at any time*."

The essential rule is easy advice to give, but hard advice to follow. The examiner should not be put off stride by the tribunal's interruptions. Rather than looking at the interruption as the arbitrator trespassing on the examiner's territory, he or she should page"45"regard it as a valuable test for his or her own case theory. Most arbitrators know that the time allocated for direct examination belongs to the counsel. If arbitrators still interrupt, one can assume that it is because of a question that has been preying on their minds and that this may thus reveal valuable information about their assessment of the case. Interruptions are therefore an opportunity for the examiner to read the tribunal and to understand what the arbitrators see as the strengths and the weaknesses of the case. Their questions may also reveal that something that is clear to the witness and the examiner is anything but clear for the arbitrators. So, listening attentively to their questions and following up if possible are key.

What should one do if the interruptions become too distracting? Unfortunately, interruptions of the obtrusive kind are sometimes made by the arbitrator nominated by the opponent. But no matter whether the interruption originates from the chairman or the co-arbitrator, it is essential to not react harshly ("*Stay out of it, it's my turn!*"). The better option is to shelve the question:

Thank you, if you don't mind, we will revisit this aspect later during the examination.

With your permission, I was planning on addressing the issue of whether… in some more detail at a later stage.

If the examiner postpones the subject, it is essential to actually get back to it. A second option is to deal with the unwanted interruption, and send out a signal afterwards that it was not welcome:

I would like to pick up where we left off, or where I think we left off …

Coming back to the question I was going to put to you, Mr. Smith …

Sorry, I lost track, where were we … .

The sensitive arbitrator will understand the cue and be more reluctant with further interjections.

2. HOW TO DEVELOP AN UNDERSTANDABLE, MEMORABLE AND CONVINCING DIRECT EXAMINATION

It has been said that a direct examination has a lot in common with storytelling, and this is correct. In arbitration, though, the direct examination is not the place to present the complete case story. Unlike in traditional common law proceedings, the facts of the case are not presented to the judge or the jury through witnesses in their entirety. The complete case story is presented in the parties' written submissions that are exchanged before the hearing. Witnesses only come into play for the core elements of the dispute. If the witness examination is carried out in the civil law tradition, there will be little room for storytelling. The examination will most likely be carried out by the arbitrators and will focus on specific contentious issues. But if the witnesses are presented and examined in the common law tradition, there is more room for storytelling, even if it is page"46"not the complete case story, but rather a micro-story, a story within a story. Direct examination functions as a looking glass through which a closer look can be taken at certain important aspects of the case. The witness should also give some background information and put the relevant aspects into context. While the written submissions have painted the big picture, witness examination can be used to zoom in and to take a closer look at the details.

To the micro-story, the same rules apply as to the big picture. It should be understandable, memorable and convincing. Throughout and after the direct examination, the arbitrators should always be able to give a quick answer to the following (imaginary) questions:

How was the witness involved in the case?

What is the issue on which the witness is testifying?

How is this issue relevant to the outcome of the case?

This section will deal with some aspects that help the examiner in preparing a good direct examination.

2.1 . The Importance of Structure

It is important to make sure that the tribunal understands the structure of the direct examination. The anecdotal advice to speakers "*Tell them what you are going to tell them, then tell them, and afterwards tell them what you told them*" is also good advice in witness examination. During the direct examination, the examiner should not address the tribunal in order to explain the structure. Rather, he or she should inform the tribunal indirectly on the structure by way of questions to the witness.

In order to introduce a new subject, headline questions and introductory questions can be used:

I would like to address your meeting with Mr. Jones before the signing of the contract on May 12, 2010…

Let us turn to the events on the day after the construction works were stopped….

Such questions do not only help the tribunal, but also the witness. In order to move on from one subject to the next, the examiner can also use transitional questions. A transitional question will indicate to the tribunal that the examiner has finished one topic within the direct testimony and is moving on to the next:

Having heard about your meeting with Mr. Jones, can we move on to the signing of the contract itself on May 12, 2010...

For now I have no further questions regarding the stoppage of the construction works. Can I move on to your involvement in the drafting of the cancellation agreement….

page "47"

Sometimes the examiner may be involved in arbitrations dealing with a large number of individual claims, for instance in construction disputes. It may well be that a witness, e.g., a project manager, will cover quite a few of these individual claims in his or her witness statement. If so, it will help the tribunal and the witness if the examiner identifies the respective claims in his or her introductory question:

Mr. Jones, are you familiar with the fact that Beta Construction is claiming an amount of 1.2 million Euro related to alleged disruptions during the commissioning phase of the plant?

Mr. Smith, are you aware that the engineer refused to approve Beta Construction's claim for an extension of time related to weather conditions in December 2011?

In practice, it is rare for direct examinations to be carried out without prior written statements. The best tool for structuring the direct examination therefore is the witness statement

itself.[8] Assuming that the witness statement is well structured, one can easily identify the issues that are going to be addressed in the direct examination as follows:

Mr. Smith, could you please turn to page 3 of your witness statement. In para 3, you address a time extension claim that the engineer refused in December 2011. Could you please explain the background to this claim?

Turning to page 8 of your statement, two-thirds down the page, there is a section captioned, "*Additional works due to defective excavation works;*" please tell us what you mean by "defective excavation works."

2.2 . Less is More: Overloading the Direct Examination with Information Must Be Avoided

A direct examination is usually preceded by a written witness statement. As also mentioned, that is the very reason why direct examinations are frequently dispensed with. If they are not dispensed with, tribunals often permit only short direct examinations (often in the range of fifteen to forty-five minutes). If the lawyer can discern that the tribunal is skeptical towards live direct testimony, it is even more essential to keep the direct examination short and focused. Most likely, the tribunal is not fond of live direct testimony, expecting that such testimony is: (i) staged and (ii) only a repetition of the written statement. If those apprehensions become reality, the live testimony only serves to annoy the tribunal and bring it up against the examiner and his or her client. Therefore, it ought to be ensured that the direct testimony has something to offer to the tribunal, notwithstanding the fact that it was preceded by a witness statement. The first mistake to avoid is overloading the direct testimony with information. If one assumes there is a twenty-page written statement covering ten issues, but only twenty minutespage "48"of direct examination time are available, how should the available time be allocated to the ten issues? The answer is that it should not. If the examiner rushes in and out of one issue after the next, the direct testimony will be confusing, boring and instantly forgettable. The examiner should rather be selective and focus on those issues that he or she considers more important than others; it is key to select issues for the direct examination that are suitable for this format. If, e.g., the witness gave written evidence on complicated accounting issues, the lawyer must make a choice. The issue may well be important, but can the witness enlighten the tribunal in the short, available time? If so, this is an opportunity the examiner should not miss. If the witness is the kind of person who can explain a complicated aspect of the case, something the tribunal has so far struggled with, it will enhance the witness' credibility. His or her whole testimony will not only appear credible, but also authoritative because it solved a problem for the arbitrators. But if the examiner has reason to believe that the issue is too complex for oral testimony, it will be best to avoid it. Otherwise, the tribunal may be left more confused than it was before; this would also affect the authority and persuasiveness of the witness and of the lawyer.

There is a further issue to consider. Even if it is possible to explain a certain issue in just a few sentences, it will still be considered of little importance. Human beings also measure the importance of facts by the time the presenter takes when conveying the information. The more time the witness spends on a certain issue, the more he or she will be able to provide background information and personal perceptions that will render the testimony memorable, convincing and trustworthy. To state an example: ABC Ltd. licensed certain technology to Smith Ltd. Smith Ltd. believes that the technology is not as mature as promised by ABC and therefore started an arbitration seeking to rescind the license agreement. The agreement itself does not state in clear terms how mature the technology ought to have been. Smith therefore relies on other sources to demonstrate that ABC promised the technology to be fully developed and ready for marketing, and that this triggered Smith's decision to enter into the agreement. Amongst others, Smith relies on an excel sheet sent by ABC during the negotiating phase of the contract, stating that there would be no further costs for research and development if Smith were to buy the technology from ABC. As such, the excel sheet can serve as an additional string to the lawyer's bow, showing that R&D costs, or rather their absence, were important to the parties Compare the two following versions of the direct examination:

Q. Can I take you to exhibit C 3, please, an excel sheet that ABC Ltd. sent to Smith in June 2011. Can you explain the significance of the document?

A. Yes. It says that there would be no further R&D costs for us.

Q. Was this important information for your company?

A. It was important, indeed. I guess it was one of the main reasons for us to buy the technology.

A. Thank you. No further questions.

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The examiner took the witness to the document; the witness confirmed that, according to what was stated in the excel sheet, there would be no further costs for research and development. The witness also confirmed that this was important information for his company. But will the arbitrators perceive the information as crucial and memorable? Most likely not. The examiner has rendered the information instantly forgettable by rushing into it, only spending a few lines of transcript, and then rushing out of it on his or her way to the next issue. The information so uncompassionately presented adds nothing to the information already contained in the witness statement and the submission.

The examination on the same issue could also go as follows:

Q. Can I take you to exhibit C 3, an excel sheet drafted by ABC Ltd. and sent to Smith Ltd. in June 2011. Are you familiar with the document?

A. Yes.

Q. Can I ask you to explain the significance of this document?

A. Sure. The Excel sheet contained a presentation by ABC on the benefits we would enjoy if we were to buy ABC's technology. We received the calculation about two weeks before the scheduled signing date for the contract. Back then, I was involved in discussions with my colleagues from the R&D department almost every day, trying to convince them to buy, not make. I was...

Q. I am sorry to interrupt you, you said you wanted to convince them to buy, not make. Can you please elaborate on the difference between "make" and "buy." I don't think that everybody in this room will be familiar with it...

A. Certainly. Our company pursues a strict "make or buy" policy. That means, we either buy mature technology, or we develop our own solutions. What we don't do is to buy half-baked solutions for which we still need to do further work on our own.

Q. And why is that?

A. Because in our experience, a lot of information gets lost if one group of engineers has to finish another group of engineers' work. At the end of the day, you end up paying double.

Q. Thank you, and sorry for interrupting you. Going back to your discussions with the R&D department…

A. Yes, the R&D department. I remember that I circulated the excel sheet to all participants involved in our R&D team. We all agreed that this is a clear "buy" case, and not a "make" case. We also spent considerable time assessing the savings we would generate in terms of our own engineering efforts.

Q. What was the result of this assessment?

page "50"

A. The head of our engineering department, Mr. Walter, believed that a similar, homegrown technology would cost us something in the region between 1.2 and 1.6 million Euros.

Q. But wasn't it a bit … optimistic, to base such an important "buy" decision on just a few words in the excel sheet?

A. Well, I don't think so. After all, the excel sheet was just the final confirmation we needed after all the discussions we had with Smith Ltd. As I stated, Smith Ltd. had referred to the maturity of the technology time and again, in writing and during our meetings. Some of those statements were not yet clear enough for the purchase department, so the excel sheet was just what was needed to tip the scale in the direction of buy, rather than make.

In this version, the examiner spends considerably more examination time on the issue. Accordingly, there is less time for other issues that may appear in the written statement but that will not figure in the live testimony. This crucial point, however, was made, it is done and dusted. The tribunal understood the motivation of the buyer and the concept of "make or buy" has sunk in. Importance equals time spent.

2.3 . Using Enumerations

One of the easiest methods to structure a direct examination is with the use of enumerations. The examiner can use enumerations to show the structure of his or her examination:

Turning to your witness statement, Mrs. Green, there are three issues that I would like to address with you this morning. First, please turn to page 6 of your statement….

Likewise, the witness can use enumerations:

To me, Mr. Black's statement was important for three reasons. First, it confirmed that ….

Why do enumerations work so well in structuring content? From the moment the speaker says "First, …" the tribunal will be listening, if only because it is waiting for "Second, …" And if the speaker indicates the overall number of issues in advance, the tribunal knows how much is yet to come. A hearing can be long and tiresome, for all participants. Sometimes, the arbitrators may ask themselves "*for how much longer will this go on*?." If the examiner informs them about the overall number of arguments or issues upfront, it will increase the arbitrators' level of patience. It is the same reason for which traffic lights in some countries show a countdown to the next green light, or why information boards on train stations show the time until the next departure. Once thepage "51"uncertainty about the overall time yet to be spent is taken away, waiting, or in terms of witness examination, listening, appears less burdensome.

For the same reason, however, long enumerations can be counterproductive, especially when delivered orally. If the examiner announces that he or she intends to discuss twelve separate issues, there is a structure, but it may rather add to the arbitrators' level of frustration than reduce it. The key is not to overburden the examination. Rather, the examiner should endeavor to cut down the list to a number more digestible for a direct examination.

2.4 . First Impressions Count, Last Impressions Stay: The Correct Sequence for Witnesses, Issues and Arguments

If the examiner offers a larger number of witnesses, he or she must also spend some time thinking about the best sequence of these witnesses' testimonies during the hearing. The same applies to issues in an individual witness statement, as well as to arguments.

Starting with the sequence of witnesses, the order should be logical. Logical means that those witnesses who will lay the foundation of the claim should be presented first. Witnesses whose testimonies will build on the foundation should follow. If certain witnesses will cover the liability side of a damage claim, and others the quantum side, it makes no sense to start with quantum. If in doubt, the examiner ought to go with a chronological order, which also means that cause comes before effect.

Save for logical constraints, should one start with the strongest witness, or rather keep him or her until the end? The same question must be answered in regard of the facts and issues on which a witness testifies. Should the examiner have the witness start on a strong note, or should he or she keep stronger arguments for the middle part to keep the attention level high? In this regard, it is useful to take a closer look at the psychology of decision-making.

2.4.1 . Primacy and Recency Effects

Primacy and recency effects describe the ability of humans to remember items presented in the beginning and in the end of a series of items better than others. The effects can be demonstrated by way of so-called free-recall exercises. In a free-recall exercise, participants are instructed to quickly read a list of words and memorize as many words as they can. None of the words in the list are particularly outstanding (i.e., they are all equally interesting or dull). The participants are further asked to use a sheet of paper to cover the words just read (to prevent participants from rereading the list): page "52"

House

Spectacles

Telephone

Paper

Computer

Leather

Oil

Basket

Job

Suitcase

Home

Drawing

Desk

Umbrella

Tree

Pencil

Ladder

Car

Frame

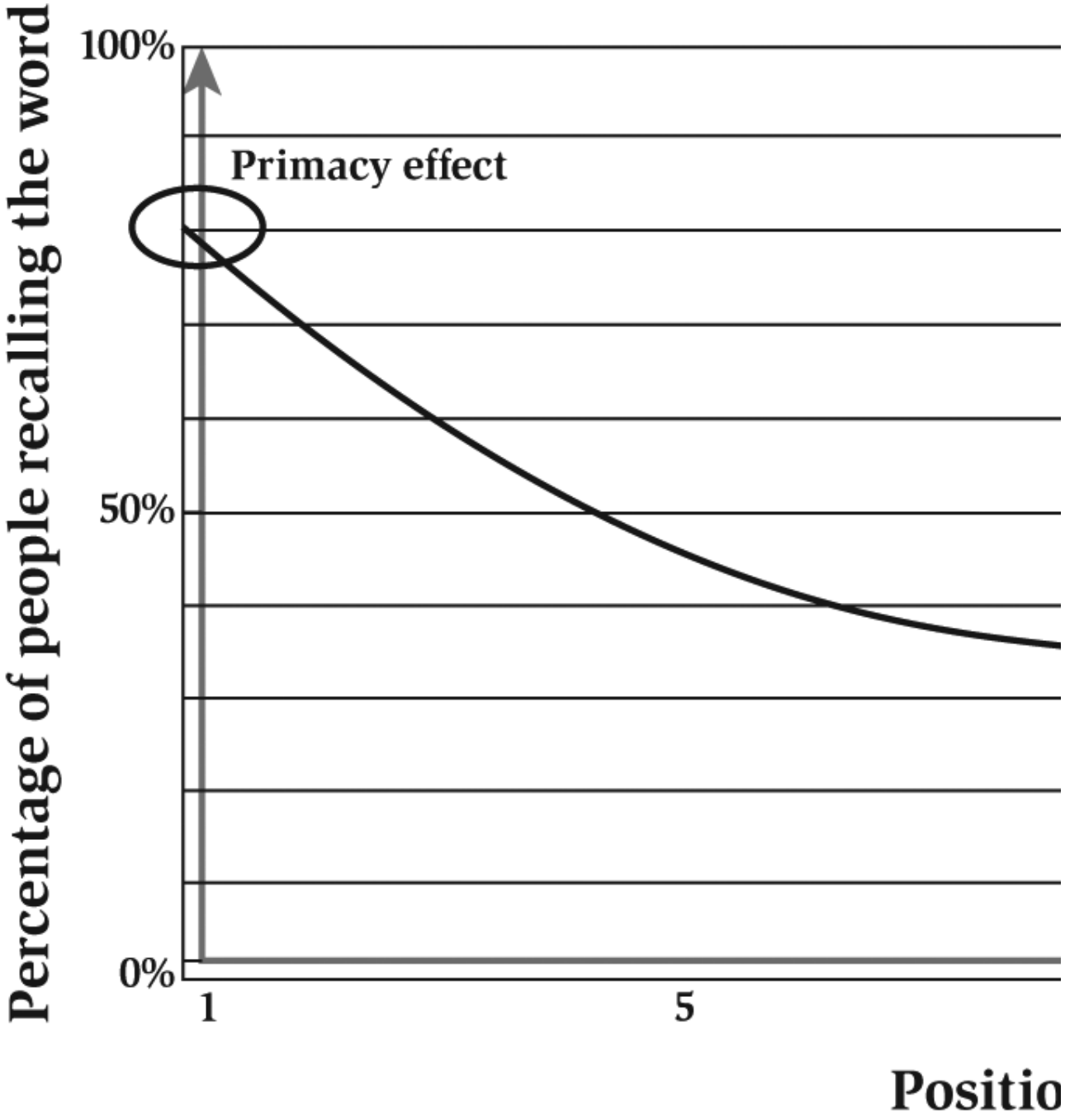
Booklet

After having read the words, the participants are asked to write down all the words they can remember; the sequence does not matter (this is why the experiment is called a free-recall exercise).

The experiment shows the following: The chance that a word will be recalled depends on its position in the list. Words presented at the beginning (*primacy effect*) and at the end (*recency effect)* of the list are more likely to be recalled than words in the middle.[9] The research also suggests that the primacy effect is slightly stronger than the recency effect.

page "53"

Figure 6.1 Primacy and Recency Effect



The findings can also be transferred to arguments. If a lawyer has developed seven arguments in favor of a hypothesis, the arguments presented at the beginning and at the end are more likely to be remembered by the decision maker. The same applies to the presentation of witnesses. If the examiner presents five witnesses, the tribunal will recall witness No. 1 and witness No. 5 more clearly than the ones who testified in between.

2.4.2 . The Recency Effect Fades If There Is a Delay between the Presentation and Decision Making

Under some circumstances, decision makers are more influenced by initial statements (i.e., by the *primacy effect*), while under other circumstances, final statements become more influential (i.e., the*recency effect*). The classic research in this area has been carried out by Norman Miller

and Donald Campbell.[10] Miller and Campbell used arguments from a litigation case on a damage claim. They assembled all the pro and contra evidence and arranged these in two blocks. Subsequently, the researchers asked probands (including lawyers and witnesses) to read through several documents in which the pro and contra arguments were presented in different ways. At times, the pro arguments were presented first, sometimes the contra arguments were. Sometimes, the probands had to take a break between reading the pro arguments and the contra arguments. At other times still, the participants had to reach a decision immediately page "54"after having finished reading the document and sometimes, there was a longer period of time between reading the arguments and making the decision.

Miller and Campbell found out that when: (i) the pro and contra arguments were read in immediate succession; and (ii) the participants were asked to decide the court case one week after reading the arguments, the participants tended to decide in favor of the first presentation (i.e, there is a stronger *primacy effect*). However, if: (i) the presentations pro and con were read with a delay of one week between them; and (ii) subjects were asked to decide on the case immediately after reading the second part, the participants tended to decide in favor of the last presentation (i.e., the *recency effect* was stronger). The study therefore showed that the recency effect fades if there is a gap of time between the last presentation and the decision-making. The fading of the recency effect over time is due to the following reason: Directly after hearing or reading the arguments, the arguments are still fresh and stored in the highly accessible short-term memory. If the decision is made right then, the influence of the last arguments on the decision-making process is stronger. If the decision is made at a later stage, retrieving the information takes more effort. The first presentations, however, benefit from the fact that the probands have had more time to effectively commit them to the long-term memory (learning effect). And arbitrators, e.g., have more time to “learn” and process an argument that is presented earlier in the arbitration. This processing makes it easier to commit the argument to the long-term memory.

2.4.3 . First Presentations Are More Likely to Be Perceived as Anchors

Research also shows that information presented at the beginning can serve as a so-called anchor and thus influence the decision-making process. Anchoring is a phenomenon wherein a person’s decision is influenced by certain reference points the person is given beforehand. The classic study on anchoring was carried out by Tversky and Kahneman.[11] The two researchers asked participants questions about the number of African countries in the United Nations. The questions were asked in a two-step procedure. In a first step, the participants had to spin a rigged wheel of fortune. For a first group of participants, the wheel of fortune invariably stopped at the number 65. The participants were then asked whether they believed that the percentage of African countries in the United Nations was larger or smaller than 65 percent. Most participants assumed (correctly) that it would be lower. Next, they were asked for their best guess as to the *exact* percentage. Their average answer was 45 percent. Tversky and Kahneman then turned to members of a second group of participants who also had to spin the wheel of fortune. Again, the wheel of fortune was rigged. This time, however, the wheel stopped at the number 10. The participants were then asked whether they believed that the percentage of African nations in the United Nations would be larger or smaller than 10 percent. Most participants correctly assumed that the percentage was higher than 10 percent. When these participants were asked for the exact page "55"percentage, the average outcome was 25 percent. With this landmark study, Tversky and Kahneman have shown how anchors can influence a person’s decision.

Similar research on the decision-making process in a judicial context was carried out by the University of Würzburg. The psychologists Englich and Mussweiler analyzed the influence of anchoring effects on sentencing in criminal cases.[12] The researchers gave participating criminal judges identical material describing a hypothetical case of an alleged rape. Different trial judges, however, were given different sentencing demands by the prosecutors. Half of the participants received a prosecutor’s demand for a prison sentence of two months. The other half was given a set of documents in which the demand was thirty-four months. Englich and Mussweiler showed that the participants, experienced trial judges, were influenced by those anchors. Participants who evaluated the high sentencing demand also determined higher sentences (on average, 28.7 months); participants who evaluated the low sentencing demands only

determined a sentence of 18.78 months on average.[13] Studies like this prove that anchoring works; how exactly it works, however, is yet unclear. The most likely explanation is that anchoring is linked to the phenomenon of positive hypothesis testing already mentioned above.[14] The trial judges in the research carried out by Englich and Mussweiler most likely arrived at their determination by testing the positive hypothesis that the respective demand was, in fact, appropriate. In doing so, the judges selectively retrieved information that was consistent with the assumption.[15] Accordingly, the participants singled out *anchor-consistent* information while neglecting counter-evidence.

