

# THE PREMISES OF WITNESS QUESTIONING IN INTERNATIONAL ARBITRATION

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## I. INTRODUCTION:

1. In scene 4 of Bertolt Brecht's *Galileo*, Galileo and two Florentine scholars dispute the existence of the moons of Jupiter. The existence of Jupiter's moons was incompatible with the Ptolemaic conception of the universe, which required all celestial bodies to revolve around the earth. The Ptolemaic system was supported by Aristotle and tacitly endorsed by Scripture.
2. The scholars consider that Aristotle is all the evidence that they need that Jupiter's moons cannot exist. Galileo begs them to observe the moons through his telescope, and to trust the evidence of their eyes. The scholars tell Galileo that if the telescope shows something that does not exist, then it cannot be a very reliable telescope. The scholars leave without looking through the telescope or accepting that the moons of Jupiter exist.
3. The scholars rely on a set of reasons accepted for centuries and endorsed by the highest authority. Galileo relies on visual observation. The scene is a neat

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demonstration of the impossibility of a constructive debate from irreconcilable premises.

4. The discussions of witness questioning in international arbitration are not riven by an intellectual divide as profound as the differences between the Ptolemaic and Copernican conceptions of the universe. Rather, the alternative premises of witness questioning are numerous and fragmented, but in their cumulative effects they can produce the sensation of a ‘dialogue of the deaf’, or of commentators talking past one another.
5. The premises of witness questioning are largely unarticulated because discussions of advocacy in general are descriptive and prescriptive rather than conceptual. This poses less of a problem inside a domestic legal system where premises might be deeply rooted and widely shared. However, in international arbitration practitioners come from many legal traditions, and their premises regarding witness questioning may be different and irreconcilable.
6. A large amount of what explains advocacy is not what is said, but what is unsaid, and merely assumed. The iceberg metaphor immediately comes to mind: what an advocate says and does on a daily basis in his cases and before tribunals is the tip of the iceberg: what floats beneath and is unseen is essential to understanding what the advocate does.
7. Another form of understanding the unarticulated premises of advocacy is offered by the distinction in logic between the enthymeme and the syllogism. In a syllogism the premises of the argument are expressed. In contrast, an enthymeme is a form of reasoning where one or more premises are not expressed, sometimes because they are self-evident or accepted by all, but also sometimes for rhetorical reasons or pure carelessness. Enthymeme is very common in forensic argument; indeed it is the preferred form of reasoning amongst lawyers.
8. The advocate is constantly managing unarticulated or only partially articulated premises in legal argument. For example, advocates routinely appeal to values that they assume are shared by the decision-maker and also which are assumed to be self-evidently good. In the same way, the skills of an advocate, and not only the subject of their argumentation, have their premises. Again, if the premises of advocacy are deeply shared, then there is no reason for advocates themselves (as distinct say, from advocacy teachers or sociologists of the profession) to seek to identify and explain them, but the premises of witness questioning are not deeply shared in international arbitration.
9. For these reasons, the primary purpose of this paper is to identify the premises of witness questioning. These premises are identified and discussed in Section II under five headings: the functions of witness questioning; oral and documentary evidence; personal recollection; premises about witness questions, and premises about advocates and arbitrators. The discussion of the premises is then used in Section III to reconsider the standard practices regarding witness questioning in international arbitration today.

10. A curious feature about the deeply conflicting premises of witness questioning in international arbitration is that they co-exist with well-established standard practices. The conflicting premises emerge in critical analyses of witnesses questioning and in the calls for change to the standard practices.
11. The current international practice is well demonstrated by the soft law guidelines such as the 2010 edition of the IBA Rules on the Taking of Evidence in International Arbitration (“*IBA Rules of Evidence*”)<sup>1</sup> and the ICC Commission Report Controlling Time and Costs in Arbitration, 2012 (“*ICC Time and Costs Report*”)<sup>2</sup>. Written witness statements are strongly encouraged, and normally operate as a substitute for direct oral testimony<sup>3</sup>. If the witness does not appear when requested, then the written statement is disregarded.<sup>4</sup> Cross-examination is permitted, but is limited in comparison with cases in common law jurisdictions of the same complexity.<sup>5</sup> Additional questions by the party that proposed the witness after cross-examination (redirect or re-examination in common law parlance) are also accepted.<sup>6</sup> It is accepted that the tribunal may ask questions to a witness at any time.<sup>7</sup> The conferencing of witnesses, and not only experts, is permissible and should be considered.<sup>8</sup> Finally, party representatives are treated as witnesses, rather than subject to special rules<sup>9</sup>.
12. The prevalence of these rules in international practice are well demonstrated by the Rules of Arbitration of the Court of Arbitration of Madrid (“*CAM Rules*”).<sup>10</sup> The CAM Rules provide for written witness statements, although they are virtually unknown in Spanish civil proceedings.<sup>11</sup> The Tribunal may disregard the statement if the witness does not appear for oral questioning, or take into account the non-appearance in the assessment of the evidence.<sup>12</sup> Party representatives are treated in

