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An Introduction to Cross-Examining Witnesses in International Arbitration by R.D. Kent

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AN INTRODUCTION TO CROSS-EXAMINING WITNESSES IN INTERNATIONAL ARBITRATION

Rachael D. Kent*

Notwithstanding the considerable procedural flexibility in international arbitration proceedings, there are certain procedures that gain acceptance over time as "standard practice" in international arbitration. The cross-examination of witnesses by counsel for the opposing party is one such practice, that while not yet necessarily accepted as standard, is certainly being used in a large number of international arbitration proceedings. One mark of the growing acceptance, and importance, of cross-examination is that it is being used even in international arbitration proceedings entirely between parties from civil law jurisdictions, where cross-examination is generally not a feature of domestic litigation.

The increased use of cross-examination means that virtually every international arbitration practitioner will be called on to cross-examine witnesses at some time in his or her practice. The diversity in the national and legal backgrounds of the lawyers who practice in this field means that international arbitration practitioners will come to cross-examination with very different levels of experience and comfort. Even those practitioners with considerable experience in cross-examining witnesses in national courts may find that cross-examination in international arbitration requires different skills and a different approach than they are accustomed to.

The strategies outlined in Part I below are intended to help international arbitration practitioners – whether from jurisdictions that are well-versed in cross-examination or from jurisdictions where cross-examination is virtually unknown – conduct effective examinations of adverse witnesses. Part II describes challenges that are commonly encountered during cross-examinations in international arbitration and suggests techniques for handling them effectively.

I. STRATEGIES

A. Consider the Background and Preferences of the Tribunal

One of the most important skills in cross-examination in international arbitration is the ability to adapt one's approach to the tribunal. While this is an appropriate maxim for virtually all aspects of advocacy in international arbitration proceedings, it is particularly important in connection with the examination of witnesses.

Some arbitrators may not be familiar with common-law style cross-examination or may even have a negative view of cross-examination.[1] Other arbitrators will recognize the value of cross-

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[1] *See, e.g.*, A. Redfern, M. Hunter, N. Blackaby and C. Partasides, Law and Practice of International Commercial Arbitration, at §6-115 (2004); J. Beechey, *Advocacy in International Commercial Arbitration: England*, *in* The Art of Advocacy in International Arbitration, at pp. 254-55 (R. Doak Bishop, ed., 2004); G. Bernini, *Italy*, *in* International Handbook on Commercial Arbitration, Suppl. 3, at p. 26 (J. Paulsson, ed., January 1985); T. Houzhi and W. Shengchang, *China*, *in* International Handbook on Commercial Arbitration, Suppl. 25, at p. 23 (J. Paulsson,

examination, but will view the aggressive style of cross-examination prevalent in U.S. courts as repugnant.[2] When preparing for cross-examination, it is important that the examiner consider how the tribunal is likely to react to her questions and to consider adopting a different approach if there is any risk of alienating the tribunal. Even more importantly, during the examination of the witness, the examining lawyer should be prepared to change her approach if she perceives that the tribunal is having a negative reaction.

In general, most tribunals will give the examiner fairly loose rein to conduct the cross-examination and will be reluctant to disallow the questions being asked. Tribunals generally will step in, however, if they feel a lawyer is unfairly attacking the witness or if the questions being asked appear unnecessary or immaterial. If the tribunal perceives the examiner as simply trying to score points as opposed to testing crucial evidence, the arbitrators may be inclined to sympathize with the witness or to step in to protect the witness.[3]

This does not mean that the examining lawyer should avoid asking hard questions or even challenging the witness's credibility where necessary. It does mean that the examiner's tone should be predominantly polite and respectful towards the witness. Witnesses in international arbitration are often senior businesspeople, government officials, or distinguished experts. Tribunals will treat them with respect, and will expect counsel to do the same. The examiner should also avoid arguing with the witness or gratuitously embarrassing the witness. In general, a confident, controlled presentation will be more effective than an emotional or aggressive approach.

B. National Court Rules of Evidence Do Not Apply

Another important point to bear in mind when preparing for cross-examination is that national court evidentiary rules (such as the United States Federal Rules of Evidence) generally do not

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ed., January 1998); C. N. Netto, *Brazil*, *in* International Handbook on Commercial Arbitration, Suppl. 35, at p. 16 (J. Paulsson, ed., August 2002); T. Szurski and A. W. Wisniewski, *Poland*, *in* International Handbook on Commercial Arbitration, Suppl. 14, at p. 14 (J. Paulsson, ed., April 1993); S. Gautama, *Indonesia*, *in* International Handbook on Commercial Arbitration, Suppl. 26, at p. 15 (J. Paulsson, ed., February 1998).