While the anchors in the mentioned research were numbers, it is suggested that legal arguments and a witness' factual presentations can also serve as anchors. A certain case theory presented early during an arbitration can work as a hypothesis that anchors the arbitrators. To give an example by way of a small case study: A manufacturer of goods terminated a distribution contract in country X for cause, arguing that the distributor breached the contract on numerous occasions; the sales figures stayed below the expectations, even if last year's figures were slightly better than the year before. The manufacturer places great reliance on a recent incident where the local packaging done by the distributor was defective. According to the manufacturer, it was unacceptable for him to continue the contractual relationship. The distributor believes that the termination for cause was just a pretext. The manufacturer's real intention would be to market its products directly in country X to make a higher profit. The distributor commences arbitral proceedings claiming damages on the ground that the termination was unjustified and therefore, constituted a breach of contract. In such arbitration, there could be two anchors: Hypothesis A and Hypothesis B.

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Hypothesis A (The Manufacturer):

The manufacturer had to deal with a highly ineffective and careless distributor for quite some time; the manufacturer was understanding and kept his calm for almost two years, but the recent letdown was the proverbial straw that broke the camel's back.

Hypothesis B (The Distributor):

The employer bent over backwards trying to develop the new and challenging market in country X. After two difficult years, his relentless work finally started to pay off. Out of the blue, the manufacturer terminated the distributor under a pretext in order to reap the benefits of the distributor's work.

Depending on whether the arbitrators test against Hypothesis A or B, their decision-making process will work differently. If they test against Hypothesis A, they will be more receptive to information supporting the "*useless contractor"* image when sifting through the evidence. If they test against Hypothesis B, evidence supporting the "*disingenuous manufacturer"* image is anchor-consistent and therefore, more likely to be singled out.

It is not necessarily the first presentation of a story that works as an anchor; otherwise, respondents would hardly stand a chance in arbitration. If the claimant presents a weak, incoherent and implausible Hypothesis A, the first shot is wasted. By offering a plausible and convincing Hypothesis B, the respondent may well achieve to place his or her hypothesis as the anchor. But assuming that the offered hypotheses are equally appealing, the first presentation stands a higher chance of being accepted as an anchor. This is what the research by Tversky/Kahneman, Englich/Mussweiler and many other psychologists demonstrates. Dispute lawyers are aware of this, consciously or subconsciously, which is why there sometimes is a race between the parties for the position of "Claimant" once a dispute arises. The claimant usually has the first opportunity to present his or her version of the facts and therefore has an advantage when it comes to casting an anchor.

What follows from the research on anchoring for the presentation of witnesses? If counsel has to determine the sequence of witnesses for purposes of the oral hearing, witnesses who are suitable to serve as an anchor ought to go first. When looking for such witnesses, the lawyer ought to look out for testimony that is strong, persuasive and suitable as a working hypothesis from the point of view of the arbitrators.

But anchoring is not only important in regard of the sequence of witnesses, but also for the sequence of issues within the witness' testimony. Going back to the case study about the distributorship agreement: Assuming that the distributor's crown witness, the company's managing director, is the first witness. Assuming further that there are various incidents reported in his or her testimony to support the allegation that the manufacturer wanted to push the distributor out of business. One of them is that the manufacturer was occasionally late in sending marketing materials, while another is that the ratio of defective products that the manufacturer supplied to the distributor was about 50 percent higher than the ratio of defective products supplied to page "57"comparable distributors in other countries. It stands to reason that the witness should not start with the issue concerning the marketing material. The argument is weak in comparison, and may obliterate Hypothesis B. The arbitrators may succumb to a dangerous "*This is your best shot?"* feeling right at the beginning and therefore regard the evidence to come with less enthusiasm. If, however, the first issue is strong and dovetails nicely with the case theory, the arbitrators will look more benevolently at further evidence.

2.4.4 . Presenting the Best Arguments and the Best Witnesses First Is What Arbitrators Expect Counsel to Do

The wise lawyer presents his or her best witnesses and arguments first for yet another reason: It is the done thing. It is such a common practice to start a debate or an argument with the strongest points that arbitrators expect counsel to do likewise. If the lawyer acts contrary to this expectation, he or she will weaken the good arguments. A good argument presented third is still a good argument. But the mere fact that it is presented only in the third place sends out a signal to the arbitrators that the lawyer considers the argument to be weaker (in comparison to arguments Nos 1 and 2).

2.4.5 . Guidelines for Sequencing Witnesses and Arguments

If one applies the results of the research summarized in the preceding sections to arbitration, more specifically to the presentation of facts and witnesses, the following conclusions can be drawn:

(i) *Start strong – end strong:* It is easier for the audience to recall witnesses and facts that are presented at the beginning and at the end. In order to make sure that good arguments and witnesses are remembered, it is advisable to make use of the*primacy effect* and the *recency effect*.

(ii) *In arbitration, the primacy effect is more important than the recency effect:* If there is a time gap between the presentation of facts or arguments and the decision-making, the recency effect fades. Given that the arbitrators will take some time after the hearing until they deliberate and make their decision, the primacy effect is more important than the recency effect.

(iii) *Do not miss the chance to cast an anchor:* Information presented at the beginning can serve as an anchor for the arbitrators. If the attorney manages to enroot his or her case theory in the arbitrators' system as the basic working hypothesis, the arbitrators are likely to test further information and evidence against this hypothesis. If so, they are more likely to search for information corroborating the theory rather than for falsifying information.

What will a sequence of witnesses or arguments following the above rules look like? Assuming that the strength of six witnesses or arguments can be ranked as follows (from 6 [best] to 1 [worst]), these are suitable sequences: page "58"

6 – 5 – 2 – 1 – 3 – 4

6 – 5 – 1 – 2 – 3 – 4

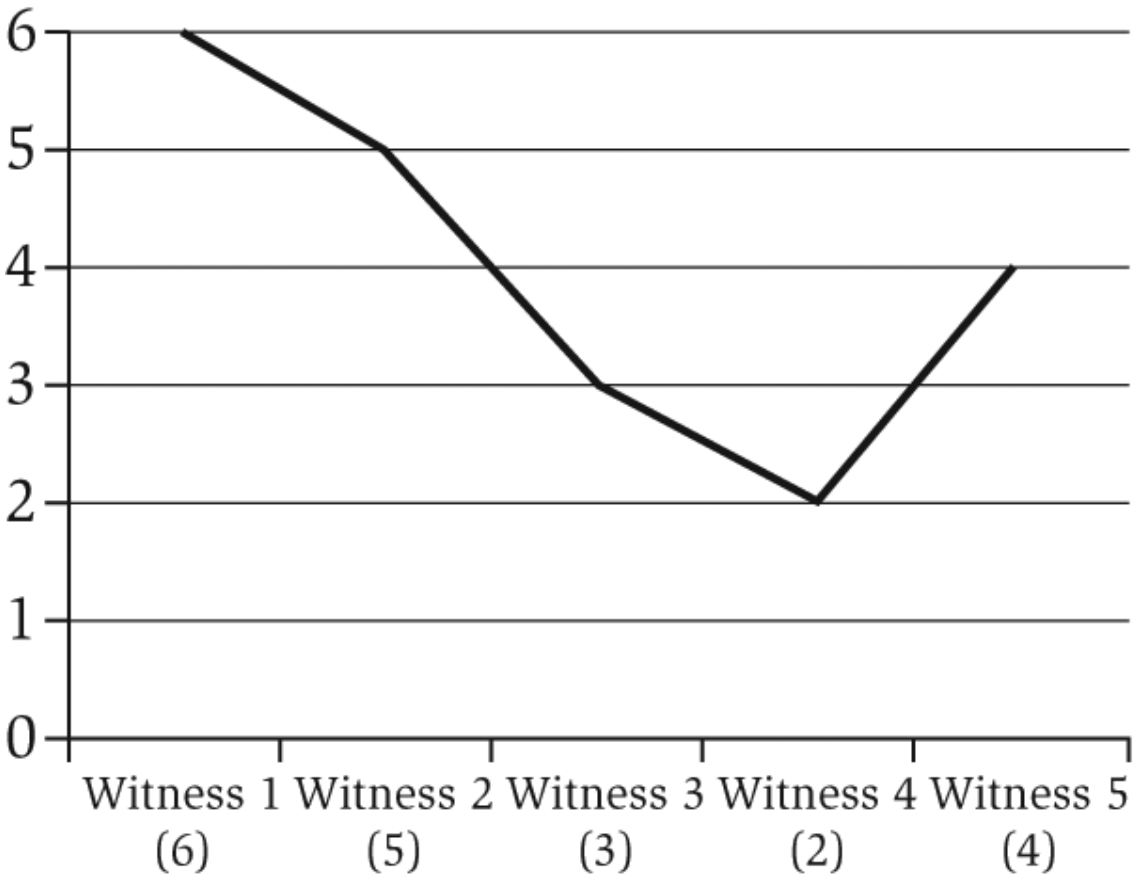
6 – 5 – 4 – 1 – 2 – 3

Depending on how weak witness or argument “1” is, it is worth considering to forgo him, her or it. The weakness of the Bad tends to dilute the strength of the Good. Exotic or patently weak arguments send out the signal that the counsel does not sufficiently believe in the previous arguments to just run on them. A lawyer who tops off sound contractual arguments in a commercial case with longish elaborations on good faith and further far-fetched arguments only shows that he or she is not confident in the contractual arguments made in the first place. The effect was already described by the Roman rhetorician and lawyer Quintilian in the first century AD:

“…we must not always burden the judge with all the arguments we have discovered, since by so doing we shall at once bore him and render him less inclined to believe us. For he will hardly suppose those proofs to be valid which we ourselves who produce them regard as insufficient.”(16)

Weak arguments or witnesses will not win the case, it is therefore often good advice to drop them. On a chart, a suitable sequence would then look as follows:

Figure 6.2 Sequence of Witnesses



2.5 . How to Deal with Disadvantageous Facts

A question every dispute lawyer is familiar with is whether to anticipate the opponent's arguments in one's own pleadings. A similar question arises during the direct examination. How should one deal with disadvantageous facts and arguments that the witness will most likely be confronted with in cross-examination? Basically, there are two options. First, pre-empt the opponent's strong points. This approach certainly has its advantages. In doing so, one keeps control over the way in which the potentially harmful facts are introduced. One's own client's version of the facts will be the basis of the tribunal's first impression and thus shape the way in which the argument is page "59"perceived. What is more, one can disarm the opponent. He or she may have prepared a long line of questions for the cross-examination designed to catch the witness off-guard and commit him or her to the harmful facts. Once these harmful facts are preempted in the direct examination, their explosiveness will be reduced or even removed. Taking as an example the following small case study concerning a commission payment: A supplier demands a contractual commission payment. Amongst other, the supplier argues that the respondent's managing director, a witness in the arbitration, has promised to effect the commission payment and thereby formally acknowledged the claim.

A cross-examination of the managing director on the issue of the alleged acknowledgement could be as follows:

Q. Mr. Burns, please turn to tab 14 in your witness bundle. For the record, this is an email written by yourself to Mrs. Miller from Abc Ltd., dated July 8, 2013 and submitted as Exhibit C 15. Mr. Burns, do you recall this email.

A. Yes.

Q. Can I ask you to turn to the second paragraph and read it out loud for the record?

A. Well, it says "*I can confirm that you will receive the commission payment upon proof of the respective sales*," but let me explain…

Q. There is little to explain, is there? You unambiguously stated that you confirm the commission payment. Did you receive the respective invoices?

A. I did, later, but let me explain….

Compare this to the following account of the same event during a direct examination:

Q. Mr. Burns, please take a look at tab 3 in your witness bundle, your email to Mrs. Miller dated July 8, 2013. The email was submitted to the record as Exhibit C 15. Can you please explain the background to this email?

A. Well, I wrote this email at the time because ABC Ltd. had approached us regarding certain commission payments they felt entitled to.

Q. What did you tell ABC, Mr. Burns?

A. Well, I wrote that I would pay out the commission upon proof of the underlying sales.

Q. Why did you say so in your email?

A. Well, to be frank, my answer was a bit tongue-in-cheek. I said "*upon proof of the respective sales"*because I was pretty sure at the time that ABC had never made such sales and could therefore never come up with any invoices. With hindsight, I would have phrased the email differently. But page"60"at the time, you know, ABC was confronting with all kinds of claims and I was slightly … irritated.

Q. How did you assess ABC's entitlement to commission payments in general, assuming that the respective sales had been carried out?

A. At the time, you mean?

Q. Yes, when you sent the email.

A. I didn't make any legal assessment at the time, this only came later. The sales were governed by German law, I only obtained legal advice on this matter from our German attorneys about two months later. I was informed by them that we were not obliged to make such payments.

By anticipating the argument in the direct examination, the lawyer can explain the background of the allegedly incriminating email without interruptions. Unquestionably, the witness may also have been able to present the background information during cross-examination. But in cross-examination, depending on the cross-examiner's level of aggressiveness, doing so may prove to be difficult; the cross-examiner will try to leave as little room for explanation and background information as possible. Depending on the skills of the cross-examiner, Mr. Burns may also have appeared apologetic when he explained that the "promise to pay" was not meant seriously ("*So you are basically saying you were mocking ABC when you confirmed the commission payments?"*). Sometimes cross-examiners even get away with cutting the witness short in their explanations ("*If you wish to explain, please do so in your re-direct examination."*). If so, the examiner has to pick up the loose ends later during the re-examination, and thus at a point in time where the opposing side's version of the events has already sunk in.

If the examiner anticipates the disadvantageous email in the direct examination, it will still be disadvantageous. But the witness can explain the email and the background undisturbed. There is another advantage in anticipating weaknesses. The concession of a weak point ("*with*

hindsight, I would have phrased the email differently") can enhance the witness' credibility. A person acting against his or her self-interest is regarded as less biased and therefore more credible.[17] Pre-empting the opponent's points also has a tactical benefit: the examiner may have his or her opponent boiling inside, because he or she is just about to take away the ace from up the opponent's sleeve. Because what shall the cross-examiner do later during the cross-examination? He or she can still revisit the email, but the explosiveness has evaporated, there is no suspense. The tribunal already knows the email, and the tribunal knows why the witness made the statement. So the opponent would look foolish if he or she still presented the email as if it were the case's smoking gun. Alas, the direct examiner just stole the opponent's thunder. There is a famous example for this technique from Ronald Reagan's 1984 campaign to be reelected as President. At the time, Reagan was the oldest President to have ever served (73 years old), and there page "61"were quite some people doubting whether he was still was fit for the job. The democratic candidate, Walter Mondale, was 56 at the time. In one debate with Mondale, Reagan joked "*I will not make age an issue of this campaign. I am not going to exploit, for political purposes, my opponent's youth and inexperience*." In doing so, Reagan took the political explosiveness from the "age issue," and even made his opponent smile.[18] He stole Mondale's thunder.

While there are good arguments in favor of anticipating the opponent's points, there are also disadvantages to consider. In preempting weak points, an examiner runs the risk of introducing facts that may otherwise have remained undisclosed. It is important to remember that the party representative knows his or her own case, its strengths and its weaknesses, better than the opponent does. Maybe the opponent would not go into this point at all. Or maybe he or she would ask questions on the issue during cross-examination, but only in an amateurish and incoherent way so that the effect on the arbitrators is lost. Before pre-empting the opponent's issues, the lawyer must therefore weigh the potential upside against the risk that he or she presents the point better than the opponent would.

2.6 . Can the Witness Use Notes during the Examination?

Different views exist on whether witnesses may use documents during their examination not previously submitted to the record. The question usually arises when witnesses bring their personal notes to the witness stand. Institutional arbitration rules do not address this question, and neither do the IBA Rules. Article 4(5)(b) IBA Rules only states that a witness statement shall include "*a full and detailed description of the facts, and the source of the witness' information as to those facts*." So according to the IBA Rules, the witness should identify the source of the information, but not necessarily produce the source itself. Unless the issue was settled in the specific procedural rules for the arbitration, the tribunal must therefore decide whether the witness may rely on notes or not (if the other side objects, which it will often do). Experience shows that tribunals follow different approaches. In reaching the decision, the tribunal will have to balance various considerations and interests.

On the one hand, arbitration is not a memory contest; witnesses in commercial arbitration often testify on issues that occurred many years earlier; the mere fact that the witness does not know certain things by heart does therefore not disqualify the witness. At the end of the day, a recollection that was recorded contemporaneously may well be worth more than an imperfect present recollection.

On the other hand, the tribunal must keep in mind considerations of fairness. The basic idea of taking evidence in arbitration is that the playing field between the parties should be level. Reasonably in advance of the hearing, the parties are entitled to know the evidence that the other side will be relying on. If a witness testifies on notes that are brought only to the hearing, the other side does not know the full content of the notes page "62"and can therefore not prepare a cross-examination on them. The question arises why the notes were not previously produced.

To give a practical example: it may be in issue between the parties whether a certain meeting between the witness and the other party occurred before or after a contract was signed. In the direct examination (or during the cross-examination), the witness testifies that the meeting had

occurred before the signing of the contract. Assuming further that the events happened many years ago, it may be questionable how dependable the witness' recollection still is (especially if the witness is still employed by the side offering him or her). If the witness consults notes, and reconstructs the sequence of events based on these notes, this can certainly increase the testimony's evidentiary value; notes, in particular, contemporaneous notes, reduce the risk of imperfect recollections. But for the other side, it is difficult, and in fact risky, to explore the evidentiary value of the notes during cross-examination. The counsel can cross-examine the witness about the exact wording in the notes. Maybe the notes just state "meeting", without listing the participants and the agenda. And maybe there are further "meeting" entries also after the signing of the contract. In this case, the witness' recorded recollection is not as conclusive as one might have thought. On the other hand, assuming that the opposing counsel cross-examines on the notes' exact content and matters get worse for her, the notes do record the exact date, time, agenda and participants of the meeting. One may say that there is nothing to complain about because the tribunal is entitled to know the full truth. But it is not the primary purpose of cross-examination to investigate the facts. In arbitration, it is usually accepted that there should be a level playing field between the parties when it comes to the taking of evidence. Both sides are therefore entitled to know the evidence the other side is relying on reasonably in advance.

In the last example, one could even consider that the other side intentionally set a trap by withholding information; why were the notes not produced in advance? Was this done on purpose? Is there other information in the notes, potentially harmful to the case, which the witness does not want to disclose? But even if so, is this in itself unfair? After all, there is no rule in arbitration that the parties must disclose all information available to them; each side is free, save for document disclosure proceedings, to determine the documents that it is going to rely on in the arbitration. The same holds true for notes.

As stated, there are no hard and fast rules as to the use of notes and different tribunals follow different approaches. Faced with a witness who intends to refer to personal notes in the witness stand, the examiner has several options, the most extreme option of which is asking the tribunal to disallow the use of notes. When doing so, the examiner must be prepared to explain his or her motives. He or she must explain that the witness could and ought to have produced the notes prior to the hearing and that he or she had no opportunity to prepare with regard to the notes. The examiner can also refer to the IBA Rules of evidence as best practices, even if they are not incorporated. In their preamble, the rules state: page "63"

The taking of evidence shall be conducted on the principles that each Party shall act in good faith and be entitled to know, reasonably in advance of any Evidentiary Hearing or any fact or merits determination, the evidence on which the other Parties rely.

While the rules do not specifically state that notes must be disclosed, it can be argued that they should have been disclosed in good faith as part of the documentary evidence. It should also be pointed out that the request to have the notes disallowed is not made to obstruct justice or to conceal facts. Determining the truth is a noble aspiration, but parties also have the right to a fair and equitable hearing.

Alternatively, the examiner can apply to the tribunal that the witness may only use the notes if these are disclosed. If possible, the notes should then be made available on the spot for the cross-examination, and the examiner should be given some time to peruse the notes and to cross-examine on them. The alternative is the one closest to the federal evidence rules in the United States:

Rule 612. Writing Used to Refresh a Witness

(a) Scope. This rule gives an adverse party certain options when a witness uses a writing to refresh memory:

(1) while testifying; or

(2) before testifying, if the court decides that justice requires the party to have those options.

(b) Adverse Party's Options; Deleting Unrelated Matter. Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

*(c) Failure to Produce or Deliver the Writing***.** If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or – if justice so requires – declare a mistrial.

If the tribunal allows the notes, and does not order the witness to make the notes available, the examiner must make a choice. Does he or she want to go into the details of the notes? The examiner can certainly enquire about the notes' general nature, when they were made, by whom etc. This information may be relevant when assessing the evidentiary value of the testimony. To give an extreme example: if the witness refreshes his or her recollection based on a chronology prepared by lawyers, the testimony is worthless. Whether the examiner should go into more details, e.g., ask questions about the exact wording of the notes, is trickier. The risk is that the testimony may get even more detailed and stronger. Sometimes, it may therefore be better to move on to another issue, and away from the notes. In cross-examination, the cross-examiner deserves every answer that he or she may get.

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In order to prevent such a situation, careful tribunals and parties may also explicitly address this question in the specific procedural rules. See, for instance, the following provision taken from a set of specific procedural rules:

Documents that a witness expects to use at the hearing to refresh his or her memory while giving evidence shall be deemed to constitute documentary evidence and are therefore to be filed in accordance with the respective provisions.

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[1] The drafting of witness statements will be dealt with in the next chapter.
[2] Michael Eysinck and Mark Keane, *Cognitive Psychology* (2005), 471–475.
[3] Richard Waites/James Lawrence, "Psychological Dynamics in International Arbitration Advocacy," in *The Art of Advocacy in International Arbitration*, 109–110.
[4] Daniel Kahneman, *Thinking, Fast and Slow* (2011), 81.
[5] Joseph O'Connor and John Seymour, *Introducing NLP*, 19.
[6] A witness bundle is also recommended for the cross-examinations. Depending on the overlap between the documents used for direct examination and cross-examination it often makes sense to use the same bundle.
[7] As to the methods of transcription, *see* below Ch. 11, s. 5.
[8] *See* below Ch. 7.
[9] A useful description of a free-recall experiment is found in*Murdock*, The serial position effect of free-recall, J. of Experimental Psychology Vol. 64(5), November 1962, 482–488.

[10] Norman Miller and Donald Campbell, “Recency and Primacy in Persuasion as a Function of the Timing of Speeches and Measurements,” in the *Journal of Abnormal and Social Psychology,*Vol. 59 (1959), 1–9.
[11] *See* Kahneman, *Thinking, Fast and Slow*, at 119.
[12] Birte Englich and Thomas Mussweiler, “Sentencing under Uncertainty: Anchoring Effects in the Courtroom,” in the *J. of Applied Social Psychology* (2001), 1535–1551.
[13] Englich/Mussweiler, 1540.
[14] *See* Introduction to Ch. 6.
[15] Englich/Mussweiler, 1548.
[16] Quintilian, Institutio Oratoria, Book 5.
[17] Harry Mills, *Artful Persuasion* (2000), at 16.
[18] *See* video footage from debate on Oct. 21, 1984 at http://www.reaganfoundation.org/reagan-quotes-detail.aspx?tx=2238.