<sup>1</sup> Available at: <[http://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx)>

<sup>2</sup> Available at: <<http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/ICC-Arbitration-Commission-Report-on-Techniques-for-Controlling-Time-and-Costs-in-Arbitration/>>

<sup>3</sup> Article 4.4-4.8 IBA Rules of Evidence; para. 78, ICC Time and Costs Report. According to the Queen Mary University of London and White & Case LLP, *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*, “In a significant majority of arbitrations (87%), fact witness evidence is offered by exchange of witness statements....” On witness statements see generally, see Michal KOCUR “Witness Statements in International Commercial Arbitration” in Beata Gessel-Kalinowska vel Kalisz (ed) *The Challenges and the Future of Commercial and Investment Arbitration. Liber Amicorum Professor Jerzy Rajski* (Warsaw, 2015) at pp. 175-181; available at: <<http://kocurpartners.com/wp-content/uploads/2015/06/Witness-Statements-in-International-Commercial-Arbitration.pdf>> (last accessed March 11, 2016); Pierre BIENVENU, Martin J. VALASEK, “Witness Statements and Expert Reports” in D. BISHOP, E. G. KEHOE (eds) *The Art of Advocacy in International Arbitration* (2<sup>nd</sup> ed. JurisNet LLC, 2010), Chapter 10; M. HWANG SC and A. CHIN, “The Role of Witness Statements in International Commercial Arbitration”, in: A. van den Berg (ed.), *International Arbitration 2006: Back to Basics?*, Montreal: ICCA Congress Series 2006, N° 13, pp. 650-660.

<sup>4</sup> Article 4.7 and 8.1 of the IBA Rules of Evidence.

<sup>5</sup> Article 8.3(b) IBA Rules of Evidence; para. 80, ICC Time and Costs Report.

<sup>6</sup> Articles 8.2 and 8.3(b) IBA Rules of Evidence.

<sup>7</sup> Article 8.3(b) IBA Rules of Evidence.

<sup>8</sup> Para. 79, ICC Time and Costs Report.

<sup>9</sup> Article 4.2 IBA Rules of Evidence.

<sup>10</sup> Effective March 2015; available at <[http://www.arbitramadrid.com/web/corte/reglamento\\_corte](http://www.arbitramadrid.com/web/corte/reglamento_corte)>

<sup>11</sup> Article 31.2 CAM Rules.

<sup>12</sup> Article 31.3 CAM Rules.

the same way as fact witnesses, notwithstanding the separate treatment of witness and party representatives, including separate rules for the evaluation of their evidence, in Spanish civil procedure.<sup>13</sup> Finally, all parties may question the witness, and the tribunal may ask questions of the witness at any time.<sup>14</sup>

13. This paper considers only the questioning of witnesses. The questioning of experts has its own premises, and is not covered by the discussion in this paper.

## **II. THE PREMISES OF WITNESS QUESTIONING:**

### ***A. Premises about the Functions of Witness Questioning:***

14. A witness is a person with knowledge relevant to matters in dispute, and the traditional description of a person as a ‘fact witness’ seems to immediately identify the purpose of questioning. It is to be informed about the facts.
15. Indeed the *information function* is probably the primary and least contentious function of oral evidence. It features prominently in the description of the role of both witness questioning generally and also of cross-examination. The scope of the information function might vary; historically English procedure was exclusively oral and so the witnesses and witness questioning has dominated procedure in a way that does not exist in any modern international arbitration.
16. The expansion of the realm of documentary evidence provides an alternative source of factual information and a corresponding contraction in the necessary information function of witnesses. Indeed, with the voluminous documentary evidence of a modern international arbitration, the information function of witness questioning might be reduced to putting the documents in context, as well as providing a ‘flesh and blood’ embodiment of the participants in correspondence, negotiations and meetings and assisting the tribunal to understand the role of personalities in the dynamics of a dispute.<sup>15</sup>
17. Cross-examination has specific information functions including supplementing the witness declaration or direct testimony with information that has been omitted, to correct inaccuracies or misstatements in the declaration or oral testimony, to ensure facts are set in their proper contexts, and to identify and reconcile apparent contradictions.<sup>16</sup>

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<sup>13</sup> Article 31.1 CAM Rules. The questioning of parties is dealt with in Article 301-316 of the *Ley de Enjuiciamiento Civil*, and the question of witnesses in Articles 360-381 of the *Ley de Enjuiciamiento Civil*.

<sup>14</sup> Article 31.4 CAM Rules.

<sup>15</sup> Michael E. SCHNEIDER “Twenty-four Theses about Witness Testimony in International Arbitration and Cross-Examination Unbound” in M. WIRTH, C. RAMÍREZ and J. KNOLL ASA Special Series N° 35, *The Search for ‘Truth’ in Arbitration: Is finding the Truth What Dispute Resolution is About?* (Juris, 2011) Chapter 5, p. 63 (Thesis 2).