[2] *See, e.g.*, R. Doak Bishop, *Advocacy in International Commercial Arbitration: United States*, *in* The Art of Advocacy in International Arbitration, at p. 348 (R. Doak Bishop, ed., 2004); J. Beechey, *Advocacy in International Commercial Arbitration: England*, *in* The Art of Advocacy in International Arbitration, at p. 255 (R. Doak Bishop, ed., 2004); M. Bühler and C. Dorgan, *Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbitration – Novel or Tested Standards?*, Journal of International Arbitration, Vol. 17, No. 1 (2000), at p. 25; P. Griffin, *Recent Trends in the Conduct of International Arbitration – Discovery Procedures and Witness Hearings*, Journal of International Arbitration, Vol. 17, No. 2 (2000), at p. 27.

[3] *See, e.g.*, A. Redfern, M. Hunter, N. Blackaby and C. Partasides, Law and Practice of International Commercial Arbitration, at §6-87 (2004); J. Paulsson, *Cross-Enrichment of Public and Private Law Dispute Resolution Mechanisms in the International Arena*, Journal of International Arbitration, Vol. 9, No. 1 (1992), at p. 62; J. Beechey, *Advocacy in International Commercial Arbitration: England*, *in* The Art of Advocacy in International Arbitration, at p. 255 (R. Doak Bishop, ed., 2004); H. Holtzmann and D. Donovan, *United States*, *in* International Handbook on Commercial Arbitration, Suppl. 28, at p. 33 (J. Paulsson, ed., January 1999).

apply in international arbitration proceedings. Most institutional arbitration rules give the tribunal complete control over the questioning of witnesses and the weighing of evidence.[4]

Even the IBA Rules on the Taking of Evidence in International Arbitration say only that:

> "The Arbitral Tribunal shall at all times have complete control over the Evidentiary Hearing. The Arbitral Tribunal may limit or exclude any question to, answer by or appearance of a witness … if it considers such question, answer, or appearance to be irrelevant, immaterial, burdensome, duplicative, or covered by a reason for objection set forth in Article 9.2."[5]

The lack of strict evidentiary rules means that the examining lawyer may be able to ask questions during cross-examination in an international arbitration proceeding that would not be allowed in a national court proceeding. While tribunals have the power to disallow a question that they deem improper, as long as the question asked is relevant, material, and does not infringe an accepted privilege (such as the attorney-client privilege), it will generally be allowed. Of course, if the question calls for the witness to speculate or to give hearsay evidence (information about which the witness does not have first-hand knowledge), even if the question is allowed, the tribunal may not give much weight to the answer.

C. Ask Leading Questions

Leading questions are generally allowed in cross-examination.[6] As with other aspects of advocacy in international arbitration, individual tribunals will impose different limits on the extent to which counsel may lead the witness. To the extent that generalizations can be made, counsel will generally be allowed to lead a witness during cross-examination, but may not be

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[4] *See, e.g.*, ICC Rules of Arbitration, Article 21.3 ("The Arbitral Tribunal shall be in full charge of the hearings"); LCIA Rules, Article 20.5 ("Any witness who gives oral evidence at a hearing before the Arbitral Tribunal may be questioned by each of the parties under the control of the Arbitral Tribunal. The Arbitral Tribunal may put questions at any stage of his evidence."); AAA ICDR International Arbitration Rules, Article 20.4 ("The tribunal may determine the manner in which witnesses are examined."); UNCITRAL Arbitration Rules, Article 25.4 ("The arbitral tribunal is free to determine the manner in which witnesses are examined."); ICSID Rules of Procedure for Arbitration Proceedings, Rule 35 ("Witnesses and experts shall be examined before the Tribunal by the parties under the control of its President. Questions may also be put to them by any member of the Tribunal.").

[5] IBA Rules on the Taking of Evidence in International Arbitration, Article 8. The Article 9.2 objections include lack of sufficient relevance or materiality, legal impediment or privilege, commercial or technical confidentiality, special political or institutional sensitivity, and considerations of fairness and equality. IBA Rules on the Taking of Evidence in International Arbitration, Article 9.2.