Chapter 8: Cross-Examination

Source

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“You would agree, would you not…”

Cross-examination is the examination of a witness by the opposing party’s counsel. It is the corrective to the direct examination. As we have seen, the common law system in which cross-examination developed trusts that the truth is best established by strong presentations of the case by the parties themselves.[1] Direct examination provides the party with an opportunity to tell its story. Cross-examination is the opposing party’s opportunity to show that the story is not accurate and not reliable.

There is little that has shaped the public perception on the vocation of trial lawyers more than the display of cross-examination in U.S. courtroom movies. In the movies, cross-examination is show time. It is the clash between the (usually untruthful) witness and the brilliant lawyer. While so far the chances were even, it is now time for the good guy to score. The witness, so far a notorious and ruthless liar, collapses under heavy cross-examination and admits everything. One famous depiction of such a cross-examination in the movies is the examination of Jack Nicholson as Colonel Jessup in *A Few Good Men*. After a series of setbacks, the defense realizes that the case is almost lost. They do not have the evidence to win the trial and their crown witness has committed suicide. Their last chance is to cross-examine Jessup and to infuriate him up to a point where he loses his temper and gives the case away. The movie climaxes in the cross-examination of Jessup when Tom Cruise demands, “*I want to know the truth!”* and Jessup responds “*You can’t handle the truth!”* but still continues to give the truth away. As entertaining as the movie is, it is a distorted picture of the U.S. litigation practice and it certainly bears no resemblance to cross-examination in international arbitration.

Cross-examination is not intended to bring the witness to confess and admit that his or her testimony was untruthful; this is an unrealistic goal and it is only achieved page "97"in the movies. Impeaching a witness works in a more subtle way and cross-examination is not intended to gather information that the examiner needs to win the case. The fact-finding has to

be finished long before the hearing stage begins. The facts that the parties rely on are presented in their written submissions, in the documents submitted to the record, and in the parties' witnesses' testimony. If one finds that this information is not sufficient to plead a coherent case, something went awry along the way. The real purposes of cross-examination in international arbitration are covered in the next section.

1. THE PURPOSES OF CROSS-EXAMINATION

By far the most important purpose of cross-examination is to demonstrate that the witness' testimony is not safe to rely on (*see*1.1). Cross-examination can also be useful to have the other side's witnesses confirm parts of one's own story (*see* 1.2). Within limits, cross-examination can also be used to elicit information from the witness (*see* 1.3). And finally, cross-examination can be instrumental in reading and educating the tribunal (*see* 1.4).

1.1 . Show That the Witness' Testimony Is Not Safe to Rely On

The main purpose of cross-examination is to weaken the persuasiveness of the witness' testimony, i.e., to impeach the witness. His or her testimony is one of the other side's puzzle pieces. During cross-examination, the examiner has the chance to show that the pieces do not fit the picture as nicely as argued by the opponent. There are two ways of achieving this goal. First, cross-examination can go to show that the facts as testified are not credible (*ad rem*). Second, the cross-examination's thrust can be to damage the credibility of the witness itself (*ad hominem*). In international arbitration, the impeachment *ad rem* is far more important than the impeachment *ad hominem*. We will look into the techniqques of impeaching a witness in more detail in Chapter 8 section 4.

1.2 . Have the Other Side's Witnesses Corroborate the Factual Basis of One's Own Claims

Cross-examination can also be instrumental in having the other side's witnesses confirm parts of one's own case story. Testimonies by "opposing" witnesses are usually not as far apart as one may believe. Often, they go along with each other 90 percent of the way, and only differ in regard of the remaining 10 percent of the underlying facts. They may even go along 100 percent with regard to the facts but simply interpret these differently. Accordingly, the other side's witnesses can also be instrumental in order to prove baseline facts. Strictly speaking, proof will not be necessary if there is no dispute between the parties as to the baseline facts. But it makes a difference whether a fact that is pleaded and put under evidence is simply not contested by the other side, or whether it is confirmed. To give an example from practice: In a commercial arbitration case, the parties were in dispute about the scopepage "98"of a settlement agreement. The respondent defended certain damage claims by arguing that the claims were covered by a settlement agreement. The specific issue was whether the settlement agreement also covered claims that were unknown at the time the settlement agreement was entered into. The respondent presented a witness who testifies to the negotiation of the settlement agreement and the intention of the parties at the time (i.e., that the parties wished to settle any and all claims, including claims that were unknown). It is an unrealistic goal to have the witness admit that his or her testimony is wrong, and that the settlement agreement was not intended to cover unknown claims such as the one now presented by claimant. But the witness was also involved in the actions and omissions that led to the claimant's alleged damage claims. There was quite some substance to the claims, which is why the respondent did not defend the claims heavily on substance, but rather, focused on the settlement agreement. The claims themselves were not covered by the witness testimony, but according to the rules of that specific arbitration, cross-examination was permitted to go beyond the scope of the witness statement.[2] The witness therefore reluctantly had to confirm a great deal of the facts on which the claimant based its damage claim. One may say that this is not a great achievement because the respondent did not even argue against the substance of the claim. But this would ignore the psychology of decision-making. The interpretation of the settlement agreement was not a clear-cut case, i.e., the tribunal could have gone both ways. It would have been easy for a tribunal to consider the claim settled by a settlement agreement as long as the claim was cloudy and lifeless. But once the tribunal had seen that the claim was genuine and caused real harm to the

claimant, striking out the claim based on the disputed settlement agreement became more difficult. Filling the claim with life and substance had raised that bar. To this end, it makes a great difference whether the other side simply does not contest certain facts, or whether the other side's witnesses positively confirm them during cross-examination.

1.3 . Eliciting Information

One of the most widely spread, purported cross-examination rules is that the cross-examiner should not ask questions that he or she does not know the answer to (or the answer to which he or she cannot prove wrong if the witness gives an unexpected answer). The theory behind this rule is the following: cross-examination is about controlling and impeaching the witness. Once the cross-examiner asks an open-ended question to which he or she does not know the answer, the examiner opens the Pandora's Box. It is an invitation to an open, narrative answer, and it gives the witness an opportunity to digress. In this situation, the cross-examiner deserves any answer that he or she may get.

But in international arbitration, exceptions to the rule must be made. The rule is derived from cross-examination in U.S. civil litigation, and there is a marked difference page "99"between U.S. litigation and international arbitration: Evidentiary hearings in U.S. courts are usually preceded by depositions. A deposition is the out-of-court questioning of a potential witness for discovery purposes.[3]Accordingly, a lawyer is entitled to question witnesses of the other side before the hearing in order to gather information about what the witness does know, or does not know. The main purpose of a deposition is intelligence, i.e., to gather information. Therefore, any questions to which the lawyer does not know the answer should be asked during a deposition. Hence, the rule that a cross-examiner should not ask a question to which he or she does not know the answer during the trial. But in arbitration, there are no depositions; accordingly, an arbitration counsel has to be prepared to take a slightly bigger risk.

What is more, if the cross-examiner knows the relevant answer, it is most likely included in the written submissions and witness statements. The odds therefore are that the arbitrators also know the answer. As Schneider has put it, the arbitrators may then be more attracted by the demonstration of the skill of making a tiger jump through a burning ring than being interested in the substance which is revealed.[4] Unless the cross-examiner intends to bore or even antagonize the tribunal, he or she must be prepared to take a bigger risk and to also ask questions that he or she does not know the answer to. But of course, the risk must be a controlled one. The "*no-questions-to-which-you-do-not-know-the-answer-to"*-rule must therefore be modified: Only ask questions to which you know the answer, or for which you are able to deal with all possible answers. To give an example: take a dispute about defects in certain engineering works. The defects consist of cracks that have occurred in a metal structure, and the root cause of the cracks are defective welding works. For the claimant's damage claims, it is important whether the contractor could have prevented the defects by choosing a more appropriate welding method. The claimant has produced numerous contemporaneous publications describing the technical phenomenon that may have led to the cracks, and the publications therefore recommended using a different kind of welding method. What the claimant does not know is whether the engineering department of the respondent knew of the articles. Still, questioning the witness about whether he or she is familiar with the articles is the correct approach. If the witness testifies that he or she is not familiar with the articles, the counsel can develop the theme that the respondent acted negligently because he or she did not keep up with recent technical developments in his or her field. If the witness testifies that he or she was familiar with the publications, the counsel can argue gross negligence on the part of the contractor because he ignored essential information that he was privy to. As the example shows, open questions are fine as long as the cross-examiner is prepared for all answers he or she may get.

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1.4 . Some Tips for Cross-Examination in the Unknown: When to Ask Questions to Which One Does Not Know the Answer

As just stated, it is fine to ask questions to which the examiner does not know the answer as long as he or she can handle all alternative answers. Sometimes, though, the examiner may have to take an even bigger risk and ask questions in a genuine attempt to elicit the truth from a witness, not knowing what may come out of it. Such open questions should only be asked if the counsel has reason to believe that the witness is prepared to provide more facts, truthfully, if asked directly. But when is this the case? In answering this question, the craft of *statement analysis* helps. Statement analysis is the practice of analyzing a person's statement in order to determine if the person is being truthful or deceptive.

The fundamental basis of statement analysis is that the vast majority of people have a truth bias. In other words, it is rare for a witness to be a notorious and persistent liar. A person's preferred method to avoid making a damaging statement is not telling a lie, but an incomplete or evasive statement. People prefer not to lie about harmful facts, but rather to omit them, or to shape the truth in other ways (without precisely lying). A skillful cross-examiner should therefore look out for clues that are indicative of such behavior. If the cross-examiner perceives such behavior, there is a good chance that the witness will reveal the information if questioned directly and tenaciously. And even if the witness does not reveal the information, chances are that he or she will not lie about them, but rather be evasive. And evasiveness in a response to a straightforward question can be as effective as the answer itself, from the cross-examiner's perspective.[5]

The following section deals with some of the clues in a witness' answer that are indicative of additional information that may be elicited by probing further.

1.4.1 . Answering Questions with Questions

Look at the following conversation between a father and his son:

Father: Henry, did you download apps on my phone?

Henry: Who, me?

Mother: There is nobody else here… Now did you or did you not?

Henry: Why are you always picking on me, you never ask Mary these kinds of questions!

Henry's behavior is typical. He does not dare to say "*No"* to the first question, because it would be a downright lie. "Answering" questions with questions is a very typical sign of deceit. In the second question, Henry does not blame his sister ("*It was Mary*"), because again, this would be a lie. Rather, he tries to get away from thepage "101"question by asking a counter-question. The odds are that Henry will finally confess to the act of having downloaded apps on his father's phone if the conversation continues.

The very same behavior can be found in witnesses. Rather than presenting a lie, witnesses dodge a straightforward answer:

– Why would I accept such defective works?
– Do I seem like the kind of person who would do something like that?
– Don't you think somebody would have to be pretty stupid to give such an instruction?

If a witness answers along these lines, chances are that he or she will not switch to a lie if the subject is pursued persistently. Rather, the witness will stay evasive, or admit to the fact. And even if the examiner does not manage to commit the witness to the correct answer, the witness' constant evasiveness also does the trick; the tribunal will see for itself that the witness remains evasive and draw the right conclusions.

1.4.2 . Omissions and Incomplete Statements

A good cross-examiner will also look out for incomplete statements and omissions. Once such incompleteness is spotted, the examiner can probe for the missing information. There is a good chance that the omission was chosen to avoid outright untruthfulness, and that the truth bias is still working. Take the following example from Barack Obama's announcement regarding the death of Osama Bin Laden on May 2, 2011:[6]

Today, at my direction, the United States launched a targeted operation against that compound in Abbottabad, Pakistan. A small team of Americans carried out the operation with extraordinary courage and capability. No Americans were harmed. They took care to avoid civilian casualties. After a firefight, they killed Osama bin Laden and took custody of his body.

The statement as such is presumably not incorrect. What is does not mention, though, is that four other people, three men and one woman, were killed during the operation.[7] Whether some or all of them were "*civilians"* is unclear, as is the definition of "*civilian*." But even if civilians should have been amongst those killed, the statement is sufficiently hedged to remain correct. "*They took care to avoid civilian casualties"* does not mean that they succeeded in doing so. After all, the statement only confirms that "*no Americans were harmed*."

A good cross-examiner will look out for linguistic hedges and qualified assertions such as "*they took care to avoid…"* and "*No Americans were harmed*." A good cross-examiner will further look out for words of which the definitions are not sufficiently clear. Assume that a statement along the lines of the above-mentioned was page "102"included in a witness statement, a skillful cross-examiner would step in and probe, sensing that the truth is lurking in the background:

You have stated that no Americans were harmed. Were people of other nationalities harmed?

How many "non-Americans" were harmed?

What kind of harm was inflicted, were people killed during the operation?

Can you identify the people killed?

Were there also civilian casualties?

1.4.3 . Lack of Self-Reference

Truthful people make frequent use of the pronoun "I" to describe their actions:

I arrived in Berlin on June 5, 2012. The driver picked me up at 9:30 and I went straight to the site office where I participated in the site meeting. During the meeting, the manager informed me that ABC had notified him about the defects.

This statement contains the pronouns "I" and "me" five times in three sentences.

Compare this to the following statement:

The site meeting took place in Berlin on June 5, 2012. During the meeting, the manager informed that ABC had notified defects.

Whereas the facts are the same, there is no self-reference in this statement. It does not mean that the statement is a lie, but some distance between the witness and the actions described can be seen. The distance may simply be owed to the fact that the witness was not in Berlin himself; but the distance may also be a sign that the witness is not fully comfortable with the statement. In any case, it is worth following up for the cross-examiner:

Did you participate in the site meeting?

Who else was present?

What were the site manager's exact words?

As stated, deceptive people tend to use language that minimizes references to them. A typical way to reduce self-references is to describe events in the passive voice.[8] In 2011, the German Minister of Defense, Karl-Theodor zu Guttenberg, resigned from his post after a plagiarism scandal concerning his doctorate thesis. It had turned out that 65 percent of his thesis' text consisted of verbatim copies from other sources without identifying these sources, i.e., passing them off as his own work. The University of Bayreuth finally stripped him of his doctorate. For a long period of time, Guttenberg struggled with these facts; on February 18, 2011, he made the following statement: page "103"

At no point in time was there any intentional deceit or any intentional nondisclosure of authorship. In case somebody should feel offended by this or by any incorrect insertion and citation or omitted insertion of footnotes in regard of 1,300 footnotes and 475 pages, I sincerely regret this.[9]

Guttenberg's use of passive voice is striking. He does not say "*I did not intentionally deceive…"* but "*There was no intentional deceit….*" He does not say "*…*offended by the fact that *I omitted* to insert footnotes," but "offended by … the *omitted insertion* of footnotes." The lack of self-reference is revealing. The use of such language is an indicator for a cross-examiner to probe further.

1.4.4 . Euphemisms

The versatility of language permits the speaker to give the same action or statement a different spin by using different words. If the speaker substitutes a milder, indirect or vague word for a direct, offensive or harsh expression, this is called a euphemism. Statements made by untruthful witnesses often include euphemisms, i.e., mild or vague words rather than their harsher, more explicit synonyms (e.g., "to take liberties with the truth" instead of "to lie"). Euphemisms let the subject's behavior or perceptions appear in a more favorable light and minimize any harm the subject's actions might have caused. Cross-examiners therefore ought to look out for euphemistic terms.

Consider the statement by Karl-Theodor zu Guttenberg from the previous paragraphs. He also uses euphemistic language to describe his actions. Looking at the sheer volume of undisclosed quotes from other sources, it is hardly conceivable that he accidentally "*forgot"* to disclose the sources he had used. But in his statement, the fact that 65 percent of his thesis were copied from other people's work became the "*incorrect insertion and citation or omitted insertion"* of footnotes. Guttenberg thus tried to distract his audience from the real problem. The problem was not an "*incorrect insertion"* of footnotes, but the lack of footnotes. What in fact was plagiarism is euphemistically called the "*omitted insertion of footnotes"*, and comes last in his enumeration.

Whenever a witness uses euphemistic language, it will be worth the examiner's while to probe further, even if he or she may not know the answers.

1.4.5 . Equivocation

The less firm a witness is in his or her statements, the more likely it is that the examiner will be rewarded if he or she digs deeper into the subject. A typical sign for such lack of determination is the witness dodging the examiner's questions by filling his or her statements with expressions of uncertainty, weak modifiers and vague expressions. Whenever a witness uses noncommittal language such as "*I think, I believe, I guess, I page"104"suppose, sort of, maybe, might, perhaps, approximately, about right, could,"* it indicates that the witness is not fully confident

about his or her statement. Witnesses use such vague statements and expressions of uncertainty as an escape hatch. In theory, the vague statement leaves some maneuvering room, i.e., the opportunity to modify the assertion at a later point in time without directly contradicting the original statement. At the same time, though, the vague statement is indicative of the fact that the witness does not want to make a direct, untrue statement. And this is where the attentive examiner ought to nail down the witness. If the examiner follows up on the vague statement, he or she locks the back door.

An infamous example of a testimony brimming with equivocation is former president Bill Clinton's testimony before the Grand Jury investigating the President's relationship with Monica Lewinsky.[10] To pick a random example from the transcript: One of the issues was whether Clinton, through his adviser Vernon Jordan, attempted to influence Monica Lewinsky's testimony. At one point, Bill Clinton was asked whether Mr. Jordan had met with Ms. Lewinsky and talked about the case. See the various statements of equivocation printed in italics:

QUESTION: [Y]ou were asked… "Has it ever been reported to you that he met with Monica Lewinsky and talked about this case?"

This is your answer, or a portion of it.

"I knew that he met with her. I think we suggested that he meet with her. Anyway, he met with her. I thought that he talked to her about something else."

Why didn't you tell the court when you were under oath, and sworn to tell the truth, the whole truth and nothing but the truth, that she had been talking with Vernon Jordan about the case, about the affidavit from the lawyer, the subpoena?

CLINTON: … I believe – I may be wrong about this – my impression was that at the time – I was focused on the meetings. I believe the meetings we had were meetings about her moving to New York and getting a job.

I knew at some point that she had told him that she needed some help because she had gotten a subpoena. *I'm not sure I know* whether she did that in a meeting or a phone call. *And I was not focused on that*.

I know Vernon helped her to get a lawyer, Mr. Carter. And *I believe* that he did it after she had called him, but *I'm not sure*. But I knew that *the main source* of their meetings was about her moving to New York and her getting a job.

1.4.6 . Changing the Issue

The truth may also be within palpable reach if a witness evades a straight answer by changing the issue. To give an example: It is a disputed issue whether the witness page "105"approved certain payments. The witness statement reads "*I did not have the authority to approve any such payments*." What does this mean? The witness does not deny that he or she approved the payment. The witness just switches attention to the issue of authority, which allows him to give an answer that is at least not an outright lie. The fact that he did not have authority is not in conflict with the fact that he approved the payment. The witness is simply dodging the real issue. In such a situation, it is worthwhile exploring the issue even if the examiner does not know answer, or if he or she cannot prove that the person approved the payment. The cross-examination may turn out to go as follows:

Q. Mr. White, did you approve the payment?

A. I guess I stated in my witness statement that I did not have the authority to do so.

Q. Your authority is a different issue, and we will address this later. Getting back to my question: I suggest to you that you did in fact approve the payment, isn't that correct?

A. I have nothing to add to my written statement in this regard.

Q. Mr. White, your written statement is clearly unresponsive in this respect. So again, did you approve the payment?

A. As I said, we were in the midst of settling the final accounts, and at that point in time it would not have made any sense to approve one single payment.

Again the witness changes the issue. The witness is trying to reason with the examiner about whether it made sense to approve the payment or not. Why does the witness do so? Chances are that he wants to avoid making a false statement. He tries to steer the examination into a direction where the tribunal can draw conclusions, in his favor, without him actually testifying untruthfully ("*We don't know for sure whether he approved the payment, but it did not make sense to do so, so probably he did not.*"). Based on this maneuvering, there are sufficient indicators in the statement to conclude that: (i) the witness did in fact approve the payment; and that (ii) the witness' truth bias is working. Accordingly, it is safe for the examiner to continue the cross-examination on this issue even if he or she does not know the answer, or cannot prove the expected answer. In order to lock the witness in even further, the examiner ought to close the door on the issue of whether an approval made sense or not:

Q. Mr. White, I was not asking whether it did or did not make sense to do approve the payment at the time. The question is: Did you approve the payment?

The witness could give one of his previous, nonresponsive answers, again changing the issue to authority or to whether an approval made sense; but such an answer is more difficult now that the examiner underlined that the question whether an approval made sense is not the issue. And even if the cross-examiner does not get the witness to "confess" that he approved the payment, he still achieved something. page "106"The non-responsiveness is properly named and shamed; the only conclusion the tribunal can draw from Mr. White's beating around the bush is that he did in fact approve the payment.

1.5 . Educating the Tribunal

Cross-examination can also be a means of educating the tribunal. Gaining a sound understanding of the case's subject matter is more difficult for arbitrators than it is for counsel. Counsel can clarify all their questions with their party. Especially in technology-driven disputes, the party's own staff is the most valuable source of information. Arbitrators, however, are dependent on the written submissions in order to understand the subject matter of the dispute, at least up the point of the hearing. Likewise, until the hearing the parties have no opportunity to test the tribunal's understanding. For those matters that the counsel knows to be difficult to understand, but that are important to the case, he or she can use witness examination to educate the tribunal. This is done best by way of direct examination; however, direct examination is usually limited to a short period of time or dispensed with at all. Sometimes, it is therefore useful to educate the tribunal by way of cross-examination. This technique is particularly useful in regard of expert witnesses. Taking the example from above:[11] Welding works can be a highly complex matter the intricacies of which are typically not within the arbitrator's personal knowledge. But in order to understand the details of the dispute, it is important that the arbitrators gain some sound understanding of welding. In other words, the basics of welding hold the key to understanding the dispute, even if they themselves are not in issue. Such basics, however, can also be established together with the opposing expert witness during cross-examination. Frequently, such examination also creates an atmosphere in which the tribunal joins in and asks questions on its own, which, in turn, allows counsel to test the tribunal's understanding. Accordingly, if the examiner believes that a sound understanding of the issues in dispute will rather further his or her case than the opponent's, cross-examination on such issues may be time well spent. But one word of warning: while this kind of cross-examination can be useful, it should not take too much room. As said, the main purpose of the cross-examination is to discredit the other side's evidence. If the examination dwells on uncontentious baseline facts only, it may bore the tribunal, or worse, give the impression that the counsel is afraid of touching upon the contentious issues.