<sup>16</sup> See Anthony C. SINCLAIR “Differences in the Approach to Witness Evidence between the Civil and Common Law Traditions” in D. BISHOP, E. G. KEHOE (eds) *The Art of Advocacy in International Arbitration* (2<sup>nd</sup> ed. JurisNet LLC, 2010), Chapter 2, at p. 41.

18. Secondly, witness questioning has a *credibility function*. This is of course closely related, or even inextricably interwoven, with the information function. Information is of no use if it is not credible. Credibility is closely associated with the personal veracity of the witness and personal knowledge of the facts, but goes much wider than these ideas in international arbitration. Credibility is enhanced by the personal authority of the witness, their position and corporate responsibilities, and their ability to explain their evidence coherently and confidently. It is sometimes asserted that international arbitration has little tolerance for credibility, but such comments usually equate credibility with character evidence or direct assaults on the veracity of a witness. International arbitration may in general have little tolerance for accusations or insinuations that a particular witness is a liar, but the credibility function remains inseparable from the personal presence and oral character of witness testimony.
19. There is a different balance between the information and credibility functions of witness testimony in direct and cross-examination. In direct testimony, normally replaced by a witness statement in international arbitration, the information function predominates as the witness explains events to and so informs the tribunal. The credibility function is more prominent in cross-examination where counsel often seeks to show the limits of the witnesses' personal knowledge, as well as omissions and inconsistencies in their evidence.
20. Witness questioning also has an important *rhetorical function*, particularly for common lawyers. It is another way for counsel to put their party's case to the tribunal, not directly as in the written briefs and oral arguments, but indirectly through a third person. The rhetorical function is manifested in witness preparation where the lawyers assisting the witness seek not only to identify the information that the witness can provide, but to organize the information so that it fits comfortably with the arguments that counsel wishes to make. A problem that has emerged with the substitution of direct testimony by written declarations is that written words can be stitched so tightly together that the voice that emerges may be more that of the lawyer than the witness. The result is that the written witness statement prioritizes the information and rhetorical functions, but loses credibility as it ceases to be the single voice of a witness.
21. Cross-examination also has a strong rhetorical function. This rhetorical function seems to have increased in significance or at least recognition in modern common law treaties as the dogmatic association of cross-examination with the discovery of the truth has fallen into discredit. Cross-examination provides an opportunity through the careful selection of topics and questions for the cross-examining counsel to direct the tribunal to important features of their case theory, or to facts or documents that support that theory.<sup>17</sup> The most effective questioning technique to derive rhetorical advantage from cross-examination is the leading question.

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<sup>17</sup> Ronald H. CLARK, George R. DEKLE & William S. BAILEY *Cross-Examination Handbook: Persuasion, Strategies, and Techniques* (2<sup>nd</sup> ed. Wolters Kluwer; 2015): "Cross-examinations are not conducted in isolation. They are part of the total trial plan....The purposes of cross are to preserve and build upon your case theory or demolish the other side's, and in this way to persuade the [tribunal]" (p. 6).

Counsel can put selected elements of their case to the witnesses proposed by the other side in a series of affirmative propositions that has the effect (often irrespective of the answer of the witness) of driving the propositions into the consciousness of the tribunal. The purpose of the rhetorical cross-examination is to draw attention to counsel's own case, and not to provide information to the tribunal. The rhetorical cross-examination is an additional form of forensic argumentation made in the form of questions to a witness.<sup>18</sup>

22. In international arbitration these rhetorical advantages might involve higher information and credibility costs than in jurisdictions where witness statements do not substitute direct oral testimony. The substitution of witness statements for direct testimony means the opposing counsel can often decide whether the witness is ever seen personally by the tribunal. Calling a witness for cross-examination turns a name on a statement into a person more likely to be remembered by the tribunal, and gives the tribunal the chance to assess their credibility and to seek information through their own questions. In short, cross-examination gives a platform to an opposing witness.<sup>19</sup>
23. Finally, witness questioning has a *legitimacy function*. The right to be heard refers to the right to be heard through counsel, but is more complete if the party and its witnesses have an opportunity to testify before the tribunal.
24. When serious allegations are made then witnesses to the events may be presented and thoroughly questioned to substantiate the allegations. Witness questioning may have a cathartic effect in the long tense process of a commercial confrontation. In these ways, witness questioning legitimises the decision of the tribunal, and increases the prospect of the acceptance of the award by the Parties and the termination of the dispute.
25. There is a major difference between arbitration practitioners in their evaluations of these four functions of witness questioning. Much of the criticism of witness questioning originates in the assumption that the provision of information (either new facts or the clarification of existing documents or other evidence) is and should be the purpose of witness questioning. This perspective denies any validity to the credibility and rhetorical justifications of witness questioning.