[6] *See, e.g.*, IBA Rules on the Taking of Evidence in International Arbitration, Article 8.1; K. Hober, *Advocacy in International Commercial Arbitration: Sweden*, *in* The Art of Advocacy in International Arbitration, at p. 190 (R. Doak Bishop, ed., 2004); D. R. Haigh, Q.C. and B. Beck, *Advocacy in International Commercial Arbitration: Canada*, *in* The Art of Advocacy in International Arbitration, at p. 299 (R. Doak Bishop, ed., 2004). By contrast, leading questions are generally not allowed during direct examination. *See e.g.*, Black's Law Dictionary (8th ed. 2004); IBA Rules on the Taking of Evidence in International Arbitration, Article 8.1; K. Hober, *Advocacy in International Commercial Arbitration: Sweden*, *in* The Art of Advocacy in International Arbitration, at p. 189 (R. Doak Bishop, ed., 2004); D. R. Haigh, Q.C. and B. Beck, *Advocacy in International Commercial Arbitration: Canada*, *in* The Art of Advocacy in International Arbitration, at p. 299 (R. Doak Bishop, ed., 2004).

allowed to ask the same narrow, tightly-structured leading questions that are routine in common-law courts.

A "leading question" is, simply put, a question that suggests the answer that the questioner expects.[7] Leading questions are the opposite of open-ended questions, which require a witness to provide a more expansive answer. For example, an examiner could ask "Why did XYZ Company decide to enter into this deal?" (an open-ended question) or could ask "XYZ Company entered this deal because it was under pressure from its parent, ABC Company, to expand its operations in South America, correct?" (a leading question).

Litigators in common-law courts are often taught to ask only very narrow, leading questions during cross-examination, and to insist that the witness answer only "yes" or "no" in response to every question. Common law judges will often endorse this approach and will instruct witnesses to answer only the specific question asked by the questioning lawyer, even if doing so limits the witness to only a "yes" or "no" answer.

International arbitral tribunals may not have much patience for an approach that uses only extremely narrow leading questions. They will generally expect the questioning lawyer to ask real questions of the witness, and may perceive very tight leading questions as argument rather than true questioning. Tribunals will generally allow a witness to explain his or her answers and may not have much patience for a lawyer who tries to force the witness to give only one-word answers.

This does not mean that the examining lawyer cannot ask leading questions on cross-examination in international arbitration. Most tribunals will allow the examining lawyer to ask leading questions, and, indeed, leading questions are often necessary, effective, and fair.

The examiner can maximize the effectiveness of the leading questions that she does ask, and minimize the chances of the tribunal limiting her leading questions, if her examination does not exclusively use tightly-structured leading questions. It is often advisable to limit very tight, "yes" or "no" questions to the most important points covered with the witness. Where possible, the examining lawyer should ask more open-ended questions about non-critical subjects or to set the stage when moving on to a new topic. If the tribunal perceives that the examiner is letting the witness answer those questions fully, it may be less inclined to interfere with narrower, tighter questions on the more critical points in the testimony.

D. Start with Points of Agreement

Along the same lines, another effective strategy for cross-examination is to start with areas of agreement. Although the general focus of cross-examination is challenging evidence that is harmful to one's case, most adverse witnesses can also provide testimony that is helpful for the opposing party's case. Cross-examination can be used to lock in good testimony from the written witness statement, or to ask about general propositions that the witness is likely to agree with.

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[7] *See, e.g.*, Black's Law Dictionary (8th ed. 2004).

For example, in a dispute over a joint venture, the examining lawyer might want to ask an adverse witness about his company's optimistic projections for the joint venture at the time of contracting. In a construction dispute, counsel might ask an adverse witness about his employer's standard of care in choosing subcontractors. In an investment dispute, the investor's counsel might question an officer of the state entity that was involved in the project about previous projects to demonstrate the experience and sophistication of the state entity.

Starting with points of agreement will often get the cross off to a good start and will generally make the witness more cooperative, particularly if those questions paint the witness or his employer in a positive light. In addition, in a post-hearing brief or closing argument, the testimony of adverse witnesses may be more persuasive than the testimony of one's own witnesses to support key points in the case.

E. Finish on a Strong Point

When structuring the cross-examination, it is always a good idea to end the questioning of the witness on a strong point. It is human nature that we remember best what is said first and last in a lengthy presentation. The final exchanges between the questioning lawyer and the witness will help to cement the tribunal's impressions of the witness and will likely stick in the arbitrators' minds even following the conclusion of the witness's testimony. Opposing counsel will also obviously have less time to plan any re-direct examination on the points that were covered last.

F. Asking Questions Without Knowing the Answer

In cross-examination in international arbitration proceedings, the examiner will sometimes have to ask questions to which she does not know the answer. Common-law litigators are often taught never to ask a question if they don't know the answer, but this is sometimes impossible in arbitration.