2. THE SCOPE OF CROSS-EXAMINATION

There is some uncertainty as to the permissible scope of cross-examination in international arbitration. It is sometimes said that cross-examination must be limited to issues addressed in the witness statement or in direct examination. In fact, however, such a rule does not exist unless it is agreed by the parties (which is hardly ever done page "107"in practice). It seems to be the belief among some arbitration practitioners that common law systems would limit cross-examination in this way, and that arbitration should follow suit, given that cross-examination has its origin in the common law system. But the belief that all common law systems would generally restrict cross-examination to the matters touched during direct examination is incorrect.

Such a restriction is, however, found in Rule 611(b) of the U.S. Federal Rules of Evidence:

*(b) Scope of Cross-Examination***.** Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.

On state level, the majority of states follow this restrictive approach. But there is also a considerable number of states that follow the "wide open" approach. Take Rule 611(b) of the Tennessee Rules of Evidence:

A witness may be cross-examined on any matter relevant to any issue in the case, including credibility, except as provided in paragraph (d) of this rule.

Similarly, rule 611(b) of the Mississippi Rules of Evidence provides:

Cross-Examination shall not be limited to the subject matter of the direct examination and matters affecting the credibility of the witness.

Further examples for U.S. states that follow the "wide open" approach include Alabama, Ohio, Massachusetts, North Carolina and Texas.

The courts of England, Australia and Canada also permit the cross-examination to exceed the scope of the direct examination. Accordingly, it is probably fair to say that the majority of common lawyers do not practice the restriction of cross-examination to the subject matter of direct examination.

The IBA Rules only address the scope of redirect examination,[12]but are silent on the scope of cross-examination. On the one hand, one could therefore argue that the scope of cross-examination must be wide, according to the IBA Rules. On the other hand, the IBA Rules' preamble postulates that: "*The taking of evidence shall be conducted on the principle that each Party shall … be entitled to know, reasonably in advance of any Evidentiary Hearing …the evidence on which the other Parties rely."* One could say that the playing field was no longer level if the party offering the witness had to put its cards on the table (by way of witness statement), but the cross-examining side would not (because it could ask questions on any subject). In any event, as can be seen from the above considerations, the permissible scope of cross-examination is not self-evident. If the question as to the scope of cross-examination only arises in the hearing, it can lead to confusion. The party that offered the witness may object to a cross-examination going beyond the witness statement, and the tribunal then has to make a ruling. In a recent arbitration, the (civil law) chairman was not even sensitivepage "108"to the fact that the scope of cross-examination could be a contentious procedural issue, whereas the co-arbitrators phrased diametrically opposed opinions on the issue. In this setting, a lively and time-consuming discussion unfolded, along with procedural objections on both sides. The best way to avoid such procedural squabbles is to address the issue in the procedural rules.[13]

So which approach is "better," *wide open* or restricted to the matters covered in the witness statement? From the counsel's point of view, it will naturally depend on whether he or she is in the shoes of the direct examiner or the cross-examiner. From the arbitrators' point of view, the

better arguments speak in favor of the *wide open*approach. If the cross-examination is limited to the witness statement, it can be tedious to observe. The issues addressed in the witness statement are usually also covered by the written submissions. The answers and counter-arguments are contained in the reply submissions and rebuttal witness statements. Against this background, a cross-examination limited to the witness statement can do little more than rehash already well-established facts and arguments. Frequently, however, a witness can be more interesting in areas of a dispute that he or she (or his or her party) chose not to address in the witness statement.

If the specific procedural rules limit the scope of cross-examination to matters covered in the witness statement and the direct examination, the cross-examiner must plan accordingly and be prepared to react to the "outside the scope of the witness statement" objection. Accordingly, he or she must be prepared to explain why and how the respective line of questioning relates to the witness statement or the direct examination. This is usually not a black or white decision; one can often debate whether a question is related to issues on the witness statement, or whether it concerns a new issue. In practice, however, even tribunals that limit the scope of cross-examination to the witness statement give the benefit of the doubt to the cross-examiner. If the rules are silent as to the scope of cross-examination, the careful examiner will also be prepared to explain the link to the witness statement, just in case the tribunal should restrict the questioning outside the scope of the witness statement during the hearing. Such preparation spares the cross-examiner the stress of browsing through the witness statement during the hearing in order to find such a link.

3. THE TOOLS OF THE TRADE

3.1 . Tone and Style

Never get angry. Never make a threat. Reason with people.

Don Corleone, The Godfather

For most people who are not common law trial lawyers, the picture of cross-examination is influenced by its depiction in the movies. The hollywoodized version of cross-examination is often confrontational, aggressive, and even hostile. While it is true that the average U.S. trial lawyer will be more aggressive during cross-examination page "109"than his or her civil law counterpart, it is also acknowledged by U.S. trial lawyers that gratuitous aggression is counterproductive.[14] Aggressive cross-examination almost always backfires on the examiner. The arbitrator's base setting is that witnesses are prepared to testify truthfully and to provide information that makes it possible for the tribunal to decide the case. One will hardly ever see an arbitral tribunal addressing a witness in a hostile and unfriendly manner, at least to begin with, and as long as the witness appears to be willing to testify truthfully. On the one hand, this is because the tribunal must not appear partial. On the other hand, it is a sign of courtesy and the natural pro witness bias that arbitrators have. If the examiner's default mood differs from that of the arbitrators, it is unlikely that they will adjust their mode; rather, they will question the cross-examiner's attitude.

Basically all elements of an overly confrontational cross-examination – a raised voice, aggression, cynicism – will backfire on the examiner for the following reasons:

Aggressive behavior demonstrates loss of control: The key to a successful cross-examination is control. An examiner should strive to be the tribunal's tour guide. From the opening statement onwards, the examiner should try to guide the arbitrators through the plethora of facts and arguments, showing them the right way to the award. The arbitrators are more likely to subscribe to the examiner's case theory if he or she keeps full control over the facts. Aggression and hostilities demonstrate loss of control. As soon as the examiner raises his or her voice, the examiner sends out the signal that he or she is losing grip of the situation.

*Aggressive behavior reveals the weaknesses of the case:*Shouting, cynicism and hostilities can also be interpreted as a sign of frustration. In fact, this is what they are. If an examiner raises his or her voice and starts bullying the witness, such demonstration often resembles that of a petulant child stomping his or her feet. It implies that there is something the examiner desperately wishes to have, but cannot get. Even if an examiner cannot achieve the intended objective, he or she must not highlight this failure by excessive emotional reactions. The examiner usually fares best by putting on an imperturbable poker face.

The witness is less likely to lower his or her guard: A strong reaction on the part of the examiner will produce a strong reaction on the part of the witness. If the examiner pushes, the witness will push back. On the surface, this may lead to bickering and squabbling between counsel and the witness. While this is already damaging enough, the symptoms below the surface are even less welcome. The witness will retreat into him- or herself even further and become more defensive. The witness will lock him- or herself in more and more, and resist answering all further statements simply because they are being asked by the person page"110"who just attacked him or her. The cross-examiners' default mood should therefore be calm and courteous.

To avoid misunderstandings: There is a difference between not being aggressive and handling the witness with kid gloves. The two are not the same, they rather are on different scales. The advice against being overly aggressive concerns the personal level where there is no need to attack the witness as a person. On the factual level, the examiner may of course press the witness hard. But he or she ought to do so with facts, hard-hitting and provable facts. The more of those facts the examiner can present to the witness, one after the other, the more control he or she establishes over the situation.

3.2 . The Leading Question

The defining feature of cross-examination is the leading question. By one definition, a question is leading if it can be answered by "yes" or "no." "*Did you participate in the meeting of April 6, 2006*?" is a leading question according to this definition. But this semantic definition fails to capture the real essence of a leading question. A question is leading if it contains its own answer, or is suggestive of the answer that the questioner wishes to have confirmed. According to this definition, the above example also qualifies as a leading question; not because it requires a "yes" or "no" answer, but because it is suggestive of the fact that the witness participated in "the meeting." The witness can thus "echo back" part of the question in order to answer it. A corresponding non-leading question would be "*What happened on April 6, 2006?"* Take the following example:

Did you examine the patient yourself or were you absent in the afternoon?

Depending on the context, the question is leading even though it does not demand a "yes" or "no" answer. It restricts the witness down to two alternative answers, and most likely, the questioner already knows which of the alternatives is correct.

The leading question is the perfect tool to establish control over the witness. As opposed to the open question, it does not invite a narrative answer and thus, makes it more difficult for the witness to digress or to be evasive. However, a leading question will produce little, if any, new information. From a common lawyer's perspective, this is neither objectionable nor surprising. But others, especially those that have a civil law background, may hold a different view. If counsel keeps the witness on a short leash by only soliciting "yes" or "no" answers, some arbitrators may regard such conduct as standing in the way of establishing the truth. It is therefore suggested that a counsel in international arbitration should come up with a sound mix of leading and non-leading questions, taking into account the legal backgrounds and predilections of the arbitrators. To be safe, it is advisable to limit open questions to the less

crucial and dangerous aspects of the case. As stated before, even if the examiner does not know the answer, but is confident about handling all alternatives, open-ended questions are appropriate page"111"or even advisable. Further advice for situations where open-ended questions may serve to be fruitful was given in Chapter 8 section 1.4. In regard to more critical issues, though, the leading question is the method of choice. And it must be noted that the IBA Rules clearly permit leading questions during a cross-examination. They only state that questions to a witness during direct and redirect testimony may not be "*unreasonably leading*."[15]

3.3 . One Fact per Question

Keeping control is the key to a good cross-examination. And submitting only one fact per question to the witness holds the key to keeping control. Or, to put it another way, it is advisable to avoid compound questions. A compound question is one that asks several questions, potentially requiring different answers, at the same time, as in the following example:

So it was about 10.15 pm when you entered the shop and saw a tall, dark haired man pull a gun from his coat, point it at the shop clerk and threaten to shoot him unless he opened the register and handed over to him the money contained therein?

There are basically three answers the witness can give. The most likely one is: "*Can you please repeat the question?"* A question like this is simply too complex to be properly digested in an oral examination. While this answer makes the examiner look foolish, the other two alternative answers are equally desirable. Assuming the witness simply answers "*No*," which of the facts that the examiner suggested in the question are incorrect? All of them? Or is everything correct apart from the time? Or is the time correct, but neither was the alleged perpetrator tall nor did he pull the gun from his coat? It will take quite a few follow-up questions to clear up the confusion. At the same time, it will make the examiner look amateurish.

But even if the witness answers "Yes," and the witness thereby confirms all of the facts in one go, this is not a desirable result. At first glance, it seems as if the examiner has saved time. But as stated earlier in this book, people, including factfinders, also measure importance by the time spent on certain issues. If counsel fires away ten facts in one question, and promptly receives the desired "Yes" answer, the effect of the answer on the arbitrators is lost. Such a way of questioning is not conducive to highlighting the importance of the facts. The situation becomes even worse when the question that follows is also a compound question. The tribunal is not given sufficient time to digest and remember the information just confirmed. And after a while, the decision takers will stop concentrating. More haste, less speed.

In order to highlight the importance of facts, to keep control over the witness and to make sure that the tribunal can follow, the question ought to be broken down into a series of shorter, clearer questions:page "112"

You entered the shop at 10.15 pm?

Did you see a man standing at the check-out?

The man was tall and dark-haired?

Did you see the man produce a gun?

Did he pull the gun from his coat?

Did he point the gun at the shop clerk?

Did you hear the man threatening the shop clerk?

etc.

Not only does it become easier for everybody to follow this kind of questioning. If the witness answers "*No*," the examiner exactly knows which of the facts the witness negates and can follow-up on it.

3.4 . Referring to Exhibits Properly

Proper referencing to exhibits was already dealt with in the chapter on direct examination.[16] During cross-examination, proper references are even more important. During direct examination, the witness is well-disposed towards the examiner's questioning. Accordingly, the witness will make every effort to make the examiner's questioning work and to locate the document that he or she is referring to. During cross-examination, the situation is very different. The witness will feel less inclined to assist the examiner with locating the relevant document. It is therefore essential to refer to documents as precisely as possible so that there is no room for evasiveness and no time will be wasted locating the document. The use of a witness bundle, as described in Chapter 6 section 1.4 is recommended.

3.5 . No Inflationary Use of Filling Words, Question Tags and Other Padding

Whether in direct examination or in cross-examination, the examiner ought to avoid the inflationary use of filling words and phrases, as well as other annoying habits. Some of the most popular ones are:

"And …": Some examiners tend to commence the majority of their questions with the word "*and*." The result is a monotonous style of questioning that will sooner or later unnerve the participants. What is more, it does not look well in the transcript. In 99 percent of the cases, "*and"* at the beginning of the question can be safely deleted without changing the contents of the question. Unnecessary padding bears the risk of deflecting from the content. This is especially true if unnecessary elements are overused in a repetitive manner.

"Thank you!": The same goes for examiners who tend to confirm the witness' answers by saying "*Thank you!*." Thanking the witness for his or her answer is dispensable, since the witness is there to answer questions. It is true that most of the witnesses in arbitration appear voluntarily, so it is appropriate to thank them page "113"for appearing before the tribunal to testify. But this is normally done by the tribunal at the beginning of the examination. The cross-examiner may do it again at the beginning of the questioning. But repeated "*Thank Yous"* should be avoided during the examination. It does not only deflect from content, but also may appear as an overeager attempt to please.

Nodding, uh-hmms: While nodding and uttering "uh-hmms" may not appear on the transcript, it is still annoying. What is more, such affirmative gestures send out the wrong cues to the witness. It makes the witness believe that his or her answers are acceptable, or even correct. While cross-examiners in arbitration should not be overly cross and confrontational with witnesses, there is also no need to be overly responsive with regard to the quality of the witness' answer. Generally, the cross-examiner fares best with putting on a poker face that does not reveal whether or not he or she likes the answer.

Question tags: Question tags ("*It is …, is it not?*," "*You would confirm …, would you not?"*) are a matter of taste. Some examiners love them, others hate them. They are often considered unnecessary padding, deflecting from the contents of the question. While this is correct, they can be helpful during the opening phase of the cross-examination in teaching the witness how to respond. Implicitly, the question tag will send a signal to the witness that the answer should be brief and to the point.

None of the above patterns have to be avoided completely. As stated, they only become obtrusive once they are overused. Diversity in the style of questioning will render the

examination less static and monotonous. It is therefore suggested that a good mix of different question styles be used.

3.6 . Using Silence

One of the most powerful question techniques is the use of silence. People tend to feel uncomfortable with silence after they have answered a question, especially if the answer was incomplete or inaccurate.[17] Confronted with an answer that the examiner believes to be incomplete or untruthful, it can work wonders to pause for some time and to just look at the witness. The arbitrators may even join in looking at the witness. Such silence will almost certainly cause the witness to feel uneasy. Silence creates a deadlock that has to be broken by one of the participants. If the witness' answer is inaccurate, there is a good chance that he or she will feel compelled to break the silence by correcting the answer, or adding additional information. Or at least, he or she may qualify his or her answer to make it more acceptable or credible.

3.7 . Maintaining Eye Contact with the Witness

Maintaining eye contact with the witness is important in any kind of examination, but particularly in cross-examination, where it is a matter of anxiety control. A person who page "114"has difficulty maintaining eye contact during conversations suggests timidity, shyness and nervousness. If the questioner sends out such signals, he or she gambles away one of the basic advantages over the witness. The nonprofessional witness is usually nervous, depending on the nature of his or her testimony, even anxious. The witness' and the examiner's levels of anxiety are inversely proportional: If the witness' anxiety goes up, the examiner's goes down, and vice versa. Accordingly, the cross-examiner should avoid sending out cues, whether verbal or nonverbal, indicating anxiety on his or her part. Having said that, the examiner must also avoid staring the witness down. The easiest way to avoid "staring" is to include the tribunal from time to time, i.e., to let the eyes confidently wander between the tribunal and the witness.

4. TECHNIQUES FOR IMPEACHING THE WITNESS

The cross-examination's predominant purpose is to impeach the witness, i.e., to show that the witness' testimony is not reliable. This chapter deals with various methods and techniques of witness impeachment. Broadly speaking, one can distinguish impeachments that concern the testimony itself (*ad rem*) and impeachments that concern the witness (*ad hominem*). Within these two types of impeachment, one can further distinguish the following categories of impeachment:

Figure 8.1 Categories of Witness Impeachment

Ad rem	**C**ontradictions
	Inconsistencies
	Lack of Substance
	Probability
	Relevance
Ad hominem	**C**ompetency
	Bias
	Character

4.1 . Ad Rem: Damaging the Credibility of the Testimony

In commercial arbitration, impeachment regarding the testimony itself (*ad rem*) is far more important than an impeachment *ad hominem*. The following are the most essential categories for an impeachment *ad rem*.

4.1.1 . Showing Contradictions and Inconsistencies

The classic method of shaking the testimony's credibility is accomplished by exposing contradictions and inconsistencies. The difference between the two is merely of a technical nature. While contradictions are incompatible statements within the witness' testimony itself, inconsistencies are incompatibilities between the witness' testimony and other evidence.

Contradictions can occur in various ways. First, the witness may have submitted a witness statement that is in itself contradictory. Second, the witness may contradict statements from his or her written testimony during the direct examination. Third and most important, the witness may give answers during cross-examination that contradict previous testimony as contained in the witness statement, or as given during the direct examination. Open contradictions are rare in arbitration. If a witness statement is drafted professionally, i.e., based on thorough interviews with the witnesses, there should be no open contradictions. Occasionally, though, one finds out during the hearing that witness statements were not drafted professionally; accordingly, the statement may contain what the drafting lawyer believed the witness ought to say, but the lawyer did not thoroughly check with the witness whether he or she can actually confirm such written testimony. The risk of such defective statements is increased the longer a statement becomes. Some counsels succumb to the temptation of presenting only one "crown witness" for whom an extensive witness statement, sometimes covering pages in the three-digit range, is submitted. While presenting one witness who can seemingly corroborate the complete case story may seem a smart move to some, such strategy usually backfires during cross-examination. The more complex the witness statement is, the more difficult it becomes for the witness to handle the facts. In the case of such a long and rambling witness statement, it is fair for the other side to request the right to cross-examine the witness extensively, if necessary for a full day or more. And once such witness is in the hot seat, he or she will not always be able to oversee the consequences of the live answers, in particular to analyze whether the answers contradict statements that are contained in the written testimony. Given that open contradictions are rare, they are even more damaging when they occur. If the witness contradicts his or her own testimony, it will not only damage the credibility of the particular fact in issue, but also of the witness statement and the witness, in general. The best way to prevent such a scenario is to keep witness statements as concise as possible and, of course, limited to facts within the witness' personal knowledge.

More common than contradictions are inconsistencies. Here, the witness does not contradict his or her own testimony, but his or her testimony is inconsistent with page "116"extrinsic information. This extrinsic information can originate from the witness him- or herself, as long as it was provided "out of court" (e.g., letters or emails by the witness submitted as documentary evidence). The witness testimony can also be inconsistent with other information on the record, such as documentary evidence, allegations in the written submissions, or other witnesses' testimony. The following section will give a few examples, based on the following small case scenario:

The parties have entered into a purchase contract in June 2013 and are now in dispute about certain alleged defects. The buyer commenced arbitral proceedings, claiming a reduction of the purchase price. The seller defends himself by relying on a clause in the purchase agreement, according to which the seller is not liable for any defects known to the buyer at the time the contract was entered into. The seller/respondent presents a witness who testifies that the features that the buyer now considers to be defects were discussed at length during a meeting on May 7, 2013. The claimant/buyer rejects this allegation.

A *contradiction* would occur if the witness him- or herself would, for instance during cross-examination, name a different date for the meeting.

Inconsistencies could manifest in any of the following ways:

– The statement is inconsistent with the *testimony by another witness* who testifies that the alleged defects were not discussed during the meeting.
– The statement is *inconsistent with the minutes of meeting*, either because the witness is not even listed as a participant of the meeting, or because the minutes do not reflect a discussion of the alleged defect.
– The testimony is inconsistent *with the written submissions*submitted by Respondent because these refer to a meeting on May 6, 2013.

The classic method of revealing inconsistencies during cross-examination is the following three-step procedure: First, lay the foundation. Second, ensure that the witness is committed to his or her prior statement. Third, confront the witness with the conflicting information.

4.1.1.1 . Laying the Foundation

Laying the foundation means that the cross-examiner provides some background information to the line of questioning about to come. Such background information permits the tribunal, and also the witness, to understand the context in which the following questions are going to be asked. There are two schools of thought in regard of whether it is wise to lay the foundation. The first focuses on the witness. It proposes that the examiner should refrain from laying the foundation because the witness should be kept in the dark about the relevance of the examiner's question as long as possible. This is because if the witness is prepared to testify untruthfully, this exercise will become more difficult if the witness does not know the context of the question. The other school of thought focuses on the tribunal's understanding. If the witness does not know the context, the tribunal will not know it either. And a long, drawn-out page "117"cross-examination during which the tribunal feels lost, or may feel that the cross-examiner has no agenda, may be counterproductive. After all, it is the tribunal whom the cross-examiner wishes to persuade that the testimony is not reliable. If the examiner only starts to put the witness' answer into the right context during the post-hearing submission, this may be too late. The tribunal's first impression may have been that the cross-examination was pointless and did not yield any meaningful results, and changing this first impression a few months later is a difficult task. It is therefore suggested that it is wise to start off by laying the foundation to the question. This is particularly true if the examination will cover a large number of distinct issues:

Q. Mr. Smith, I would now like to turn to a new issue. It is ABC's view in this arbitration that the alleged defects we just discussed were known to Smith Inc. I believe that you addressed this issue in par. 22 of your witness statement.

A. That is correct, yes.

4.1.1.2 . Recommitting the Witness to His or Her Prior Statement

In the next step, the lawyer ought to recommit the witness to his or her previous statement. The lawyer can recommit the witness by repeating, or having him or her repeat, the statement and by confirming that the statement is still correct in his or her view:

Q. Mr. Smith, you have testified that the defects were discussed in a meeting between the parties.

A. That is correct, yes.

Q. The meeting, so you state, took place on May 7, 2013.

A. As I said in my written statement, yes.

Q. Did you personally participate in the meeting?

A. I did.

4.1.1.3 . Confronting the Witness

Finally, it is time for the lawyer to confront the witness with the conflicting information:

Q. Mr. Smith, May I ask you to please turn to Tab 5 in your witness bundle. For the record, Tab 5 is Exhibit C 55.

A. Yes.

Q. Are you familiar with the document, Mr. Smith?

A. Let me see, yes …

Q. These are the minutes of the meeting on May 7, 2013, right?

A. Correct.

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Before continuing the confrontation, it is sometimes helpful to validate the new document. Validating consists of underlining the document's importance. If the document is properly validated, the examiner closes possible escape routes for the witness. In this example, one way of validating the document would be to show that the minutes were thoroughly drafted and cross-checked before they were sent out. Once the minutes are validated, the witness is locked in and it will be more difficult for him or her to escape, e.g., by arguing that the minutes were possibly drafted in a careless manner:

Q. Who drafted the minutes?

A. Mr. White, a colleague of mine.

Q. Did Mr. White also attend the meeting?

A. Well, naturally he did.

Q. Mr. White did not send out the minutes, but you did, correct?

A. Yes.

Q. I assume you read the minutes before you sent them out?

A. I did.

Q. And then you initialed the minutes?

A. Well, as you can see yourself, yes.

After the document has been validated, the confrontation continues:

Q. Can you please show me where the minutes reflect the alleged discussion on the defects?

A. Well, I assume you know yourself.

Q. Actually I do not. Is it correct that the minutes do not reflect the discussions that allegedly took place according to your testimony?