**B. Premises about Proof: Oral and Written Evidence:**

26. There is a major difference between the common law and continental jurisdictions in their consideration of oral and documentary evidence. The common law expresses greater confidence in oral evidence, and therefore assigns to it a greater

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<sup>18</sup> J. W. MCELHANEY, *The Real Purpose of Cross-Examination*, 22 *Litigation* 3, 53 (1996), p. 53: "The real purpose of cross-examination is to let you argue your case during the testimony of the other side's witnesses. Every witness they put on the stand is another opportunity to give part of your summation right in the middle of their case."

<sup>19</sup> Cf. John FELLAS "Cross-Examination in International Arbitration" (2015) *New York Law Journal*, volume 254; issue 26, p. 3.

prominence and more weight than the continental system which, by contrast, prioritises documentary evidence.

27. The common law confidence in oral evidence is a virtue born of necessity. The jury system necessitated an oral procedure. Documents were produced through a witness who first identified and then read the document so that even written evidence was presented to the jury orally.<sup>20</sup> The principle of orality encouraged complex rules of evidence to protect jurors from prejudicial evidence, sophisticated questioning techniques from counsel, and also forced judges to train themselves “*to listen to, to absorb, and to extract kernels*” from the questioning of witnesses.<sup>21</sup> Around this oral system there developed three articles of faith. Firstly, an untruthful or mistaken witness would be exposed by the system of cross-examination. Secondly, a judge can distinguish a truthful from a false or mistaken witness.<sup>22</sup> Thirdly, the risk of exposure for falsehood, the penalties for perjury, and perhaps the peculiar majesty of English justice, mean that witnesses by and large will speak or be driven to admit the truth, so that even parties to a cause, whose self-interest in their evidence is plain, can be treated as witnesses.
28. The importance of cross-examination to the common law is exemplified by John Henry Wigmore’s celebrated statement that: “*Cross-examination is the greatest legal engine ever invented for the discovery of truth.*”<sup>23</sup> The equation of cross-examination with truth and the exposure of falsehood is often repeated<sup>24</sup>, and is the creed underlying the common law zeal for cross-examination.
29. The confidence of the common law in oral evidence can be contrasted with the distrust of continental jurisdictions. Documentary evidence is considered more reliable, particularly contemporaneous documents.<sup>25</sup> Oral evidence is viewed with

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<sup>20</sup> The Rt. Hon. Lord WILBERFORCE in “Written Briefs and Oral Advocacy” (1989) 5 *Arbitration International* 348-451.

<sup>21</sup> Lord WILBERFORCE, *supra*, 349.

<sup>22</sup> Lord WILBERFORCE, *supra*: “*English judges entertain the belief that they can tell if a man –or even a woman- is speaking the truth. This is a Palladium [i.e. protective image/patron saint]...But there is not much scientific basis for this. Such studies, as I know of, show that liars are believed as often as truth-tellers are disbelieved...I can give several instances where exactly opposite views as to credibility were confidently given by members of...tribunals...*”

<sup>23</sup> John Henry WIGMORE, 5 *Evidence in Trials at Common Law*, § 1367 (James H. CHABOURN ed., Little, Brown & Co. 1974). This is an opinion grandly stated as an immutable truth. This type of enthusiastic admiration for cross-examination has a long history in the literature of advocacy.

<sup>24</sup> Wigmore’s statement is endorsed by the U.S. Supreme Court in *California v. Green* 399 US 149 at pp. 158-159 (1970). See also Viscount SANKEY, L.C., in *Mechanical etc. Co. Ltd. v Austin* [1935] AC. 346 at p. 359, quoting with approval Lord HANWORTH MR “*Cross-examination is a powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story.*” Cf. Justice Stevens in *United States v. Salerno* 505 U.S. 317 (1992): “*Even if one does not completely agree with Wigmore’s assertion that cross-examination is ‘beyond any doubt the greatest legal engine ever invented for the discovery of truth’, one must admit that in the Anglo-American legal system cross-examination is the principal means of undermining the credibility of a witness whose testimony is false or inaccurate*” (at 328, citations omitted).

<sup>25</sup> E. GAILLARD and J SAVAGE (eds) *Fouchard, Gaillard & Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) at para. 1278: “*Continental lawyers are generally more sceptical as to the sincerity of witness testimony and the benefit of calling for it in every case. They believe*

scepticism and is considered as of ‘little added value’. The “*hearing completes the written evidence but is not a tool for the taking of evidence in its own right.*”<sup>26</sup> The questioning of witness is often limited and directed by the Court. There is often no right to cross-examination.<sup>27</sup> This perspective is fortified by an exacting system of pleading requiring the parties to fully identify the documentary evidence relied on in the statement of claim or defence.<sup>28</sup> International arbitration also has adopted a system requiring full documentary evidence to accompany the pleadings.