The witness generally will not have given a pre-trial deposition prior to the cross-examination,[8] and there may be a number of significant points that the examining lawyer needs to question the witness about without knowing what his or her testimony will be. Sometimes it is possible to arrange the order of the witnesses during the hearing so that the earlier witnesses testify about facts that help to frame later, more critical cross-examinations.

When asking a witness about unknown facts, it is important to anticipate what different answers the witness could give and to have several alternative lines of questions in mind depending on the witness's answer. For example, if the questioning lawyer believes that a particular witness

[8] Although pre-trial depositions are used in some international arbitration proceedings, they are still relatively uncommon. *See, e.g.*, G. Born, International Commercial Arbitration, at p. 487 (2d ed. 2001); K. Hober, *Advocacy in International Commercial Arbitration: Sweden*, *in* The Art of Advocacy in International Arbitration, at p. 190 (R. Doak Bishop, ed., 2004); D. R. Haigh, Q.C. and B. Beck, *Advocacy in International Commercial Arbitration: Canada*, *in* The Art of Advocacy in International Arbitration, at p. 291 (R. Doak Bishop, ed., 2004); M. Hwang, *Advocacy in International Commercial Arbitration: Singapore*, *in* The Art of Advocacy in International Arbitration, at p. 435 (R. Doak Bishop, ed., 2004).

received a copy of the critical memo in the case, but does not have any evidence to prove that, she can prepare two alternative lines of questions. If the witness testifies that he did see the memo, the examiner will be ready to question him about the substance of the memo, but if the witness says that he never saw the memo, the examiner can be ready to question him about the fact that his not receiving the memo was contrary to the company's standard practice.

It is also advisable to plan "escape routes" in lines of questions on sensitive matters, so that if the witness's answers to preliminary questions on a topic are unhelpful to one's case, it is possible to gracefully move on to a different topic before the witness has the opportunity to give truly damaging evidence. It is also critical to remain flexible during the questioning and to not hesitate to drop questions, or whole lines of questions, if it seems that the witness's testimony on those issues will be harmful.

The most important thing when questioning a witness about unknown facts is to balance the need for the testimony against the risk of the witness giving a harmful answer. There is no easy formula or rule to help the examiner decide when to ask a risky question; it is largely a matter of experience and judgment. As a general matter, the examiner should tread very carefully when asking questions about any topic that is critical to her case and should avoid asking a question – particularly if she does not know the answer – if the witness could give an answer that would significantly harm her case.

II. CHALLENGES

A. Controlling The Witness

Inevitably, at some stage, most lawyers will face an uncooperative, argumentative witness who refuses to answer questions directly. The most important thing for the examiner in this situation is to maintain her composure. If the examining lawyer remains respectful and composed, the tribunal will likely hold the witness's behavior against him; if the lawyer loses her cool and argues with the witness, however, the tribunal may hold it against her.

Many cross-examination treatises aimed at common-law litigators talk about "disciplining" a witness who is not giving the desired answer. The techniques they advise, such as cutting-off a witness's answer, or using body language to signal displeasure with the witness, will likely be perceived as rude by an arbitration tribunal and may make the questioner look worse than the witness.

It is far more effective to control a witness by asking tightly formulated questions and by persisting in asking them until the witness gives a direct response. It sometimes works to repeat a short, direct question several times until the witness gives a short, specific answer. It is also sometimes effective to preface the repeated question with something like, "Perhaps I was unclear. I intended to ask a very simple question. My question was …" After several of these exchanges, the witness should learn to answer only the question asked.

Another technique for handling a witness who continues to give long speeches instead of answering the question is to let the witness keep talking. When he stops, the examiner can ask,

"Are you finished? Do you have anything more you want to say?" When the examiner has established that the witness is finished, the examiner can then say, "Good, now can we get back to my question? My question was: …" If the witness continues making speeches, the examiner can remind him that he had an opportunity to have his say, and now it is the examiner's turn to ask questions. Again, the most important thing for the examiner is not to get frustrated or lose her composure.

B. Time Limits

Another challenge in cross-examination in international arbitration is that there are often time-limits for cross-examination. Sometimes, a tribunal will allocate a fixed period of time to each party for all of its witness examination over the course of a hearing. For example, in a five day hearing, the tribunal may set aside half a day for opening statements and a day for closing statements, and divide the remaining 25 hours or so evenly between the parties. It would then be up to each party to allocate its 12.5 hours among all of the testifying witnesses, including direct, redirect, and cross-examinations. This is sometimes referred to as "chess clock" timing.