A. Okay … they are not mentioned. But that does not mean they didn't occur. I remember quite clearly that we discussed….

This way, the examiner has properly introduced the inconsistency. It does not prove that the defects were not mentioned in the meting, but the examiner has cast doubt as to the witness' allegation. The witness confirmed that the minutes did not include the alleged discussion. Further, he confirmed that the minutes were not drafted sloppily and that he checked them before sending them out. The more inconsistencies along these lines that can be demonstrated, the less credible the testimony becomes.

There is one criticism to be made with regard to such cross-examination. The minutes of meeting are part of the record, and the reason probably is that the inconsistency was already highlighted in the written submissions. If so, the cross-examination rehashes a point already made, and the thrill has gone; everybody, including the witness, probably knows where the examination is heading at. For some page "119"tribunals, such cross-examination may feel dull. But it is suggested that there is still some added value to be obtained from such cross-examination, even if the issue and the inconsistency are not new. In our example, the claimant had alleged that the defects were not discussed in the said meeting and he relies on the minutes. The respondent alleges that discussions did in fact take place, and alleges that the minutes are incomplete. On paper, however, this is a lifeless discussion that does not permit the tribunal to fully assess the evidentiary value of the minutes of meeting. But if the witness is confronted with the inconsistency that his recollection of the meeting is not supported by the meeting minutes, the tribunal can see how he handles himself, whether he gets nervous, evasive, aggressive, or whether he is quite confident and convincing in explaining why the minutes must be incorrect.

There is one further strategy that can be employed to prevent the cross-examination from being only a repetition of inconsistencies highlighted before. The most memorable and most convincing parts of a cross-examination are often those inconsistencies that were not previously addressed in the written submissions. Such inconsistencies are a pot of gold because the witness is unprepared and thus can be caught off guard. Sometimes, such inconsistencies only spring to the cross-examiner's eye during the preparation for the hearing. As long as the documents on which the examiner relies are part of the record, it is fair to use them in cross-examination. Based on this experience, it can even be wise to deliberately spare some inconsistencies for the cross-examination, i.e., to not mention them in the written submissions, even if they were spotted before. Obviously, this strategy is too risky for major inconsistencies to be highlighted because one can never be sure that the points can be brought out during cross-examination. But in regard of minor points, the strategy is worth considering.

One word of warning concerning minor inconsistencies: Any inconsistency the examiner relies on should be a genuine one, not just an ordinary, imperfect recollection. For instance, if the witness has testified that a relevant meeting took place "*around the end of May*," but the only meeting around this time occurred on June 1, this "inconsistency" will have a limited effect. On the contrary, if all the examiner can come up with in a lengthy cross-examination are petty inconsistencies such as this, the outcome may be counterproductive; the tribunal will rather question the strength of the examiner's case ("*So this is all he got …*").

4.1.2 . Showing a Lack of Substantiation

A further method of impeachment, which is particularly useful with expert witnesses, is to show that there is a lack of substantiation. Frequently, witnesses present claims and assertions in their expert opinions or witness statements without their statements being backed up by facts and arguments. It is then the cross-examiner's task to demonstrate that these statements are unfounded. An expert may claim that cracks in a roof structure were caused by moisture, but he

or she did not analyze whether the roof structure did actually absorb moisture, or how exactly moisture would cause cracks. In this case, the expert's testimony is speculative, i.e., lacking substantiation. page "120"Or a fact witness may claim that his or her business partner acted unfairly and in bad faith throughout a cooperation agreement, but cannot quite explain how exactly such unfair treatment occurred. In such scenarios, it is the examiner's task to unmask those areas of the testimony that are lacking substance. Based on the written submissions and the written testimony, it is usually a straightforward exercise to detect unsubstantiated statements.

4.1.3 . Showing Improbabilities or Implausibilities

The testimony's credibility can also be damaged by working out details that will show the testimony's improbability or implausibility. Turning back to the above case scenario[18] where the respondent's witness testified that the alleged defects were discussed in the said meeting: The claimant showed an inconsistency in the sense that the minutes of the meeting did not include any discussion of the respective issue. The respondent's witness had testified that the minutes then must be incomplete. In order to strengthen its case that the alleged defects were not discussed, the claimant could cross-examine on probabilities. Maybe the meeting was attended only by commercial staff of both parties so that it was unlikely that technical discussions on defects occurred. Or the claimant can show that certain aspects of the alleged defects only materialized some time after the meeting. Further, the minutes may show that the meeting only took twenty-five minutes so that it is unlikely that further points, apart from those expressly mentioned in the minutes, were discussed. None of the mentioned items directly refutes the respondent's allegation that defects were discussed, but it renders the respondent's allegations less likely or plausible. Looking at each of these items individually, they may seem weak or speculative; but if one looks at them in combination, they may well be convincing.

Cross-examining on probabilities is more difficult than cross-examining on inconsistencies. If the examiner suggests to the witness that it is unlikely that a discussion on the defects occurred because the meeting only took twenty-five minutes, the escape route for the witness is easy ("*Well, I can assure you that the defects were discussed in those twenty-five minutes*"). More promising is a cross-examination on the probability of a discussion on defects against the background that only commercial staff attended the meeting. Here, the witness would have to explain why and how commercial people discussed the technical aspects of the alleged defects. If he or she comes up with a sound explanation, it may backfire on the claimant, though. The examiner must therefore weigh the pros and cons of such a line of questioning; in particular, the examiner must assess whether he or she can also live with the answer if it serves as a sound explanation as to why commercial people discussed technical issues. But supposing that the claimant's lawyer can safely assume that defects were not discussed, e.g., because the claimant's participants of the meeting confirmed this fact, it is worth taking the risk of cross-examining on probabilities: page "121"

Q. Mr. Smith, you are the director of Respondent's accounting department, correct?

A. Yes.

Q. Your colleague Mr. White, who drafted the meeting, he is with you in the accounting department?

A. That is true, yes.

Q. Looking at the participants on Claimant's side, Mr. Walter and Mrs. Stevens: The two of them are from accounting as well, aren't they?

A. Yes, I know that.

Q. Now help me with this, and I do not mean to be disrespectful: Why would four accountants discuss the fatigue strength of 7CrMoVTiB10-10 steel?

A- Well, I dunno, I cannot remember why exactly we discussed it, but it came up… .

This is all that is needed, and the cross-examiner should leave the subject. In the post-hearing submission, he or she can make the point that discussions on defects are unlikely to have occurred, considering the participant's professional background and that the witness could not offer a plausible explanation. If the examiner decides to perform a cross-examination such as this, he or she would be wise to start on this point and only then to visit the minutes of meeting that do not reflect any discussions on defects. Otherwise, the witness may anticipate where the question is coming from and adapt his answers accordingly ("*Well, I am an accountant by training, but in my 10 years with ABC, I did, of course, pick up some technical knowledge myself.*").[(19)]

4.1.4 . Showing a Lack of Relevance

Cross-examination can further go to the relevance of the testimony. There can be manifold reasons why certain testimony may be deemed irrelevant. To give an example: The employer in a construction project may claim damages from the contractor because of a delay in the completion. The responding contractor's witness testifies, amongst others, that the claimant was late in approving certain drawings for the execution of the works. Assuming further that the employer had in fact belatedly approved the drawings, but that the contractor had already commenced the execution of the works based on draft drawings. Accordingly, the allegation that the drawings were approved belatedly is correct, but it is irrelevant when it comes to assessing whether the construction works were delayed by this fact; the approval of the drawings was not on the critical path. Here, the claimant's lawyer can cross-examine the contractor's witness on relevance.

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Quite often, when it comes to issues or relevance, the point can be made without the witness. In the example, the fact that the contractor commenced the works based on drafts so that the employer's belated approval did not cause delay can be shown with documents (daily construction records, letters, etc.). Still, there is a difference between demonstrating irrelevance in writing and establishing irrelevance during cross-examination. If a witness can be brought to admit that he or she testified to facts that are irrelevant, and that he or she in fact knew so, it will diminish the witness' credibility. In the example, it may appear to the tribunal as if the witness presented certain facts in the written testimony in order to set the tribunal on the wrong track. The facts are not wrong; the witness may not have stated that the belated approval of the drawings delayed the works, but it may have appeared as if this was the conclusion that the witness wanted the tribunal to draw (because the tribunal may assume that witnesses only testify to relevant facts). Once the witness has admitted that the facts are not relevant, he or she gambles away the credibility bias that the tribunal might have had for the witness.

4.1.5 . Knowing when to Stop

An essential skill for any cross-examiner is to know when to stop. There are good reasons and bad reasons to stop. These are the good reasons.

4.1.5.1 . Stop Drilling when You Hit Oil

Once the examiner has established the point he or she intended to make, it is time to move on. It is tempting to hammer home the point by repeating it, or by having the witness express the point in even clearer terms. But there are risks. Just as when piling up building blocks, one block too much can make the whole construction collapse.

By asking additional questions after a point has been established, the examiner gives the witness time to reconsider his or her answer. It may begin to dawn on the witness what consequences the previous answer may actually entail. As Francis L. Wellman put it in his classic work on cross-examination more than a 100 years ago:

If, perchance, you obtain a really favorable answer, leave it and pass quietly to some other inquiry. The inexperienced examiner in all probability will repeat the question with the idea of impressing the admission upon his hearers, instead of reserving it for the summing up, and will attribute it to bad luck that his witness corrects his answer or modifies it in some way, so that the point is lost. He is indeed a poor judge of human nature who supposes that if he exults over his success during the cross-examination, he will not quickly put the witness on his guard to avoid all future favorable disclosures.[20]

Turning back to the example above[21]: In order to impeach the witness on his testimony that certain discussions occurred during a meeting, the examiner wanted to page "123"rely on the fact that the minutes of meeting did not record such a discussion. In order to prevent the witness from discrediting the minutes, the examiner first validated the minutes. He worked out that the minutes were drafted by one person, and were then checked by another person who even initialed the minutes. So far, so good. Based on these answers, the examiner can draw the appropriate conclusion when closing: The minutes were drafted thoroughly and are therefore unlikely to leave out relevant discussions. The examiner would push his luck by making the point even clearer, for example by asking the following question:

Q. So it is fair to say that the minutes were checked by two people, you and Mr. White, and both of you found that the minutes accurately reflect the discussions in the meeting?

If the examiner is lucky, the witness will confirm, perhaps still not understanding where the examiner is heading. But chances are that the penny will drop, the witness will put two and two together and answers something along the following lines:

A. Well, you see, the minutes are not a verbatim transcript of the meeting. We discussed more things than those recorded. The focus of the minutes clearly were commercial issues, so other, more technical points that were discussed, but that did not seem important at the time, were not included in the minutes.

The examiner can still draw his conclusion but somehow has to deal with the witness' proposition. It diminishes the impact of the examiner's previous work. The question displays poor judgment; the risk that materialized was not justified by the advantage to be gained from an even clearer statement by the witness as to the minutes' accuracy.

Another frequent mistake occurs when the examiner asks the witness to disqualify his or her own statement. If the examiner successfully established an inconsistency, the right place and time to draw the conclusion is the closing speech, or the post-hearing submission. The examiner should not draw the conclusion on the spot, and in particular, he or she should not ask the witness to draw the conclusion. Consider the following example concerning the quantum of a payment claim arising from a change request in a construction project:

Q. Mr. Green, in your letter you alleged that 50 percent of the project management costs for the month of June were attributable to ABC's change request?

A. Yes.

Q. On what basis did you calculate this percentage?

A. Well, the project management had other tasks to do, so it wasn't that 100 percent were caused by the change request. But it wasn't zero either, so we believed it was fair to allocate 50 percent.

This should be the end of the cross-examination. It became clear that there was no precise calculation leading up to the 50 percent assessment, but just the roughest of page "124"all possible estimates, fifty-fifty. It would have been fair to draw exactly this conclusion in the post-hearing submission based on the above quote from the transcript. But if the examiner requests

the witness to punish himself by confirming that his assessment was baseless, the witness may feel the need to vindicate his approach:

Q. So Mr. Green, in fact you are saying that you did not calculate at all, you just assumed 50 percent without any factual basis for such assumption?

A. Well, we made an assumption, if you so wish. But it was an educated one. I went to Mr. Smith, the head of the project management department, and asked him how much of his people's time in June was caused related the request. He couldn't give me precise figures, but… .

Whether Mr. Green's explanation is good or bad, the situation begins to deteriorate for the examiner. Before, it seemed as if Mr. Green just picked a random figure, 50/50, now the tribunal learns that there was at least some good faith effort to establish the ratio. Perhaps, the explanation might have come anyway during the re-examination, but perhaps not. By requesting the witness to qualify his figure as a baseless assumption, the examiner weakened the point already made. Further, if the examiner makes the answer that the witness just gave appear like a capital offense, it will be much harder to extract further concessions, as the witness will simply shut down and become less responsive.

Similarly, examiners ought to be careful with asking the witness for explanations. Having established a seemingly watertight inconsistency, some examiners finish their line of questioning by a rhetoric request to the witness for an explanation. Most of the time, this is not a genuine question, but rather an expression of the examiner's feeling that he or she just scored a point ("*Now how do you explain that!*"), the examiner's belief being that no explanation is possible. The safer option, however, is to simply retreat from the issue in an orderly manner, for which there are various reasons. First, there may be an explanation; maybe the inconsistency is not as watertight as the examiner may have thought, and the witness will then counteract with a sound explanation. A classic and often related anecdote is about the policeman who testifies that he caught a burglar in the act. The examiner cross-examines the policeman on probability, suggesting that it is not plausible that the burglar did not hear the policeman approaching. He establishes that the burglary took place from a shop window in a middle of the night in a narrow cobblestoned alley, with nobody else around. He further establishes that the tall and sturdy policeman was wearing heavy police boots. Then comes the examiner's potentially big moment:

Q. So it was a narrow, cobblestoned alley in the middle of the night, you are a big man, Mr. Watts, and you were wearing your heavy police boots: So how is it possible that the burglar did not hear you approaching?

A. Because I was riding my bicycle.

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True, the exchange is anecdotal only; a real cross-examination would have evolved differently. Most likely, the policeman would have presented the explanation for his silent approach at his own motion even before the final question, or the answer would have come out during re-examination. But the blow to the examiner is more severe if it directly follows his triumphant request for an explanation. And even if there is no explanation, the question unnecessarily gives the witness time to reconsider his or her answer. Given the open question format, the witness is invited to give a narrative answer that almost invariably dilutes the effect of his or previous answers.

4.1.5.2 . When You Are Riding a Dead Horse, Dismount

In the above cases, the examiner managed to elicit from the witness what he wanted, but his greed or adrenaline rush prevented him from stopping at the right time. The opposite, however, is even more likely to occur: the examiner does not receive the answers he desires, and despair

or a wrong sense of tenacity prevents him from surrendering the line of questioning at the appropriate time.

It is not realistic to expect that all points can be established during a cross-examination as planned. The witness may already disagree when the examiner tries to establish the foundation, or validate the statement. More often than not, he or she will not go along when a confrontation is being made. Or the witness may simply be evasive. Strategies for dealing with runaway witnesses will be discussed later in this book. But even the best strategy will sometimes fail; if the examiner realizes that the witness is unresponsive, or does genuinely not understand a question, it will be wise to move on. Otherwise, valuable examination time is wasted. More importantly, the arbitral tribunal will be bored and the cross-examination will appear unorganized and pointless. This does not mean that each question should only be asked once. The examiner needs to be sensitive to the tribunal's reaction. Do the arbitrators seem irritated or impatient, or are they eager to hear the witness' answer? Depending on the tribunal's reaction, the examiner must decide whether it is wise to continue a line of questioning, or whether to surrender it.

4.1.5.3 . If You Feel the Heat, Don't Get Closer to the Fire

While it is wise not to waste cross-examination time, and not to bore the tribunal by pursuing dead ends, it is of paramount importance to anticipate danger and stay away from it. Again, considering the example from above:[22] The examiner intended to cross-examine on probability based on the hypothesis that it is unlikely that four employees with an accounting background discussed intricate engineering issues during a meeting. Assume that the examination unfolds like this:

Q. Mr. Smith, you are the director of Respondent's accounting department, correct?

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A. Yes.

Q. Your colleague Mr. White, who drafted the meeting, he is with you in the accounting department?

A. Well, yes and no. Mr. White was involved in some pricing issues at the time, but actually he is an engineer by training.

The wise examiner stops right here. He or she realizes that the hypothesis has feet of clay because at least one of the individuals involved may have had the sufficient knowledge to discuss engineering issues. At the same time, it may not yet have become clear for the tribunal and the witness where the cross-examiner's line of questioning was heading at, i.e., the participants' lack of qualification to discuss engineering matters. Accordingly, it is safer to abandon this line of cross-examination before any damage is done. The examiner's superior knowledge of the facts will almost invariably permit him or her to sense potential danger zones before the tribunal does. A skillful cross-examiner therefore devises seemingly innocuous questions that permit the examiner to test the waters, and to retreat unnoticed if the line of questioning appears too risky.

4.2 . Ad Hominem: Damaging the Credibility of the Witness

Witness impeachment can also go directly to the credibility of the witness. Here, it is not the testimony itself that is called into question, but rather the trustworthiness of the witness. Reasons for such lack of trustworthiness could be bias, character and, particularly in the case of expert witnesses, lack of competence.

In international arbitration, challenging the credibility of witnesses themselves is of secondary importance, in particular with regard to fact witnesses. Unlike in a criminal trial, there is no room for impeaching the witness on character, for instance based on prior convictions. Likewise,

demonstrating bias or a lack of independence will not get the examiner very far. Unlike in a road traffic accident case, parties in arbitration are invariably linked by a contract. It is therefore the rule rather than the exception that witnesses on both sides are connected to the parties, or have a direct or indirect interest in the outcome of the case. Accordingly, there is a natural bias. The arbitrators are aware of this, and will keep it in mind when assessing the testimony's evidentiary value. Demonstrating bias therefore only serves a purpose if a witness portrays him- or herself as independent, in particular, in the case of an expert witness, while he or she is in fact not. If, for instance, a party presents an "independent" expert witness who was employed with the party, or who derives substantial parts of his or her income from instructions by the party, it is fair to highlight such a relationship in cross-examination. This is particularly true if the witness failed to disclose a relevant relationship in his or her expert report.

Showing a lack of competency is relevant for expert witnesses. In engineering disputes or other technology-driven arbitrations, however, fact witnesses may also be experts in their fields and may testify on technical aspects. In this case, competency also matters for them.

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A challenge to competency can concern different issues, for instance the witness' vocational background (e.g., if a quantity surveyor presents a delay analysis without any previous track record of analyzing delay) or credentials (e.g., if an expert has not published any academic articles on the subject, or does not hold the academic degree one would expect).

But irrespective of whether one is dealing with an expert or a fact witness, calling the witness' competency into question as such is not sufficient to impeach the witness. If the examiner cannot put a finger to any mistakes or inconsistencies in the testimony, simply pointing to the fact that the witness has not published articles on the subject matter or does not hold an academic title will be worthless. In a certain way, it only goes to emphasize that the examiner failed to challenge the witness on the merits. A challenge on competency can only be a useful add-on if the testimony itself can be impeached. In this case, the demonstrated lack of competency can be an extra piece to the puzzle, and it may serve as an explanation why the expert is wrong on the merits.

5. STRUCTURING THE CROSS-EXAMINATION

This chapter will propose a procedure for structuring a cross-examination, which is different from structuring a direct examination. It was stated before that witness examination is, to a certain extent, storytelling. During direct examination, it is the witness who tells the story; the counsel just gives some prompts and a structure. In cross-examination, the counsel is the storyteller. He or she provides the information, and the witness is (mainly) there to confirm. So, one may say that in both types of examination, the story is told by a team of counsel and a witness; but during direct examination, counsel and witness are on the same team, whereas they are on different teams during cross-examination. These different roles also influence the way and the structure of the storytelling. In direct examination, a witness can tell his or her story in an almost chronological order, starting from the beginning, moving to the middle part, and then to the end. In cross-examination, this does usually not work out because the witness will not play along. Cross-examination thus focuses on parts where the examiner believes that he or she can show that either the opposing side's story is incorrect, or where the witness has to confirm the other side's story (because otherwise the counsel will impeach the witness). The points on which this objective can be achieved will be limited in number; accordingly, cross-examination is most of the times patchwork and not chronological. In cross-examination, setting up a workable structure is therefore more difficult than during direct examination.

Structuring a cross-examination is difficult for yet another reason: One of the most important rules for cross-examination is that there will almost invariably be surprises. While certain lines of questioning may unexpectedly turn out to be non-starters, opportunities may also open up at unexpected moments. While pursuing one line of cross-examination, the witness may suddenly jump to a different issue that is also worthwhile pursuing. It is therefore essential to prepare and structure the cross-examination in a way that keeps the counsel on its feet and flexible. There is

no one-size-fits-all method of preparation, and every counsel has his or her own method.page "128"As a suggestion, the author will propose one method that had proved to work well in practice. This method consists of three steps:

1. *Step 1:* Writing down the main points that the examiner intends to show by way of cross-examination (the pillars of the cross-examination)
2. *Step 2:* Determining the individual items based on which the examiner intends to prove the main points (the macrostructure for each pillar)
3. *Step 3:* Noting down the individual questions and exhibits the examiner intends to use to support the items of the macrostructure (the microstructure).

The method will be explained using the following case study:

Case study: Alimenta is a multinational retailer with retail stores in the European Union, South America and parts of Asia. By way of a sales contract entered into in December 2011, Alimenta purchased large quantities of certain food products from the supplier Holistic Foods (Holistic); Holistic is based outside the European Union. Alimenta intended to sell the food products via its retail stores in the European Union. Shortly before the first batches of the product were delivered, the European Food Safety Authority (EFSA) banned a certain additive, E 102, which was present in the products. Alimenta was therefore not longer able to sell the products and has suffered considerable losses, most notably in the form of lost profits and logistics costs. Alimenta believes that Holistic regarded Alimenta's purchase order as an opportunity to get rid of products that would otherwise soon have become unmarketable. Alimenta takes the case to arbitration, claiming the return of the purchase price and damage payments.

The contract did not expressly state that the products were intended to be sold in the European Union. According to Alimenta, however, it was common ground between the parties that the products were to be sold in the European Union, so marketability in the European Union was an implied term. Holistic alleges that it was not aware of the intended use in the European Union.