30. The distrust of oral testimony in civil proceedings has been strong in Spain. Until 2000 in Spanish civil proceedings the Parties submitted written questions to the judge. If the questions were admitted then they would be put by the judge to the witness in a system of very limited utility, except in situations of formal proof or admissions. One result was that the techniques of witness questioning and the accompanying rules of evidence, familiar in the common law world, are not an established part of Spanish civil procedure. Spanish lawyers also have a much lower opinion than their common law counterparts of the innate truthfulness of witnesses, or of the effectiveness of the oath or possible penalties for false testimony.<sup>29</sup>
31. Nevertheless, and despite the rules that privilege certain types of documentary evidence and demonstrate caution towards certain types of oral evidence, the general position in Spain is that the weight to be given to private documentary evidence and oral evidence is for the free assessment (*sana critica*) of the judge or arbitrator.<sup>30</sup> The distrust of oral evidence is not manifested formally in legislation, but rather informally in the attitudes of judges and lawyers. It is manifested in the ready admission that oral evidence is unreliable, and that witnesses are dishonest with impunity. It is also manifested in civil hearings in the time allocated by judges

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*that the best form of proof is written evidence, although a number of differences exist between the various continental systems.”*

<sup>26</sup> Teresa GIOVANNINI “The Continental European Perspective and Practice of Advocacy” in D. BISHOP, E. G. KEHOE (eds) *The Art of Advocacy in International Arbitration* (2<sup>nd</sup> ed. JurisNet LLC, 2010), Chapter 21, p. 511.

<sup>27</sup> Anthony C. SINCLAIR “Differences in the Approach to Witness Evidence between the Civil and Common Law Traditions” in D. BISHOP, E. G. KEHOE (eds) *The Art of Advocacy in International Arbitration* (2<sup>nd</sup> ed. JurisNet LLC, 2010), Chapter 2, pp. 24-26.

<sup>28</sup> Claude REYMOND “Civil Law and Common Law Procedures: Which is More Inquisitorial? A Civil Lawyer’s Response” (1989) 5 *Arbitration International* pp. 357-368 at p. 361.

<sup>29</sup> See, for example, X. A. LLUCH, J. PICÓ I JUNOY, *Aspectos Problemáticos en la Valoración de la Prueba Civil*, (Bosch Procesal, 2008), at p. 113 and p. 123 (the oath ‘is unnecessary for the truthful witness and useless to prevent deliberately false evidence’). Further, the few prosecutions for perjury demonstrate the tolerance or ineffectiveness of the Spanish system given the commonly held view of a high number of untrustworthy witnesses (p. 123, referring to QUINTERO OLIVARES, *Del falso testimonio, en Comentarios a la Parte Especial del Derecho Penal*, 5<sup>a</sup> Ed.). This has long been a lament in Spanish commentaries on witness evidence: see E. MIRA Y LÓPEZ, *Manual de Psicología Jurídica*, (El Ateneo, 6th ed.), p. 130. Since 2000 a new professional literature has appeared relating to witness questioning and it remains to be seen whether opinions on the value of witness questioning might also evolve. There is a more pronounced oral phase, and therefore more attention to the techniques of witness questioning, in Spanish criminal procedure.

<sup>30</sup> Ley de Enjuiciamiento Civil Art. 326.2 & 427.1 (private documents, when contested) and Art. 376 (witnesses), and Article 29.8 of the CAM Rules. There is privileged treatment of public documents (Art. 1216-1224 Código Civil; Art. 317-323 Ley de Enjuiciamiento Civil) as well as special more cautious rules for the oral evidence of a party representative (Art. 310-316 Ley de Enjuiciamiento Civil).



to oral testimony, and the scant attention often paid to it, as well as the criticism levied at the ‘free’ or ‘total’ assessment of oral evidence as a euphemism for a decision based on a ‘hunch’.<sup>31</sup>

32. The written witness statement is a prominent feature of the civil procedure of many common law jurisdictions. It is virtually unknown in Spain, where witness questioning begins with the party that has called the witness, followed by the other parties, and ending with the questions of the tribunal.<sup>32</sup> It is also virtually unknown or afforded little value in many other non-common law jurisdictions.<sup>33</sup> Nevertheless, the witness statement has become a regular feature of international commercial arbitration.<sup>34</sup>
33. In summary, the differences in common law and continental perspectives on the utility of oral evidence are substantial. While it has been possible to develop a standard procedure of written witness statements followed by limited oral questioning, and experienced common lawyers in international arbitration acknowledge the advantages of documentary evidence<sup>35</sup>, the differences remain beneath the surface in the evidential strategies of counsel and the assessment of evidence by arbitrators. The current standard procedure does not resolve the conflicting probative premises, it merely conceals them.

### ***C. Premises about Witness Recollection:***

34. Witness declarations or the oral questioning at the hearing enables a party to present to the tribunal the first-hand knowledge of the facts of a witness. In international arbitration this typically involves evidence of the circumstances that gave rise to a dispute, conversations, meetings, and the context of written communications. The premises are that a person with first-hand knowledge of events is capable of recalling and relating those events accurately some time later, and also that the memory does not change between the time of the events and the hearing. Scientific studies cast doubt on these premises.