The tribunal may also set time limits for each individual witness. The tribunal may do this ahead of time in a procedural order, usually after asking the parties to estimate how much time they need for each witness. Occasionally, a tribunal may not set time limits in advance, but may do so during the course of the hearing, particularly if time becomes tight.

Because most hearings are a fixed length and time is often tight, it is important to have a general sense of how long each of the planned cross-examinations will take. The examiner should also be prepared to cut back the planned cross-examinations to focus on only the most important points if she starts to run out of time or if the tribunal imposes a tight time limit with little advance notice.

C. Questioning by the Tribunal

Unlike common-law judges, but much like civil law judges, arbitration tribunals will often question a witness directly. The scope and timing of this questioning will vary considerably from tribunal to tribunal. Many tribunals will let counsel conduct the cross-examination with little, if any, interference, and then ask their own questions of the witness at the end of the cross-examination. Other tribunals may be very active, and may interrupt the cross-examination to ask their own questions of the witness.

It can be challenging to get a cross-examination back on track after an interruption from the tribunal, especially if an arbitrator has just asked a critical question that the examiner was meticulously building up to. On the other hand, questions from the tribunal can provide very good insight into concerns that the tribunal may have about the witness's testimony or about particular elements of the parties' cases. It is worth listening to the arbitrators' questions carefully, and following up on any issues that the arbitrators seem concerned about. Although the tribunal's questions may complicate the examiner's planned cross-examination, they can also be an invaluable tool for tailoring one's presentation to the particular concerns of the tribunal.

D. Questioning Witnesses in a Language other than the Language of the Arbitration

Another common challenge of cross-examination in international arbitration is that witnesses will often need or want to testify in a language other than the language of the arbitration. This can make cross-examination very challenging.

If the witness needs to use an interpreter, counsel may have the choice of either simultaneous or consecutive interpretation. Simultaneous interpretation involves the interpreter translating the witness's words as they are spoken and transmitting them to the lawyers and arbitrators through headphones. Consecutive interpretation involves the witness giving a full answer and the interpreter then giving a full translation of the answer.

Consecutive interpretation has some advantages because everyone in the room hears both the questions and the answers in the language of the arbitration, and it is easy to transcribe the testimony. Also, if there are any disputes about the translation, or if there is confusion about a question or answer, that can be cleared up immediately. On the other hand, consecutive interpretation generally takes much longer than simultaneous interpretation.

However the interpretation of the testimony is handled, the examining lawyer must choose her words carefully when she and the witness are speaking different languages. There is a real danger that the examiner and the witness may talk past each other, or may interpret an important term differently. The examiner must use clear words and clear concepts and make sure that the witness has understood the questions and that the examiner (and the tribunal) has understood the answers. It may help to ask particularly important questions in two different ways or using two different terms so that the witness cannot later claim not to have understood the question.

E. Objections from Opposing Counsel

There are generally fewer objections from opposing counsel during cross-examination in international arbitration hearings than in common-law court proceedings. The lack of formal rules of evidence means that there are fewer grounds on which to object to the form of a question. In addition, tribunals generally strive to create an atmosphere of civility at arbitration hearings and counsel are often reluctant to make objections that might be viewed by the tribunal as unnecessarily disrupting that mood.

Moreover, even in the face of objections by opposing counsel, tribunals often allow the question to be asked in its original form, or simply ask that it be rephrased. So long as the examiner is flexible and prepared to rephrase questions as needed, objections from opposing counsel generally will not disrupt the cross-examination in any significant way. Indeed, multiple objections, especially if they are not aimed at critical issues, are more likely to annoy the arbitral tribunal than to derail the cross-examination. If the examiner does need to respond to comments made by opposing counsel during the cross-examination, she should direct her comments to the tribunal and avoid engaging in arguments directly with opposing counsel.

III. CONCLUSION

Cross-examination has become routine in international arbitration proceedings where witness testimony is introduced. Consequently, it is increasingly important that international arbitration practitioners develop their cross-examination skills and utilize cross-examination as a tool for developing evidence and advancing their case before the tribunal. Although there is no substitute for experience, practitioners can greatly improve their cross-examinations by (i) recognizing the myriad differences between cross-examination in international arbitration and witness-examination in national courts, and (ii) anticipating the need for flexibility during oral hearings by preparing alternative approaches and planning for the potential difficulties that might arise during the course of the examination. Careful preparation and an ability to adapt to the unique factors of each case will ensure that counsel in international arbitration hearings minimize the risks of cross-examination while maximizing the opportunity to advocate their position through the testimony of adverse witnesses.