Alimenta alleges that Holistic's sales director Mr. White would have known from previous orders of similar products that Alimenta's target market for these products was the European Union. Further, Alimenta had sent an overview of the needed quantities to Holistic's Mr. White. Attached to the overview was a breakdown of the overall figure into individual target markets, including seven countries in the European Union. Further, Alimenta points to the fact that certain aspects of packaging and labelling were discussed with Mr. White taking into consideration EU regulations before the contract was signed.

Assuming that the products were defective, Holistic argues that Alimenta failed to give an immediate notice as to the alleged defectiveness of the products as required under the contract and the applicable law. Alimenta's first written notice was in fact not sent within the applicable time limit; but according to Alimenta, the defects were notified orally within the prescribed time limit. Holistic rejects this allegation.

If Alimenta were to succeed with its argument that marketability in the European Union was an implied term, it could return the products and reclaim the purchase price paid. In order to claim damages, however, Alimenta would have to show culpability on the part of Holistic. The contract provides that Holistic cannot be liable for damages unless Alimenta can show gross negligence or wrongful intent on the part of Holistic. Alimenta believes that Holistic knew or ought to have known at the time the contract was entered into that the additive used in the page"129"product was on the verge of being banned in the European Union. Holistic argues that the upcoming ban on the additives was not foreseeable at the time.

Alimenta found out that the draft ban on the relevant additives was the subject of an email news alert by the trade journal "*Food Radar*." From previous conversations, Alimenta knows that Holistic subscribes to the newsletter. What is more, Alimenta is aware that Holistic's Mr. White attended a conference by the Food Processing Industry Association (FPIA) shortly before the

contract was signed. One of the topics discussed during the conference was the upcoming ban on the additive E 102.

Last but not least, Alimenta got hold of purchase orders that its competitor Fantastic Food place with Holistic concerning similar products at about the same time. Interestingly, the products delivered to Fantastic Food in 2012 do not contain E 102, even though previous shipments of this product in 2011 did. In Alimenta's view, this goes to show that Holistic was in fact aware of the upcoming ban.

5.1 . Step 1: Determining the Pillars of the Cross-Examination

Based on the written submissions and the witness statements, the contentious issues to be dealt with in the evidentiary hearing have usually crystallized. As a first step, it is necessary to identify the issues that are contentious between the parties and their witnesses. The first list of contentious issues should be complete, i.e., not singling out items for lack of importance, et al. In most cases, the cross-examination will not cover all the issues, but only (i) issues that are relevant and material, and (ii) for which the examiner can achieve one of the objectives of cross-examination. As stated before, they broadly fall into two categories: First, damaging testimony that the examiner can prove to be unreliable, and second, points in the examiner's own evidence that the other side's witnesses will have to confirm.

In the author's view, the ideal format for structuring a cross-examination is a mind map. For readers who are not familiar with mind mapping, a mind map is a form of diagram used to present and structure words, ideas or other items radially around a central key word or idea. The radial presentation facilitates a flexible approach because it eliminates the hurdle of establishing a logical order or hierarchy of the items right from the beginning. The method is particularly useful if the mind map is drafted by using a mind mapping software. Software-based mind mapping spares the examiner the task of having to redraw a new mind map for every step of the preparation. The structure can then be rearranged and adjusted easily by a few mouse clicks.

Going back to the case study, one can single out the following three points, or pillars that the examiner wants to demonstrate in the cross-examination of Mr. White:

First, Holistic was aware of the fact that the products were intended for sale in the European Union.

Second, Alimenta gave an immediate oral notice of the products' defectiveness.

Third, Holistic acted with intent or at least gross negligence when ignoring the new EU regulations on food additives.

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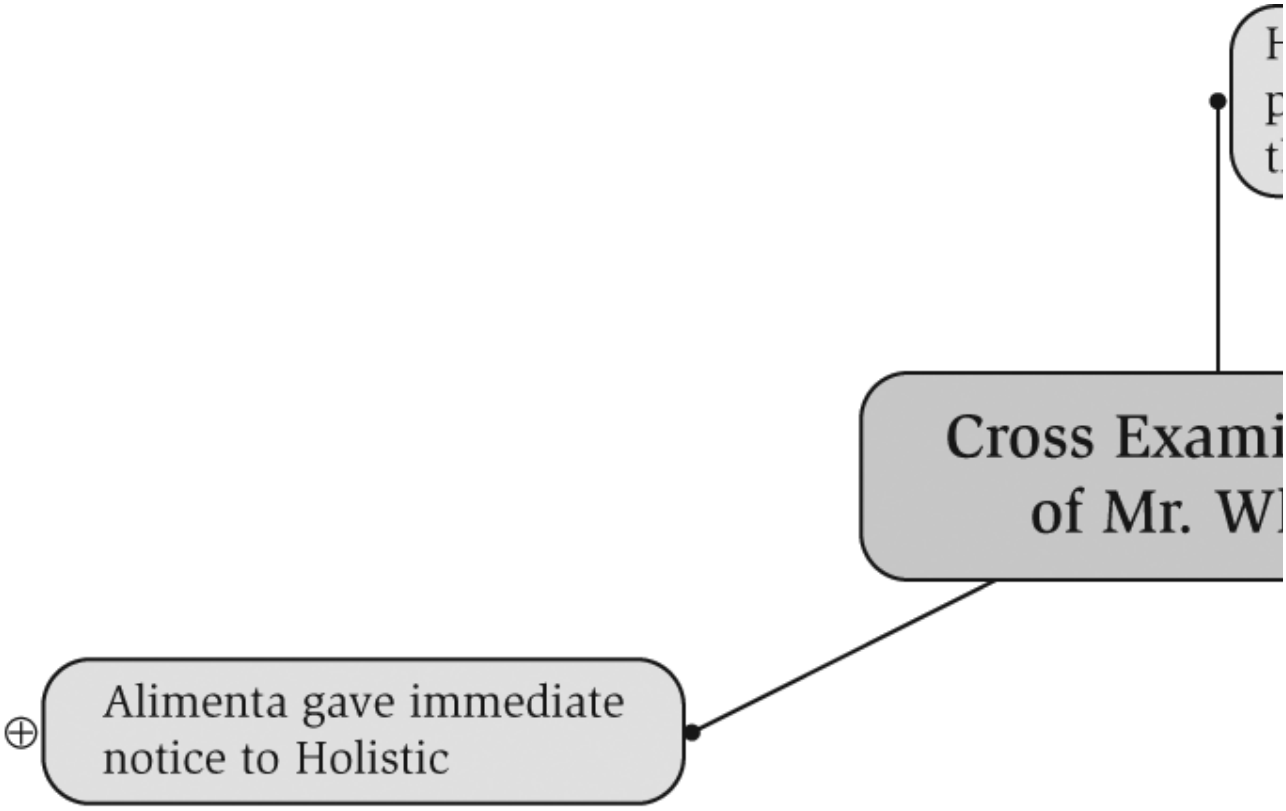
The first mind map would look as follows:

Figure 8.2 Three Pillars of the Cross-Examination of Mr. White



5.2 . Step 2: Determining the Macrostructure for Each Pillar

In the second step, the examiner has to determine the macrostructure for each of the pillars of the cross-examination. A pillar does not yet refer to certain facts. It is, rather, a topic that has to be brought to life. Take for instance the third pillar – Holistic was aware, or ought to have been aware, of the upcoming ban on additives so that it acted with gross negligence when selling products to Alimenta including such additives. In order to show that this was the case, the counsel can use the following puzzle pieces:

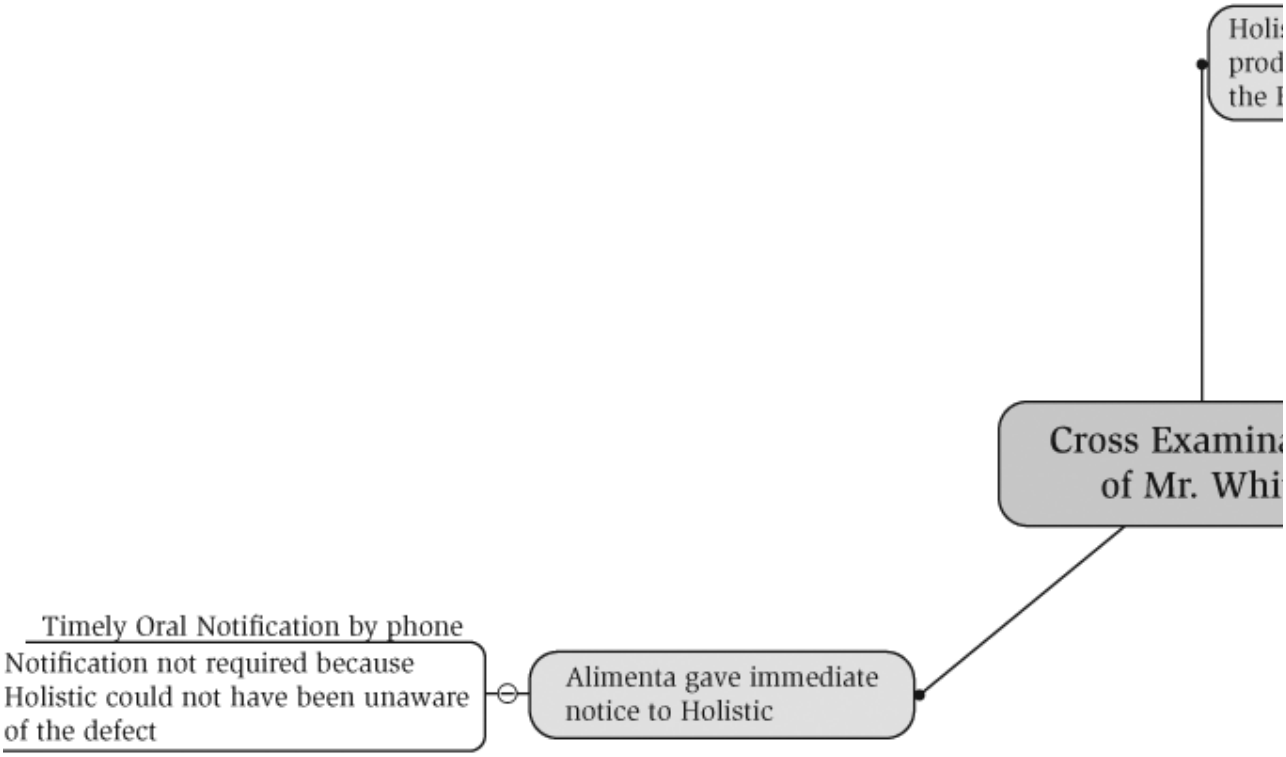
(i) There was a news alert by *Food Radar* in February 2012 informing readers of the upcoming ban of certain additives; as a subscriber to *Food Radar*, Holistic regularly receives the newsletter.

(ii) Mr. White attended a conference by the Food Processing Industry Association (FPIA) in March 2012. One of the agenda items were the upcoming EU Regulations banning, amongst other, the additive in issue.

(iii) At about the time of Aliment's order, Holistic sold similar products to Alimenta's competitor Fantastic Food that did not contain the additive that was about to be banned. Earlier shipments of the same product, however, did contain the additive. Apparently, the upcoming ban was therefore foreseeable for Alimenta.

After adding these issues and the corresponding issues for the other two topics to the list, the macrostructure will look as follows:

Figure 8.3 Three Pillars of the Cross-Examination of Mr. White Including the Macrostructure



5.3 . Step 3: Developing the Microstructure for Each Item of the Macrostructure

Determining the microstructure for each item in the macrostructure requires the most preparation. While the first two points concern strategy, determining the microstructure is about tactics. How can the counsel get the witness to confirm the points he or she wants to demonstrate? What are suitable questions, what aren't? In what sequence shall the questions be asked?

Taking again as an example the proposition that Holistic knew about the upcoming ban and therefore acted with gross negligence or even intent: One of the items in the macrostructure for this pillar is Mr. White's potential attendance at a presentation on the new EU Regulations at the FPIA conference in Rome. How should the examiner go about with regard to this item? Can he or she suggest to the witness that he knew about the regulations, at the latest, after having attended the conference? The examiner could, but doing so would not be wise. By moving into this issue too quickly, the examiner could lose the tribunal; at the same time, once the examiner frames the issue in such a direct manner, the witness is put on guard and can easily formulate effective answers. The witness may simply deny the proposition, argue that he did not pay attention to this topic, or that he took a break to attend to some other business when the issue was presented during the conference. It is therefore essential to build the argument step by step, starting on facts that the examiner can prove: The regulations were on the conference agenda, as evidenced by the programme; the witness attended the conference. A suitable line of questioning could look as follows:

Is Holistic a member of the FPIA?

Are you aware that the FPIA hosted a conference in Rome in March 2012?

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That was three months before the contract with Alimenta was signed, right?

Did you attend the conference?

(If “No”/”I cannot remember” → Tab 5/ Exhibit C 4: List of attendees)

Could you please turn to Tab 6 in the binder in front of you (Exhibit C 5)?

Is this the agenda of the March 2012 conference?

Can you please turn to page 2 of the program?

For the record, I quote the second topic of the morning session..."*New additives regulations by EFSA/ ban on E 102*?"

The above facts are not contentious; if they are contested, their veracity can be demonstrated using documents on the record. Still, it is important to lay the foundation in order to make sure that the tribunal can follow and the point is understood. Importance equals time spent. From there, the examination may move into *terra incognita*. Mr. White is on the attendance list, but maybe he still did not go to the conference. And if he went, the examiner does not know whether Mr. White attended that particular session. Did Mr. White learn during this conference that the additive E 102 was about to be banned? In the absence of witness depositions, the examiner does not know the answer to these questions. But if the examiner does not ask these crucial questions, it will look odd to the (attentive) tribunal. (“*Why does the examiner not dare go into the real question: Did Mr. White learn about the upcoming ban of the additive during the conference?”*). The test for whether it is safe to ask the open-ended question is whether the examiner can handle the “*no”* answer. In the example, the examiner can. Even if Mr. White were to testify that he did not attend the session (and that Holistic also did not know about the recent developments from other sources, such as the newsletter), the examiner can develop the argument that Holistic did not have the necessary mechanisms in place to monitor changes in the relevant regulations for its line of industry, and that this amounts to gross negligence. If Mr. White confirms that he heard about the upcoming changes at the conference, the examiner can then argue that Holistic knew about the upcoming changes and “dumped” the soon-to-be-unmarketable products on its customer. Thus, also in this scenario, the examiner can argue that Holistic’s act was grossly negligent or even with intent. The examiner could go as follows:

Did you attend the session?

If no:

- Why didn’t you? (open question, but the answer does not really matter)
- What else does Holistic do to stay informed on regulatory developments? (Safe open question/ potential link to line of questioning on newsletter)

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If yes:

- Are you aware that Dr. Werner addressed the upcoming ban on additives in his presentation?
- No matter whether yes/no: go into Dr. Werner’s presentation on occasion of the FPIA conference(Exhibit C 8).

Different counsel employ different methods for developing the microstructure. Some practitioners tend to write down more or less complete sets of questions for each issue, others jot down keywords only. It is suggested that writing down complete sets of questions is beneficial for the beginner because it provides the examiner with some security. But over time, the notes ought to become less detailed. Detailed notes tend to render the structure less clear, workable and flexible.

Once the examiner has, for example, developed his or her typical pattern for introducing documents and confronting the witness with such documents, he or she does not have to write down each question or phrase used to introduce documents. It will do to make a note of the tab and exhibit number ("*Tab 5/Exhibit C 55/Letter by … to … of…"*).

Having developed suitable sets of questions for each issue of the macrostructure, the microstructure could look as follows. The questions are still phrased more or less word-for-word for items 1 and 2, but have turned into an abbreviated form for item 3. Once the examiner feels more secure, this style is more suitable.

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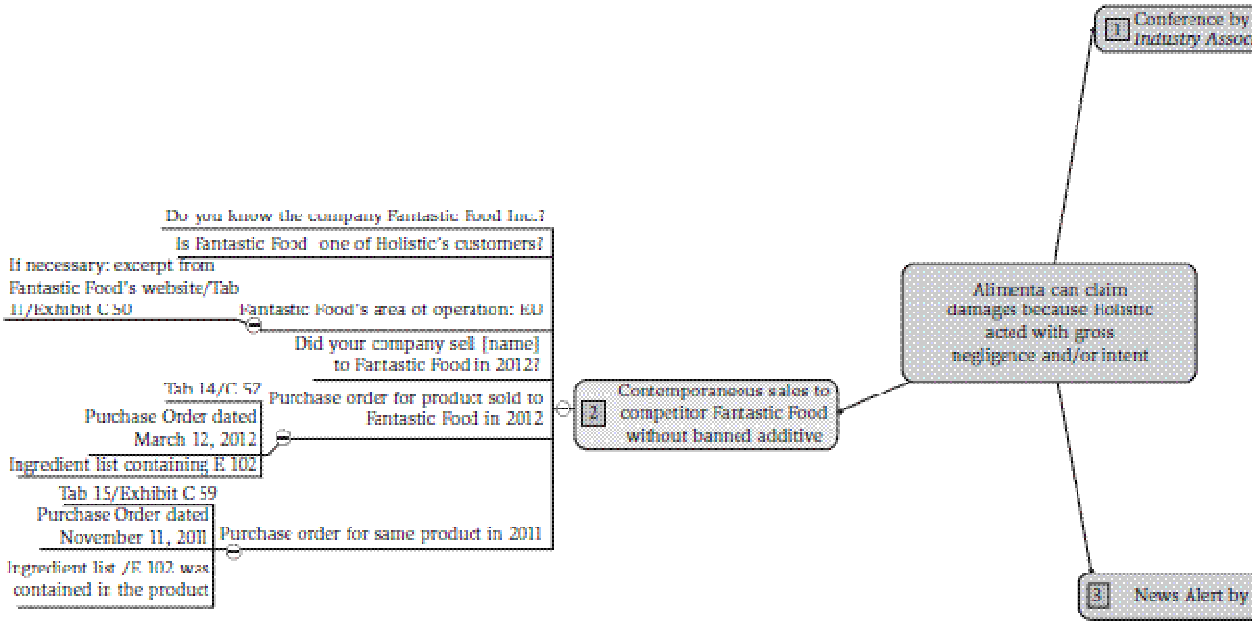
Figure 8.4 Microstructure for Argument that Holistic Acted with Gross Negligence



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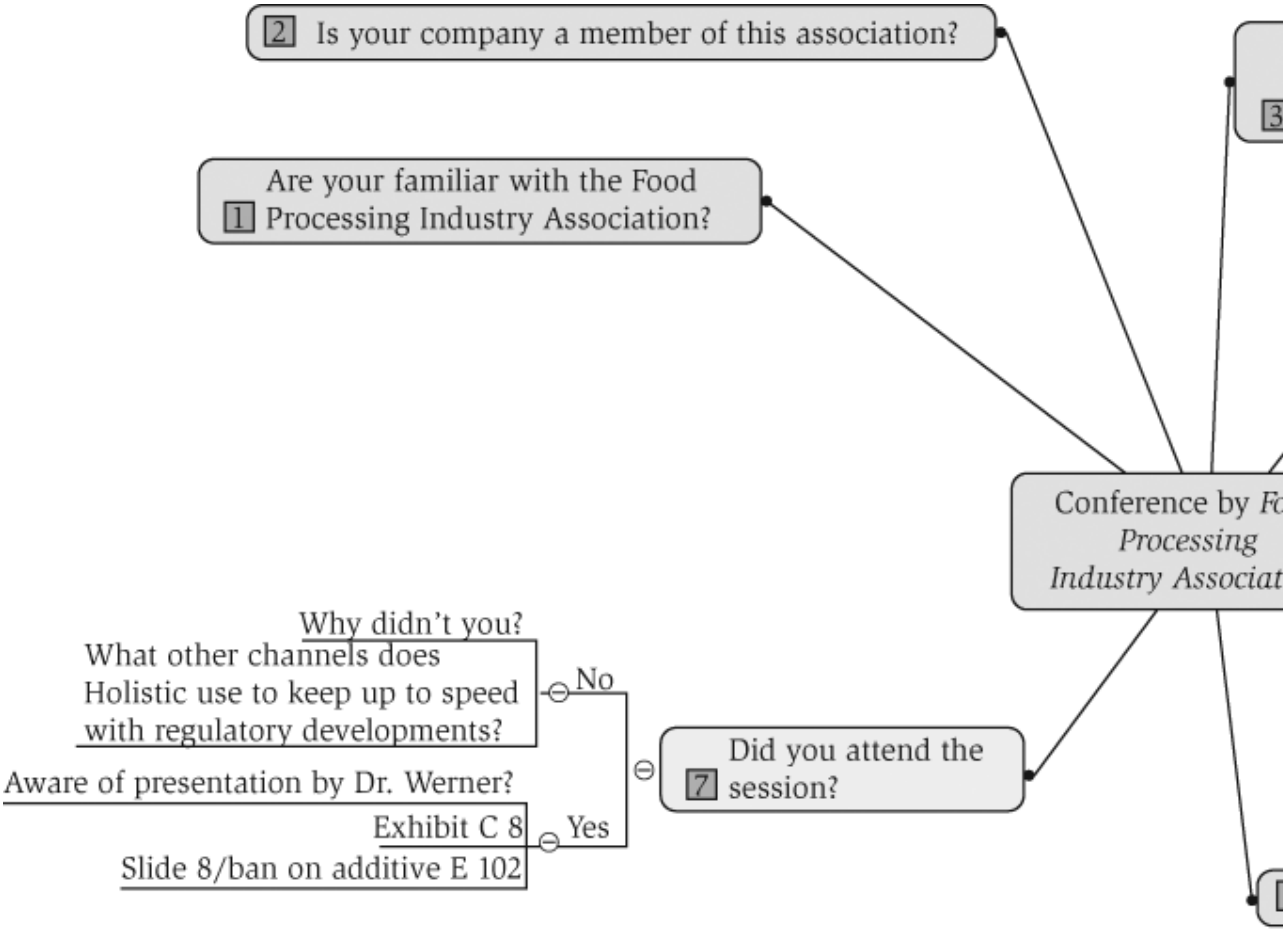
Similar mind maps will exist for the remaining two points (*Holistic was aware that the products were to be marketed in the EU; Alimenta gave immediate notice to Holistic*). Often, the aspects to be covered in cross-examination will be more complex than in the case study. It may then become necessary to "*outsource"* certain aspects to a new mind map rather than just create a sub-branch. Assuming that the examiner outsources the line of questioning on the FPIA conference (No. 1) to a separate mind map, it could look like the mind map on the following page. Outsourcing sets of questions to separate mind maps is particularly helpful if the software permits hyperlinking to various mind maps so that these can be navigated smoothly. In order to avoid leafing through exhibits, the exhibits can even be electronically linked to the relevant questions.