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<sup>31</sup> E. M. DOMÍNGUEZ IZQUIERDO “La retractación en el delito de falso testimonio: cuestiones procesales y sustantivas”, 88 Cuadernos de Política Criminal, Segunda Época, 79 (2006) p. 81 (the problems of oral evidence are not resolved by recourse to the principle of free assessment of the evidence (*libre apreciación de la prueba conforme a la sana crítica*) by the judge, as in writing a judgment it is not sufficient to rely of a ‘hunch’ that cannot be further explained).

<sup>32</sup> Article 372, Ley de Enjuiciamiento Civil.

<sup>33</sup> Anthony C. SINCLAIR “Differences in the Approach to Witness Evidence between the Civil and Common Law Traditions” in D. BISHOP, E. G. KEHOE (eds) *The Art of Advocacy in International Arbitration* (2<sup>nd</sup> ed. JurisNet LLC, 2010), Chapter 2, pp. 24-26.

<sup>34</sup> The preparation of witness statements raises questions of the relationship between the written statement and the subsequent oral examination of the witness. The witness statement is oral evidence in written form. The written form should in no way affect the evaluation of the evidence.

<sup>35</sup> N. BLACKABY, C. PARTASIDES A. REDFERN & M. HUNTER *Redfern and Hunter on International Arbitration* (UP, 2009), para. 696-698; Michael Hwang “Ten Questions Not to Ask in Cross-Examination in International Arbitration” in D. BISHOP, E. G. KEHOE (eds) *The Art of Advocacy in International Arbitration* (2<sup>nd</sup> ed. JurisNet LLC, 2010), Chapter 17, p. 449: “Arbitrators have more often than not been disappointed by how little they have learnt from hearing the witnesses, as opposed to reading their witness statements and reviewing the relevant documents.”

35. Scientific studies have identified serious reliability issues with the acquisition, retention and retrieval of evidence by witnesses. A witness's memory is influenced by their own expectations at the time of the event, so that witnesses tend to remember details consistent with their initial point of view and this form of confirmation bias in the acquisition of memories tends to get stronger over time. A witness's retention of a memory deteriorate as the time between the event and the recollection increases.<sup>36</sup> Further, the witness's memory of the event will be influenced by post-event information from other sources. *"Postevent information can not only enhance existing memories but also change a witness's memory and even cause nonexistent details to become incorporated into a previously acquired memory"*. *"Over time, information from these two sources [i.e. perception of the event, and 'external' information provided after the event] may be integrated in such a way that we are unable to tell from which source some specific detail is recalled. All we have is one 'memory'."*<sup>37</sup>
36. At the retrieval stage, the way a witness is questioned can affect the accuracy and completeness of their report. A witness permitted to narrate events in their own way is likely to be more accurate but less complete in their description of details. When a witness is required to answer specific questions -as in cross-examination- more errors are likely to occur than when they are free to choose their own details. Small variations in the form or assumptions of the questioning can affect a person's recollections about their past personal experiences.<sup>38</sup> There is a complex relationship between the confidence of a witness in the accuracy of their evidence and the accuracy of the recollection, although those evaluating evidence often assume a positive correlation between confidence and accuracy.<sup>39</sup>
37. The implications of these studies for witness declarations and witness preparation generally are profound. The exposure to new information about an event after that event has occurred can change a witness's recollection of that event. This new information might take the form of asking the witness to review contemporaneous correspondence and written documents, or through discussions about what occurred with other participants, or simply through the questions that are asked by the lawyer assisting the witness in their preparation. The susceptibility of memories to alteration by means of post-event information is such that interrogators should do whatever possible to avoid the exposure of a witness to new information after the event has occurred<sup>40</sup>. Witness preparation often involves the exact opposite, as the

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<sup>36</sup> ELIZABETH R. LOFTUS *Eyewitness Testimony* (Harvard University Press, 1996) at pp. 47-48; E. MIRA Y LÓPEZ, *Manual de Psicología Jurídica*, (El Ateneo, 6th Ed.) pp. 124-125.

<sup>37</sup> ELIZABETH R. LOFTUS *Eyewitness Testimony* (Harvard University Press, 1996) at pp. 55 and 78.

<sup>38</sup> ELIZABETH R. LOFTUS *Eyewitness Testimony* (Harvard University Press, 1996) at pp. 91 and 95 WHEATCROFT, WAGSTAFF and KEBBEL, "The Influence of Courtroom Questioning Style on Actual Perceived Eyewitness Confidence and Accuracy", 9 *Legal and Criminal Psychology* 83 (2004), pp. 97-98. Thus, "lawyerese questions with negative feedback" (i.e., leading and suppositional questions that imply whether the answer given may be incorrect) were found to decrease accuracy in the witnesses' statements, while simple questioning style augmented it (at p. 95).

<sup>39</sup> ELIZABETH R. LOFTUS *Eyewitness Testimony* (Harvard University Press, 1996) at p. 19, and pp. 100-101.

<sup>40</sup> ELIZABETH R. LOFTUS *Eyewitness Testimony* (Harvard University Press, 1996) at pp. 78 and 87: *"The implications of these results for courtroom examinations..... is fairly obvious: interrogators should*

detailed questions of lawyers about a witness's recollection of events irreversibly shapes the recollection. At the same time as the recollection changes, preparation enhances the confidence of the witness in the accuracy of their testimony.<sup>41</sup>

38. These studies suggest that caution must be exercised with the oral evidence of a prepared witness or a written witness declaration. The evidence should not be treated as an accurate first-hand recollection of events, but what it really is: a first-hand recollection of events modified with the substantial integration of post-event information. In terms of the purposes of witness questioning, the science of memory confirms that witness preparation and written declarations diminish the informational reliability of testimony.
39. Substantial hours of lawyers and witnesses working together will encourage the convergence of case theory and witness testimony without conscious impropriety by either lawyers or witnesses. The current practices of international arbitration diminish the informational value and credibility of oral evidence, and increase its rhetorical function.

***D. Premises about Questions:***

40. Common law jurisdictions have detailed rules of evidence relating to questioning. They also have well developed techniques of questioning. Conceptually, the difference between a technique of questioning and a rule of evidence is clear, but the distinction is often quickly lost in discussions of witness questioning.<sup>42</sup>
41. The detailed rules of evidence are the basis of the common law practice of making evidential objections during witness questioning. These objections can sometimes be technically quite complex and are second nature to counsel. However, if the underlying domestic rules of evidence do not apply, as is often the case in international arbitration, then the objection can appear to be merely obstructive and time-wasting, particularly to an arbitrator that doubts the worth of witness questioning to begin with.
42. There are three premises about questions that are problematic in international arbitration.
43. First and foremost there is the premise that leading questions (i.e. putting a statement to the witness and requiring a 'yes' or 'no' answer) is a useful questioning

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*do whatever possible to avoid the introduction of 'external' information into the witness's memory." "People's memories are fragile things. It is important to realize how easily information can be introduced into memory....."*

<sup>41</sup> WHEATCROFT and WOODS, "Effectiveness of Witness Preparation and Cross-Examination Non-directive and Directive Leading Question Styles on Witness Accuracy and Confidence", 14 *The International Journal of Evidence & Proof* 187 (2010), p. 196.

<sup>42</sup> For example, leading questions are a technique of questioning, but there are various rules of evidence governing when they may or may not be used. On the confusion of acquired techniques of questioning and prescriptive rules, see Bernardo M. CREMADES & David J. A CAIRNS "Cross-Examination in International Arbitration: Is it Worthwhile?" in Lawrence W. NEWMAN & Ben H. SHEPPARD Jr. eds. *Take the Witness: Cross-Examination in International Arbitration* (Juris, 2010) pp. 223-242.

technique. Curiously, the common law prohibits leading questions in direct examination on the basis that this constitutes putting words into a witness's mouth, but permits leading questions on cross-examination where the effect is exactly the same. Further, the conventional common law wisdom is that cross-examination should as far as possible consist only of leading questions. Leading questions provide a means to control the witness and direct their answers.<sup>43</sup>

44. The common law has great affection for cross-examination, and it is often attributed a talismanic significance. Experienced common lawyers practising in international arbitration realize the limitations of this questioning technique, but many probably do not fully appreciate the depth of hostility to leading questions amongst continental lawyers. Continental lawyers simply see no value in putting words into the mouth of a witness. It is all show, and no information. It is a waste of time, where time and cost are at a premium.<sup>44</sup>
45. At the root of the opposing perspectives on leading questions is the validity of the rhetorical justification of witness questioning and, to a lesser extent, the credibility justification. The critics who argue cross-examination via leading questions produces little new information for the tribunal are correct. However, the common lawyer can reply that new information is at most a tertiary purpose, and that the primary purpose is to use other side's witnesses to make statements or refer to key documents that support the case theory of cross-examining counsel. The rhetorical power of this technique if used well should not be underestimated and, to a common lawyer at least, is part of the fundamental right to be heard.
46. Secondly, there is the English premise that if counsel intend to impugn the evidence of a witness then the witness must be given the opportunity in cross-examination to answer the allegation.<sup>45</sup> This rule requires an English barrister to cross-examine a witness where the witness's declaration contradicts the case counsel intend to

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<sup>43</sup> 'Use only leading Questions' is the third commandment of Professor Irving YOUNGER in *The Art of Cross-Examination* (American Bar Association. The Section of Litigation Monograph Series, n. 1, 1975) at pp. 22-23: "The third commandment is that you should never ask anything but leading questions on cross-examination. The whole idea of cross-examination is that you take the witness by the collar and make him go where you want him to go. You put words in his mouth. You make him say what you want him to say. The way you do it is by leading questions." On witness control and leading questions see also Ben H. SHEPPARD, Jr. "Taking Charge-Proven Tactics for Effective Witness Control" in Lawrence W. NEWMAN & Ben H. SHEPPARD Jr. eds. *Take the Witness: Cross-Examination in International Arbitration* (Juris, 2010) Chapter 1; Edward G. KEHOE "Cross-Examination and Re-cross in International Arbitration" in D. BISHOP, E. G. KEHOE (eds) *The Art of Advocacy in International Arbitration* (2<sup>nd</sup> ed. JurisNet LLC, 2010), Chapter 16, pp. 423-426.