Figure 8.5 Individual Mind Map for the Issue That Mr. White Attended the FPIA Conference



6. OBJECTIONS DURING CROSS-EXAMINATION

The public's perception of cross-examination is inextricably associated with procedural quarreling and objections. Again, this picture is, to a large extent, derived from the U.S. civil trial and its dramatized version in the movies. While objections also occur in international arbitration, there are two marked differences. First, there is no jury to impress, so objections are usually made in a less dramatic manner. Second, unlike in the United States, there are no technical rules of evidence determining the admissibility of questions. Accordingly, a counsel who objects to a cross-examination question on the ground that it requires a hearsay answer, for example, may find him- or herself confronted with a counter-question: On what basis does he or she believe that hearsay evidence is inadmissible in international arbitration? It is therefore necessary to look at the foundations for possible procedural objections in international arbitration. Arbitration laws and institutional rules are silent in this regard. However, the IBA Rules provide some guidance as to which questions a tribunal may exclude: page "136"

Art. 8 (2) Rules

…The Arbitral Tribunal may limit or exclude any question to… a witness, if it considers such question…to be irrelevant, immaterial, unreasonably burdensome, duplicative or otherwise covered by a reason for objection set forth in Article 9.2.

Art. 9 (2) IBA Rules

The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons:

(a) lack of sufficient relevance to the case or materiality to its outcome;

(g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.

Even in the absence of formal rules of evidence, quite a few of the objections so typical of the common law civil trial may be subsumed under the concepts enshrined in Articles 8(2) and (9)(2) IBA Rules:

Asked and answered: A counsel may object if the cross-examiner keeps asking the same question over and over again even though the witness has already given an answer (even if the answer was "*I do not know*"). The IBA Rules specifically provide that duplicative questions may be disallowed.

A wise counsel, however, will avoid objecting too early on the ground that a question is asked repetitively. After all, if the witness consistently answers the question in the same manner, no harm is done. The best way of dealing with repetitive questions is by preparing the witness accordingly, and having the witness respond to the repetition in an appropriate manner; the examiner ought to explain to the witness that he or she must not allow him- or herself to be bullied. Rather, the witness should remain calm and answer the repetitive question in the same way as before (even if the answer simply is "*As I said, I don't know*"). Tribunals tend to give the cross-examiner quite some leeway in their questioning, even if it is repetitive. Take the following example from the investment arbitration between *Methanex Corp. v. United States of America*:[23]

4 COUNSEL: That's asked and answered

5-9 …

10 COUNSEL: Again, that's asked and

11 answered. I object to that.

12 THE WITNESS: That's correct.

13 PRESIDENT: … we will

14 allow some latitude in these questions and if the

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15 question is asked twice, if it's answered the same

16 way, it doesn't do you any harm.

If the cross-examiner persistently asks repetitive questions, especially if it seems that the repetitive questioning is made in an attempt to bully the witness, it is worth considering a polite objection along the following lines:

Now, Mr. Chairman, I believe this question has been asked and answered three times now and it is suggested that my colleague ought to move on.

Outside the scope of the witness statement: Depending on the applicable procedural rules, the opposing counsel may object if the cross-examiner asks questions outside the boundaries of the witness statement:

I appreciate that the tribunal gives counsel some leeway in his questioning, but I do not see any relation to Mr. Collins' witness statement or direct testimony here.

Whether or not such an objection is valid depends on the permissible scope of the cross-examination.[24] If the specific rules are silent in this regard, the counsel could still object, arguing that fairness and equality would demand that the cross-examination be restricted to the witness statement. Otherwise, the party offering the witness would have to disclose its evidence in a witness statement prior to the hearing, whereas the opposing side could surprise the witness and the other party. As stated above,[25] the "*wide open"* approach is preferable from an objective point of view, because the witness' confrontation with issues deliberately not addressed in the witness statement can sometimes unearth interesting facts. But if a counsel feels inclined to advocate a more limited approach, fairness and equality are the reasons on which he or she ought to rely.

Argumentative: An argumentative question is one by which the counsel is not actually addressing the witness but rather intends to make a speech to the arbitral tribunal, while not caring about the witness' answer. Assuming that a witness testifies to certain facts that occurred fifteen years ago; the witness seems to remember the exact wording of a conversation he has had, and the alleged content is to the disadvantage of the cross-examining side. If a counsel "asks" the witness: "*So, Mr. Miller, you seem to have quite a remarkable memory, but you do not expect the tribunal to believe that you can recall details of a conversation you had one and a half decades ago?*," this is in fact not a question to the witness; it is an argument, directed to the tribunal, that the witness cannot possibly remember the exact wording after such a long time, so that he must have made it up. "*Argumentative"* is a typical objection from the U.S. jury trial, and it has little room in arbitration. In a jury trial, the "speech" is not made to the judge, but to the jury. The "*argumentative"* objection may therefore be necessary in a jury trial because laymen are easier to influence by way of such tactics. Seasoned arbitrators will not be impressed by argumentative questions, so one can page "138"usually just let the line of questioning continue without objecting. If the cross-examiner consistently pleads to the tribunal rather than ask questions, the examiner can consider a soft objection along the following lines:

Madame Chair, it seems as if opposing counsel is in the midst of his closing argument. Mr. Miller flew over from the United States to answer our questions, so we would appreciate if opposing counsel would actually examine Mr. Miller.

or

I am sorry to interrupt, but I do not think it's helpful to ask the witness to argue with a conclusion … .

Irrelevant/ Immaterial: A further reason for an objection that is directly mentioned in the IBA Rules is the question's lack of relevance and materiality (Article 9 (2)(a)). Just as with the "*asked and answered"* objection, it is suggested that one ought to be careful with this objection. If the line of questioning is actually irrelevant and immaterial, the cross-examiner is wasting his or her time and no harm is done. All too often, the "*irrelevant"* objection is made in a situation where the line of questioning moves into a hazardous area from the vantage point of the party that has offered the witness. The "*irrelevant"* objection is then simply made because the opposing side is afraid of what may come out of the line of questioning. In doing so, the objecting counsel runs the risk of falling victim of the *Streisand* effect, named after the entertainer Barbara Streisand. Streisand attempted to suppress photographs of her impressive residence in Malibu, California by way of a court order. Due to the court action, she inadvertently created more publicity for the subject than there would have been without the

attempt to have to photos removed. A Google search on *Streisand*and *Malibu* today produces literally hundreds of pictures of her mansion. A counsel runs the same risk when raising objections. A tactical "*irrelevant"* objection made in order to prevent a potentially dangerous line of questioning can inadvertently draw the tribunal's attention to a fact that would otherwise have passed unnoticed. If the examiner wishes to object on the basis of this argument, a statement along the following lines should be considered:

Mr. Chairman, I appreciate that counsel is free to use her time as she pleases. But I frankly do not see how Mr. Miller's previous occupation could be relevant to this dispute.

Hearsay: The hearsay objection typically has no place in international arbitration. Hearsay evidence is evidence not based on the personal observation of a witness ("*Mr. Miller told me that Mrs. Smith informed him that…"*). In the absence of strict rules of evidence, such as Rule 801 et seq. of the U.S. Federal Rules of Evidence, arbitration permits hearsay evidence. The distinction between direct and indirect evidence is still relevant, but only in regard of the weight of the evidence, not its admissibility. If a party therefore believes that a certain question asks for a hearsay answer, it is no reason for a procedural objection. Rather, the party ought to invite the tribunal at the appropriate time (e.g., in the closing speech or in the post-hearing submission) to consider the testimony's indirect nature in their decision-making when evaluating the evidence.

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Speculative: A question that invites the witness to speculate or guess about relevant facts. Consider the following example from the examination of a fact witness:

Q. Why did cracks occur in the metal frame after only eight months of operation?

A. I cannot tell.

Q. Would you agree that defective welding works are the most likely explanation?

Unlike expert witnesses, it is not the task of fact witnesses to speculate. Fact witnesses should testify based on their own knowledge and observations. Speculations by fact witnesses therefore typically have little probative value. The counsel could step in as follows:

Mr. Chairman, the witness already answered that he has no explanation, and Mr. Smith is not here to speculate. I suggest that Mrs. Wayne save her questions for the expert Mr. Werner, who will testify tomorrow.

In most cases, though, such an objection is not necessary if the witness is well-prepared for his or her task; one of the golden rules for a witness is that he or she does not have to speculate.[26] If the witness is aware of this, he or she can handle the question and the counsel does not have to object:

A. As I just said, I do not know the reason and I'd rather not speculate.

There often is a grey area, though, in which also fact witnesses may legitimately be asked to speculate. Taking as an example an arbitration about a power plant project between a multinational engineering company and the sub-supplier of an allegedly defective turbine. Turbine design and manufacturing are highly complex matters; both sides' fact witnesses will almost invariably be experts in their field. Occasionally, especially when it comes to cutting-edge technology, a fact witness may even be more of an expert than the independent expert witness. If so, it is fair to also ask the witness technical questions that may require the witness to speculate. This is particularly true if the witness opened the door to such questions by having included speculations in his or her witness statement. A well-prepared cross-examiner will take note of such speculations in the witness statement in order to defend his or her line of questioning in the case the opponent raises a "*speculative"*objection:

Madame Chair, the witness herself has given an opinion on the root cause of the defects in para 23 of her witness statement. I believe it's only fair if Respondent is permitted to question Mrs. Green on her opinion.

Misstating the evidence: Occasionally, cross-examiners misstate or distort facts in their questions. Sometimes this is done inadvertently, sometimes in an unprofessional page"140"attempt to mislead. If the misstated facts are in the witness' own knowledge, the rectification should be left to the witness:

Q. Mr. Winter, why did you refuse the request even though you had indicated in writing only two weeks earlier that you would approve of the request?

A. This is not what I said. As I said before, I did not indicate that I would approve the request. I simply notified ABC that the approval would be granted subject to further scrutiny.

If the lawyer who offered the witness realizes that the witness is inattentive or too nervous to recognize such misstatements, it is time for him or her to step in. The same holds true for misstatements that the witness cannot easily discern him- or herself because they concern documentary evidence or another witness' testimony:

Q. Mr. Winter, yesterday afternoon, your colleague Mrs. Black testified that the Engineer was only notified on May 9, 2011. Are you now saying that her testimony is incorrect?

A. Well....

Counsel. Mr. Chairman, my colleague is misstating Mrs. Black's testimony. She testified that the first*written* notification occurred on the mentioned date. We are glad to provide you with a reference to the transcript if you give us a second.

On a more general note in regard of objections, the lawyer must always be prepared to explain the factual background to the objection, and not just name it (not: "*Objection, misleading!*"):

The question is misleading, Mr. Chairman. My colleague suggested to the witness that Mrs. Black yesterday testified that… In fact, however, she only stated that… The reference to this is yesterday's transcript at page 108, starting at line 11.

In the case of less straightforward objections, and in the absence of formal rules of evidence, it is also essential to explain the procedural basis on which the question is considered inadmissible. As a point of reference, the IBA Rules are always a good starting point:

Madame Chair, this line of questioning bears no relation to Mrs. Gordon's witness statement. We consider such examination outside the scope of the direct testimony unfair to Claimant. Respondent did not indicate prior to the hearing that it would rely on Mrs. Gordon's testimony in order to show that… I would like to refer to the IBA Rules on the Taking of Evidence, providing that each party shall be entitled to know the evidence on which the other party relies reasonably in advance of the hearing. The reference for that is No. 3 of the IBA Rules' preamble.

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As stated above, a witness who skillfully deals with inappropriate questions is more effective than any objection by the counsel. The cross-examiner is less likely to argue with the witness, and the tribunal is less likely to "overrule" the witness if he or she politely states to have already answered a certain question, or that he or she would rather not speculate. The best way of dealing with inappropriate questioning therefore is by thoroughly familiarizing a witness with the procedure of cross-examination.

As a general rule, counsel ought to be conservative with raising objections. This is particularly true for “tactical” objections, which are raised in order to disrupt the cross-examiner’s flow or to avoid damaging testimony by the witness. Such objections are like tactical fouls in football, i.e., a foul committed in the hope of delaying or spoiling the play of the opponent rather than one committed in order to win the ball. A seasoned tribunal will be able to detect such gamesmanship and hold it against the cross-examiner – and the party.

What should a cross-examiner do if the other side’s objections are not genuine but tactical fouls? To begin with, it is essential to stay calm; if necessary, the counsel should explain to the tribunal why his or her own question is not objectionable and await the tribunal’s ruling on the objection. In any event, it is advisable to avoid collateral squabbling with the opposing counsel. If the examiner feels that the opposing counsel is persistently raising invalid objections in order to derail the cross-examination, a statement to the tribunal along the following lines can help:

Madame Chair, for the last 20 minutes, my colleague has been making unfounded objections to my cross-examination, none of which were sustained. These objections are disrupting my cross-examination, and I am afraid that this is the very reason why they are being made. I would appreciate if the tribunal could instruct Mr. White to refrain from raising unfounded objections.

7. DEALING WITH INTERRUPTIONS BY THE TRIBUNAL

Interruptions by the tribunal should be dealt with in the way discussed in the chapter on direct examination.[27] In cross-examination, however, interruptions can be even more disturbing. Putting the witness under stress and giving him or her less time to think and to potentially craft an answer is a pivotal part of cross-examination. Interruptions disturb this flow, and unfortunately, a partisan arbitrator may pursue exactly this purpose when making interruptions. In extreme cases, it is fair to ask the arbitrators in a friendly but firm way to postpone their questions until the end of the arbitration, if possible. But the tribunal’s interruptions should also be regarded as an opportunity to read the tribunal. The arbitrators’ questions can be important cues to their mindsets. Can the tribunal follow the reasoning? Is the tribunal getting impatient, not being able to discern where the examiner is heading? Does the tribunal believe that the examination now touches upon the crucial issues? Have they misunderstood certain facts and arguments? What are the lynchpins of the case in their view? For the page "142"cross-examiner, it is extremely difficult to concentrate on the witness’ answer, prepare the follow-up questions, and at the same time analyze the tribunal’s reactions. If a team of lawyers is representing the party in the hearing, a person other than the cross-examiner should therefore be tasked with monitoring the tribunal’s reactions and questions.

8. DEALING WITH RUNAWAY WITNESSES

Cross-examination is about control, and the key to controlling the witness is the leading question. But it would be naïve to assume that the witness will simply play along and tamely provide the desired “yes” and “no” answers. First of all, there are situation where things are not black or white, even if the examiner may suggest so, and in these cases, a qualified answer by the witness is justified. If so, it would be unreasonable for the examiner to request a clear-cut answer, and it would even reflect badly on the examiner if he or she did so. Some counsel start off their cross-examination by asking the witness to answer to the questions only with “yes” or “no”; such attempts to “domesticate” the witness ought to be avoided. At the end of the day, they only go to show that the examiner is afraid of what the witness might say in addition to the desired “yes” or “no” responses.

However, there are witnesses who evade a straight answer even if such an answer is clearly possible and required. The motives can be different. Some witnesses seem to be almost paranoid, believing that each question is a “trick question” (“*Please state your name for the record”*…“*Hmmm…actually…”*). Other witnesses have an exaggerated “me-against-the-examiner” feeling that makes it almost impossible for the witness, as a matter of principle, to agree with anything the examiner proposes. Finally, some witnesses may, in fact, be evasive for tactical reasons; evasiveness is often a smokescreen. However, as stated before, it can be assumed that most witnesses have a truth bias.[28] It is therefore difficult for them to present a

straightforward lie as an answer. Untruthful witnesses therefore prefer to omit crucial information. If the examiner directly asks for the omitted information, the evasive witness will often answer a question that was not asked.

The best method of dealing with the runaway witness is to simply repeat the question. To begin with, this should be done in a friendly manner; the examiner can even take the blame for the presumable obscurity and the resulting confusion:

Perhaps I was unclear. Let me rephrase my question … .

It is also helpful to acknowledge the witness' evasive answer, indicating to the witness that the examiner is not simply ignoring his or her answer:

I understand that you would like to talk about the events in June, and we may get to them later. But for now, my question intends to find out what happened in May… .

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If the witness remains unhelpful, it is time to become confrontational, and to shift the blame from the examiner to the witness:

That was not my question. I was asking you whether …

What you just stated bears no relation to my question. Let me repeat: … .

Silence can also be a useful tool to highlight that the witness' answer is unhelpful and evasive because it makes the witness feel uncomfortable.[29] The examiner can let the witness finish the evasive answer, then pause, for a time that is slightly longer than normal, and continue as follows:

Are you finished? Now let us go back to my question … .

A further forceful method of dealing with an evasive witness is the "broken record" technique. Without rephrasing, the examiner simply asks the same question, verbatim, time and again. If the witness keeps zigzagging, the examiner repeats the exercise, until he or she receives the answer or the tribunal steps in. One famous example of the broken record method stems from the BBC host Jeremy Paxman, interviewing former British Home Secretary Michael Howard. The interview concerned the political investigation of a breakout from Parkhurst Prison. Mr. Howard held a meeting with Derek Lewis, head of the British Prison Service, about the possible dismissal of John Marriott, the governor of Parkhurst Prison. Lewis wanted to transfer Mr. Marriott to non-operational duties whereas Howard wanted Marriott to be dismissed immediately. As Home Secretary, though, Mr. Howard was not permitted to interfere with operational matters. The issue on which Paxman interviewed Mr. Howard therefore was whether Mr. Howard had threatened to overrule Mr. Lewis in the case Mr. Lewis would not remove Mr. Marriott from his post. The transcript of the interview of May 13, 1997 reads as follows:[30]

PAXMAN: Did you threaten to overrule him?

HOWARD: I did not overrule Derek Lewis.

PAXMAN: Did you threaten to overrule him?

HOWARD: I took advice on what I could or could not do, and I acted...

PAXMAN: Did you threaten to overrule him, Mr. Howard?

HOWARD: ...scrupulously in accordance with that advice. I did not overrule Derek Lewis.

PAXMAN: Did you threaten to overrule him?

HOWARD: Mr. Marriott was not suspended.

PAXMAN: Did you threaten to overrule him?

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HOWARD: I have accounted for my decision to dismiss Derek Lewis in great...

PAXMAN: Did you threaten to overrule him?

HOWARD: ...in great detail before the House of Commons.

PAXMAN: I note you're not answering the question, whether you threatened to overrule him.

In this case, Howard's grotesque evasiveness is as revealing as the straightforward answer that he is painstakingly trying to avoid would have been. And as said before, importance is also measured by time spent on an issue. As a result of Paxman's broken-record technique, the public's attention on the issue became even higher.

Similar forms of evasiveness often encountered in practice are "*It depends"* and "*Yes, but…"* answers. Here, the witness seemingly confirms the question, but goes on to qualify the confirmation by additional explanations ("*Yes, but"*), or he or she starts discussing the meaning of the question with the examiner ("*It depends…"*). Sometimes, such qualifications are necessary because things are not always black or white, sometimes they are grey; or the question may, in fact, need clarification. But quite often, such answers are just another form of evasiveness. When listening to such an answer, the examiner ought to keep in mind whether it lends itself to a meaningful quote in the post-hearing brief. If not, e.g., because it was a long and narrative answer brimming with qualifications and irrelevant information, it is a good technique to condense and rephrase the narrative answer ("*So you are saying …"*; "*What you just told us is…"*). The examiner should summarize the advantageous bits of the witness' answer, leaving out the "*buts*" and other forms of evasiveness:

Examiner: Is it correct that you and Mr. Ford discussed the welding method for the outer steel structure during a meeting on November 12?

Witness: Well, no, it depends on how you define "*discuss*." The meeting on November 12 was the usual Jour Fixe, all kinds of issues were covered, Mr. Ford may have mentioned welding, but if you say "discussed" that to me indicates...

Examiner: So you are saying that Mr. Ford mentioned welding during the meeting on November 12?

Witness: Well, yes.

Examiner: The welding method for the outer steel structure?

Witness: Yes.

Examiner: Did Mr. Ford also mention that the appropriate welding method for the outer steel structure would include preheating?

Witness: Yes, but at the time no specifics were discussed, I guess “preheating,” whether and in which form, was very unspecific and in no way certain to be carried page "145"out. It would be overstating the issue to say that preheating was actually envisaged at the time.

Examiner: So you are saying that preheating was not envisaged at the time, but Mr. Ford did mention it as an option?

Witness: Yes.

No matter which approach the examiner chooses, it is wise not to start too aggressively. There is a fine line between being vigorous and being overly aggressive, which tribunals do not appreciate. One should only discipline the witness when sufficiently confident that the tribunal also finds the witness evasive and unhelpful.

9. CROSS-EXAMINE BY ALL MEANS?

Cross-examination is a means to an end, not an end in itself. Before embarking on the mission of cross-examination, each examiner must answer two questions:

Did the witness statement or the direct testimony do any harm?

If yes, can I achieve one of the purposes of cross-examination?

In the premise of these two questions, the examiner ought to heed two golden rules in cross-examination:

Don’t fix it if it ain’t broke.

If you can do no good, do no harm.

9.1 . Don’t Fix It If It Ain’t Broke

Witness statements and direct testimony in international arbitration often cover issues that are, strictly speaking, irrelevant or circumstantial. To a certain extent, this is legitimate. As addressed earlier in this book, witness evidence in international arbitration is more than testimony on relevant and contentious issues. It is part and parcel of the parties’ opportunity to tell their story in a more direct manner than by written submissions. Some lawyers may also believe that a great number of long witness statements makes the case (appear) more substantial. No matter what the reason for irrelevant and immaterial testimony is, the counsel should not reflexively decide to cross-examine all witnesses offered. If the testimony is irrelevant, no harm was done and the testimony can simply be ignored. Still, one often sees cross-examinations on witness testimony that is irrelevant, so that likewise, the cross-examination is pointless. It is suggested that such unnecessary cross-examination results from the counsel’s apprehension that his or her decision not to cross-examine may appear as a weakness. This, however, is a misapprehension. If the witness statement is irrelevant on the face of it, it is a commanding and powerful move to waive the right to cross-examine the witness. Things are only different if the testimony is irrelevant, but the irrelevance may not be obvious. In this case, it can be necessary to demonstrate the irrelevance by way page "146"of cross-examination. Things are also different if the procedural rules permit cross-examination beyond the scope of the witness statement. If so, the cross-examination may serve a purpose even if the witness statement itself is irrelevant. In all other cases, the examiner ought to consider waiving the right to cross-examine – don’t fix it if it ain’t broke.

If the examiner decides to waive the right to cross-examine, when is the best time to do so? There are basically two options. If the witness statement stands as direct evidence, the examiner can be expected to make such decision before the hearing; usually, the tribunal will invite the parties prior to the hearing to indicate who of the other side’s witnesses they wish to cross-examine. If the opposing side waives its right to cross-examine, and the procedural rules

provide that witness statements shall stand as direct evidence, there is no need for the witness to appear at the hearing. This will not only save costs and hearing time; from the opposing side's perspective, it also reduces the other side's opportunity to present a "*live"* story through the witness, or to spring surprise testimony on the other side during the direct examination.

Occasionally, a party who offered a witness insists on examining (or rather presenting) the witness during the hearing by way of a direct examination, even though the other side had indicated that it does not wish to cross-examine the witness. Strictly speaking, there is no reason to do so, at least if it was agreed that the witness statement ought to include the witness' full testimony. Still, some tribunals are reluctant to deny such requests, presumably fearing that the party may raise procedural objections or a violation of the right to be heard at a later point in time. If so, the opposing party can postpone its decision as to whether to cross-examine or not until after the direct examination. And if neither the witness statement nor the direct examination includes anything harmful, there is some magic in the words "*No questions, Mr. Chairman*."

9.2 . If You Can Do No Good, Do No Harm

The second rule following which it can be wise to refrain from cross-examining a witness is that the examiner must not make a bad situation even worse. Unless the side offering the witness has done a poor job, the testimony of their witnesses will, at least to a certain extent, be damaging to the other side's case theory. Based on the written statement, and while listening to the direct testimony, the examiner needs to assess whether he or she can achieve one of the purposes of cross-examination in regard of the damaging testimony. Is it possible to show inconsistencies? Can implausibilities or improbabilities be demonstrated? Can the witness be used to obtain information corroborating one's own case theory? Are there other aspects not covered by the witness statement on which a cross-examination could be useful, assuming that the procedural rules admit such examination beyond the scope of the witness statement? If the answer to all these questions is "no," it would be wise to not cross-examine. Nothing is worse than a cross-examination that only repeats uncontested facts or testimony presented in the witness statement or during direct examination. Such cross-examination is useless at best and counterproductive at worst. Considering the following example: page "147"

Q. You have just stated that …, correct?

A. That is correct.

Q. You have further testified that …, right?

A. Yes.

Q. And you believe this statement to be correct?

A. Absolutely!

Q. Are you aware that you are obligated to tell the truth and nothing but the truth as a witness in arbitration?

A. I certainly am.

Q. Would you like to reconsider your answer?

A. Well, no.

If such a line of questioning is not followed by an impeachment, the examiner makes matters worse. The examination is not only dull; it repeats and thereby reinforces the harmful testimony. The examiner even underscores that he or she has no effective remedy against the harmful testimony.

Why do some lawyers still cross-examine on harmful testimony even if they cannot impeach the witness? One reason may be the counsel's belief that he or she owes it to the client to carry out a cross-examination. Clients who are not arbitration-savvy tend to have a wrong idea of cross-examination. They believe that cross-examination is the climax of the arbitration, the decisive battle between their lawyer and the other side's witnesses. As made clear in this book, this is not what cross-examination is about. If the examiner believes that the client may entertain wrong notions about cross-examination, it is the wrong move to stage a cross-examination for the client's benefit. Rather, the lawyer must manage the client's expectations beforehand, and inform the client why it is sometimes wise to refrain from cross-examining.

9.3 . The Rule of Browne v. Dunn

There is one exception to the "*If you can do no good, do no harm"* rule: In traditional common law arbitrations, the cross-examiner can be obligated to put his or her evidence to the other side's witnesses even if the examiner knows that the witnesses will contradict the proposition. The *Browne v. Dunn* rule was established in 1893 by the Judicial Council of the British House of Lords for reasons of evidentiary fairness. The rule's gist is that a cross-examiner cannot rely on evidence that is contradictory to the testimony of the witness without putting the evidence to the witness in order to allow him or her to attempt to justify the contradiction.

Accordingly, if a witness made a statement that is inconsistent with what the cross-examining party wants to lead as evidence, the counsel must raise the contention with that witness during cross-examination. If the counsel does not do so, he or she page"148"cannot rely on the evidence to contradict the testimony of the witness. To understand the rule, it is worth looking at a quote from the decision:[31]

it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that the imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses…Of course I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is to manifest, that it is not necessary to waste time in putting questions to him upon it. All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted.

As can be seen, the *Browne v. Dunn* rule is a manifestation of fair play. The parties are required to put their cards on the table and give the other side a chance to reply. While the thought behind the rule is noble, it can lead to odd and sometimes even amusing situations during cross-examination that do little to further the case:

Q: I suggest to you that you met with Mr. Smith on April 5th, 2013.

A: That is incorrect.

Q: I further suggest to you that you and Mr. Smith negotiated heads of terms for the Joint Venture agreement on this date.

A: No.

Q: I put it to you that you later confirmed the agreement in a phone call with Mrs. White.

A: I put it to you that this is untrue.

In this example, the party's procedural obligation based on *Browne v. Dunn* to put its contentious case theory to the other side becomes a mockery of cross-examination, a ticking-the-box-exercise. Therefore, the *Browne v. Dunn* rule is often dispensed with in arbitration.

In "civil law" arbitrations, in particular arbitrations where the seat of the arbitration is not in a common law country and the participants, i.e., neither the arbitrators nor the parties, have any common law link, the rule is not practiced page "149"anyhow. But the stronger the common law element of an arbitration becomes, the more advisable it is to clarify whether the rule of *Browne v. Dunn* is applicable or not. If, for example, the arbitrators, or some of them, are common law practitioners, they may hold it against a party if the counsel, even in good faith, simply not knowing said rule, does not put its case theory to the other side's witness. Similarly, if one side is represented by a common law lawyer, but the other is not, it will most likely lead to procedural squabbles if one side follows the*Browne v. Dunn* rule, whereas the other side does not. In such setups, it should therefore be clarified whether the rule is being applied. In most international arbitration cases where the rule of*Browne v. Dunn* could be considered applicable, the clarification occurs in the way that the rule is not applied. If so, the terms of reference, the specific procedural rules or a procedural order will include a wording along the following lines:

The rule of Browne v. Dunn is dispensed with.

If the rule is applied, and a party does not abide by it, the consequence will be harsh: the party failing to comply with the rule may not rely on the evidence it failed to put to the other side's witness. It is thus a hard, procedural consequence disallowing certain evidence.

But even in arbitrations without any common law angle, and without the formal rule, some thought should be given to the rationale behind *Browne v. Dunn*. As Lord Herschell put it, the rule is about fair play and fair dealing. One essential purpose of an evidentiary hearing is to enable the tribunal to decide between the two versions of the facts that were presented by the parties. To that end, the tribunal needs to hear both versions, *audi et altera pars*. Unquestionably, the tribunal will be cognizant of both versions from the parties' written submissions and the witness statements. But the very purpose of the taking of evidence is to determine which of the two versions presented in writing is more likely to be true. Direct examination only serves this purpose to a limited extent because the witness remains in his or her comfort zone. An essential part of assessing the testimony's evidentiary value is the stress test in form of cross-examination. Only this confrontation, involving a clash of conflicting interests, is likely to yield meaningful results. If the cross-examiner shies away from the confrontation, in fear that the witness may hold the upper hand, it would thus be unfair to dismiss the witness testimony as untrustworthy later on. Even in the absence of a formal *Browne v. Dunn* rule, the tribunal may regard the absence of cross-examination on relevant and crucial issues as a weakness; after all, the counsel's motive for having shunned certain areas of the testimony was that he or she was afraid of the answers. A good opposing counsel will spot such weaknesses and will not rely on the tribunal to detect and assess such behavior. Rather, the counsel will draw the conclusions him- or herself, for example during a closing argument or in a post-hearing submission. Here is such an example:

On Tuesday, Claimant's counsel spent close to three hours cross-examining Mr. White. In every detail she explored…. As the tribunal has noticed, even Claimant's repetitive and tenacious questioning on … did not lead to any answers that would page"150"support Claimant's theory. After all, my colleague's cross-examination was therefore not so much interesting for the things that were asked, but for the questions that were not asked. In Claimant's opening statement, we heard that Claimant attacked Mr. White for his statement that ... Claimant called this statement, and I quote "not credible and untrustworthy." In my colleague's cross-examination of Mr. White, though, there was roaring silence on this issue. My colleague did not ask Mr. White …; neither did she question Mr. White on … We all know the reasons for her failure to do so. Had she put these questions to Mr. White, questions that go to the very core of this case, Mr. White would

have testified that… I respectfully suggest that the tribunal ought to take the opposing counsel's failure to cross-examine Mr. White on … into account when assessing the evidentiary value of Claimant's evidence.

Accordingly, the rationale behind *Browne v. Dunn* also has its place in international arbitrations without a common law link.

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[1] *See* Ch. 2.
[2] As to the question whether a witness may be cross-examined on issues not covered in the witness statement or in the direct examination, *see* Ch. 8 s. 2.
[3] *See* e.g., Rule 30 of the U.S. Federal Rules of Civil Procedure.
[4] Michael Schneider, "Twenty-four Theses about Witness Testimony in International Arbitration and Cross-Examination Unbound," from the ASA Special Series No 35.
[5] For tips as to how to deal with evasive witnesses, *see* Ch. 8 s. 8.
[6] http://www.whitehouse.gov/blog/2011/05/02/osama-bin-laden-dead.
[7] http://edition.cnn.com/2013/09/09/world/death-of-osama-bin-laden-fast-facts/; http://www.theguardian.com/world/2011/may/04/osama-bin-laden-killing-us-story-change.
[8] *See also* above, Ch. 7 s. 4.3.6.
[9] The original statement in the German language reads: "*Es wurde allerdings zu keinem Zeitpunkt bewusst getäuscht oder bewusst die Urheberschaft nicht kenntlich gemacht. Sollte sich jemand hierdurch oder durch inkorrektes Setzen und Zitieren oder versäumtes Setzen von Fußnoten bei insgesamt 1300 Fußnoten und 475 Seiten verletzt fühlen, so tut mir das aufrichtig leid.*"
[10] August 17, 1998, http://www.enquirer.com/clinton/complete_transcript.html.
[11] Chapter 8 s. 1.3.
[12] Article 8(3)(b) IBA Rules state that redirect examination shall concern additional questions on the matters raised in the other Parties' questioning.
[13] *See* e.g., Appendix II, s. VI. 10.2.
[14] *See* e.g., John Beechey, "Advocacy in International Commercial Arbitration: England," in *The Art of Advocacy in International Arbitration*, 255; George von Mehren and Claudia Salomon, "Submitting Evidence in an International Arbitration: The Common Lawyer's Guide," in the *J. of Intl Arbitration*, Vol. 20 (2003), 293.
[15] Article 8(2) IBA Rules.
[16] *See* above Ch. 6 s. 1.4.
[17] Roger Fisher/ and William Ury, *Getting to Yes* (1991), 112.
[18] Chapter 8, s. 4.1.1.
[19] *See also* 4.1.5 as to when to stop a line of questioning.
[20] Francis Wellman, *The Art of Cross-Examination*, (First Touchstone Edition, 1997), 42.
[21] Chapter 8, s. 4.1.1.
[22] Chapter 8, s. 4.1.1.
[23] Transcripts accessible at http://www.state.gov/s/l/c3741.htm. Day 3, at 108 et seq.
[24] *See* Ch. 8 s. 2.
[25] Chapter 8 s. 2.
[26] *See* below Ch. 12 s. 7.2.7.
[27] *See* Ch. 6 s. 1.5.
[28] Chapter 8 s. 1.4.
[29] *See* above Ch. 8 s. 3.6.
[30] For video footage of the interview, cf. http://www.bbc.co.uk/programmes/p00r2912.
[31] *Browne v. Dunn* (1893) 6 R. 67, H.L., Lord Herschell LC (70–71).

Chapter 9: Re-examination

Source

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Don't fix it if it ain't broke

After the cross-examination, the right to ask questions reverts to the party that nominated the witness for the re-examination. Generally, the question format is back to open questions, or, as the IBA Rules put it, questions that may not be "*unreasonably leading*."[1]

1. THE PURPOSE OF RE-EXAMINATION

The purpose of re-examination is to clarify or explain matters that arose in the cross-examination. It is the re-examiner's opportunity to repair any damage that the cross-examiner might have done.

There are two typical situations where re-examination can become necessary:

(i) The cross-examiner elicited incomplete testimony from the witness. If so, re-examination serves the purpose of completing the picture.

Example: The claiming party demands payments for certain quantities of electrical cable that were used during construction works, and the price is calculated on a *per kilometer* basis. The exact length of cables that were used can no longer be assessed by simply measuring the cables because they are buried in the ground. In his witness statement, though, the witness states that 87 km of cables was used. During the cross-examination, the examiner was able to establish that the witness did not personally measure the length of cable used for the construction. The witness failed to add that there were other means of establishing the quantities. A re-examination could look as follows: page "153"

Q. Mr. Green, you were just asked about the quantity of high-voltage cables that were used for the electrification works. In your witness statement, you had referred to a figure of 87 km of cable, correct?

A. Yes.

Q. During your cross-examination, you testified that you did not measure the length of cables used for the works yourself. Can you explain on what basis you arrived at the figure of 87 km?

A. Well, from the purchasing department, I obtained the quantity of cables that were acquired for the project, which totaled to 150 km. Our warehouse department also provided me with the figure of cable drums left over. Based on this, I could establish that 63 km of cable were left over. Comparing this with the original length of 150

km, I established that the quantity of 87 km of cables was used during the construction works.

Needless to say, it would have been better if the witness had provided the explanation during cross-examination. But cross-examination is a stressful experience, and incomplete answers are given. The witness' level of attentiveness drops during a protracted cross-examination, and the cross-examiner may even provoke incomplete answers by way of his or her questioning. Occasionally, the witness may therefore simply answer the question with "yes" or "no" even in a situation where a "*no, but…"* answer would be warranted. It is then the re-examiner's task to spot such mishaps and redress them in re-examination.

As can be seen from the example, the re-examiner uses a mix of leading and non-leading questions. Just as in direct examination, there is no absolute ban on leading questions during re-examination. The IBA Rules state that questions during re-direct may not be *unreasonably leading*. The use of leading questions is reasonable in order to frame the issue to be examined, in particular, in order to establish the link to the cross-examination.

(ii) The witness made a mistake, used an ambiguous expression, or gave an answer that is open to a wrong interpretation. Re-examination serves the purpose of removing the ambiguity.

Example: Take the above example concerning the quantities of cable used for construction works. The witness had testified that 87 km of cable was used. Assume that during cross-examination, the cross-examiner produces a report stating a quantity of 63 km, suggesting that this would show that the quantity of cables used was less than 87 km. In fact, however, the report concerns the quantity of cables that was left over after the works, not the quantity that was used. The witness does not notice the mix-up and therefore admits during cross-examination that there is an inconsistency between the witness statement and the report. The re-examination on this issue could go as follows: page "154"

Q. Mr. Green, you were just questioned about the quantity of high-voltage cables that were used for the electrification works. In your witness statement, you had referred to a figure of 87 km of cable, correct?

A. Yes.

Q. During your cross-examination, you were referred to Tab 5 in the witness bundle, which is Exhibit C-44. Could you please go back to the document? My colleague suggested that the report would indicate that only 63 km of cable were used.

A. Yes.

Q. Could you please state the heading of this document for the record?

A. It says "*Record of remaining cable quantities*."

Q. Can you explain to us how this document relates to the quantities of cables used?

A. In fact, this document does not show the quantities used, but the length of cable remaining*unused*. In order to arrive at the figure of cables used, we need to subtract the remaining length of 63 km from the original length of 150 km. So the installed quantity is in fact 87 km, as stated in my witness statement.

This would be the perfect patch for the ostensive inconsistency. If the witness does not understand that and how he misinterpreted the document, due to stress or exhaustion, the examiner may have to be even more direct:

Q. Does this report concern the installed quantities of cable, or those quantities left over, i.e., not installed?

While such a question is in fact leading, notwithstanding the pseudo-open format, it is still better to ask a leading question rather than to leave the alleged inconsistency unexplained. The evidentiary value of the testimony is not diminished due to the leading question, given that the answer is not about the witness' recollection, but about an objectively mistaken interpretation of a document. Whereas the examiner could explain the witness' oversight in his or her closing submission, it is better to rectify the mistake on the spot while the tribunal is still concentrated on the issue. Otherwise, it may sink in with arbitrators that the witness' testimony was inconsistent.

2. THE SCOPE OF RE-EXAMINATION

As a general rule, re-examination is limited to issues addressed during the cross-examination.[2] The rule stands to reason if one keeps the purpose of re-examination in page "155"mind, i.e., to clarify or rectify issues that arose during cross-examination. To put it negatively, re-examination is not intended as a reserve for matters forgotten in the witness statement or during direct examination. If the witness believes it necessary to add to the matters addressed in the witness statement, this ought to be done when the witness is introduced.[3]

In the absence of strict rules of evidence, however, arbitrators usually give some leeway to re-examiners who go beyond matters addressed in the cross-examination. This is particularly true if witness statements stand as direct evidence. With most tribunals, even a weak link to the matters addressed in cross-examination will do. So the boundaries between what is admissible in re-examination and what is not are blurred.

As opposing counsel, this gives rise to the question as to whether one should complain if the re-examiner addresses matters during redirect that were not touched upon during the cross-examination. As always with objections, this is a balancing act. On the one hand, a complaint about the admissibility of questions during the re-examination may appear as an overanxious attempt to keep out damaging information. On the other hand, the examiner does not have to accept a re-examination that turns into a surprise attack and introduces new facts.

It is suggested that an examiner should refrain from objections to the scope of the re-examination if these are only raised as a matter of principle, i.e., simply because the issues were not covered during cross-examination. Rather, it is necessary to make a quick assessment whether the new information is harmful or not. If it is not, it is more imposing if the counsel keeps his or her composure and simply lets the opponent get away with the out-of-scope questions. If, however, the introduction of the new information is harmful, especially if the new information seems to be introduced in bad faith, it is time to object. Such objection during re-examination usually occurs in two steps. In the first place, the counsel should motion for the question to be declared inadmissible. If the tribunal is reluctant to exclude the questioning, nothing remains for the counsel but to motion for an opportunity to re-cross-examine the witness. Re-cross-examination is an examination on matters only brought up during re-examination; it follows, as the name suggests, the same rules as cross-examination. In practice, however, re-cross-examinations are rare, and if they occur, they are hardly ever yielding. A witness who has just gone through a direct examination, cross-examination, questions by the

tribunal and a re-examination, will often lack the necessary concentration in order to be productive during re-cross-examination. But such an examination is not only burdensome for the witness; the tribunal's sympathy for the need of a re-cross-examination will also be limited. It is therefore suggested that an application for the right to re-cross should only be made if the examiner has a clear and achievable objective in mind for such examination.

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3. RE-EXAMINE BY ALL MEANS?

Just as in the case of cross-examination, the examiner must apply good judgment in deciding whether or not to re-examine. This is even more important in re-examinations. The cross-examination of a witness is the rule rather than the exception; there is nothing surprising about the fact that a counsel exerts the right to cross-examine the witness. Re-direct examination, however, is not part of the standard programme; its purpose is to repair the damage, so conducting a re-examination implies that there is a problem that needs fixing. If the examiner sends out such a signal, it should be for a good reason and with an achievable objective in mind. The two guiding principles that govern the counsel's choice are the same as in cross-examination:

Don't Fix it, if it Ain't Broke

If the cross-examiner did not manage to elicit any damaging, misleading or otherwise harmful information from the witness, there is no need to re-examine. Not only would such futile examination be a waste of hearing time; as said before, by carrying out a re-examination, the examiner sends out the signal that he or she is concerned about the matters that came out of the witness' cross-examination.

If You Can Do No Good, Do No Harm

Second, the examiner should not reflexively re-examine simply because the opponent has done some harm. Maybe he or she was able to reveal some inconsistencies, or let the facts testified by the witness appear in a different light. But before beginning to re-examine, the examiner must assess whether he or she can repair the damage that has been done. Sometimes, there may be an inconsistency, and it may in fact be harmful, but there is nothing that can be done about it. If so, the same rule as in cross-examination applies. *If you can do no good, do no harm.* Going over the damaging information once again, without correcting it, or without at least putting it into perspective, will make matters worse. Rehashing the harmful information will simply make it more memorable for the arbitrators.

Sometimes, waiving re-examination can be the right thing to do even if the cross-examination produced some unfavorable results that might be repaired. As a re-examiner, one never knows how difficult it will prove to remedy the harmful testimony that was given during cross-examination. In the case of clerical mistakes or simple slips of the tongue, it may be easy; but in other situations, things may be more complicated, e.g., because the witness may not even know that and how his or her testimony was damaging. What is more, the witness will no longer be as astute as he or she was during the direct examination. Cross-examination is a stressful experience for the witness. Before the cross-examination starts, the witness will experience a high level of stress. As soon as the cross-examination finishes, the tension is released and the witness winds down. The flipside of this winding down process is that the witness will be less attentive, and less receptive for cues. After all, the re-examiner ought to use open, i.e., non-leading questions, which makes it even more difficult to yield results during re-examination. And as a rule, there is no opportunity to talk to the witness page"157"before re-examination. In most cases, the re-examination will directly follow the cross-examination, without a break. But even if there is a break, the examiner is normally not permitted to discuss the re-direct examination with the witness. Some tribunals make this express if there is a break before the re-direct examination and "quarantine" the witness.[4] If so, the witness is not permitted to talk to his or her party during the break. Even if the tribunal does not give such directions, it is recommended not to talk to the witness (even about unrelated matters). Any such conversation may give rise to

suspicions that the examiner is trying to influence the testimony or to give some cues to the witness before the re-examination.

This difficulty of not knowing whether the witness is mentally prepared to fix the damage done during cross-examination can on its own be a valid reason to decide against re-examining. And there is a further element that can militate against a re-examination. The examiner must remember that his or her knowledge of the case is superior to that of the arbitrators. This "knowledge edge," acquired through careful preparation, also means that the counsel will be alert to harmful information to which the members of the tribunal may be blissfully unaware. A meaningful re-examination presupposes that the tribunal understands why the subject matter of the examination is relevant; the counsel would therefore first have to enlighten the arbitrators as to why and how the information is relevant, which means harmful, in order to then try and remedy the situation. To a certain extent, the counsel would therefore have to explain the harmful aspects of the case that the cross-examiner may have failed to explain in a comprehensible manner. If the counsel refrains from re-examining on the issue, the tribunal may release the witness with a general feeling that the cross-examination did not yield any results. The cross-examiner naturally has an opportunity to explain the – yet-unnoticed – significance in his or her post-hearing submission. But chances are that the arbitrators' first intuitive reaction to the witness examination is more important in their decision-making process than the rational weighing of arguments at a later stage; also, the time gap between the examination and the closing submission renders it more difficult for the cross-examiner to persuade the tribunal that a testimony, which they so far believed to be insignificant, was in fact compromising. If the counsel has reason to believe that the tribunal did not understand the relevance of certain harmful information that came out in cross-examination, it can be the better choice to refrain from re-examining.

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[1] Article 8(2) IBA Rules.
[2] *See* Article 8(3)(b) IBA Rules: "The Party who initially presented the witness shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties' questioning."
[3] *See* Ch. 7 s. 9.
[4] A rule of practice in England is that once the witness has started to give evidence, he or she cannot discuss the case or his or her evidence with anyone until the examination is finished; *see* e.g., Jeff Dasteel and Richard Jacobs, "American Werewolves in London," Arbitration International Vol. 18 (2002), 182.