<sup>44</sup> This view is well summarised in theses 5-10 of Michael E. SCHNEIDER "Twenty-four Theses about Witness Testimony in International Arbitration and Cross-examination Unbound" in M. WIRTH, C. ROUVINEZ & J. KNOLL eds. ASA Special Series N° 35 *The Search for "Truth" in Arbitration: Is Finding the Truth what Dispute Resolution is About?* (Juris, 2011) pp. 64-65.

<sup>45</sup> This rule dates back to the House of Lord's decision in *Browne v. Dunn* (1893) 6 R. 67, H.L., and is often referred to as 'the rule in *Browne v Dunn*'. It has long formed part of the ethical obligations of an English barrister. The current ethical rule is Rule C7.2 of *The Bar Standards Board Handbook*, 2nd Edition – April 2015, the Code of Conduct: "you must not make a serious allegation against a witness whom you have had an opportunity to cross-examine unless you have given that witness a chance to answer the allegation in cross-examination."

submit. Where the witness statement is inconsistent with the documentary record, this rule can produce a mechanical exercise: first, counsel puts a document to a witness who is asked to read a certain passage, then the witness is asked to confirm what the document says, and then to confirm whether that the passage just read contradicts the witness's previous testimony, and then whether the witness adheres to their testimony. The more blatant the falseness of the witness's testimony, the longer this process might take, as document after document may be put to the witness. This can be infuriating for an arbitrator who has read the file, knows the documents, can see for themselves that the witness's testimony is incoherent with the documentary record, and probably has already mentally disregarded the witness's statement. For them, this is a time consuming exercise in the statement of the obvious.

47. Thirdly, the common law in general gives the last word to the party making a claim or counterclaim. The claimant speaks first, and then has a right of reply to the respondent. The manifestation of this rule in witness questioning is that cross-examination is followed by re-direct.
48. On the continent the parties are normally given equal turns to address the tribunal, so if the claimant begins then the respondent has the last word. For witness questioning, the implication of this rule is that the questioning should terminate after cross-examination (eliminating re-direct) or an additional turn for the respondent must be added (sometimes called re-cross-examination).
49. In practice, tribunals are reluctant to eliminate re-direct. However, as re-direct is not part of the civilian tradition, there are few pre-conceptions as to the limitations on this right. When combined with the practice of submitting written declarations in general terms so as not to commit the witness too much in advance,<sup>46</sup> re-direct is sometimes used as an opportunity to elaborate the contents of the witness statement after the other party has completed its cross-examination.<sup>47</sup> This can be unfair and a limited right of re-cross-examination might well be granted.
50. In conclusion, the different premises about questions lead to the prolongation of the hearing for little informational advantage.

***E. Premises about Advocates and Arbitrators:***

51. Finally, the debates about witness questioning and particularly cross-examination reveal premises relating to the respective roles of counsel and arbitrators in modern international arbitration.

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<sup>46</sup> See Anthony C. SINCLAIR "Differences in the Approach to Witness Evidence between the Civil and Common Law Traditions" in D. BISHOP, E. G. KEHOE (eds) *The Art of Advocacy in International Arbitration* (2<sup>nd</sup> ed. JurisNet LLC, 2010), Chapter 2, pp. 34-35.

<sup>47</sup> On this problem, see M. HWANG SC and A. CHIN, "The Role of Witness Statements in International Commercial Arbitration", in: A. VAN DEN BERG (ed.), *International Arbitration 2006: Back to Basics?*, Montreal: ICCA Congress Series 2006, N° 13, pp. 650-660, at pp. 653-655 who states that in Singapore the practice is to treat the witness statement as the complete testimony in chief and only allow elaboration (in either direct or redirect) in four exceptional circumstances.

52. There are different understandings in the international arbitration community regarding the role of the advocate and the proper limits of advocacy. There has been a trend in recent years to question the value of oral advocacy. This has been encouraged by the initiatives to reduce the time and cost of arbitration, as hearings and oral advocacy, including witness questioning, are viewed by many as wasteful.<sup>48</sup> The *IBA Guidelines on Party Representation in International Arbitration* (2013)<sup>49</sup> articulate potential remedies to address ‘Misconduct’ by a Party Representative, and authorize the arbitral tribunal to impose various sanctions upon the party or its representative (Guidelines 26 and 27). While some Misconduct described in these Guidelines is egregious (e.g. inviting or encouraging a witness to give false evidence: Guideline 23) the definition of Misconduct includes “*any other conduct that the Arbitral Tribunal determines to be contrary to the duties of a Party Representative*”. The assumption is that advocacy can be abused, and therefore supervision is necessary.<sup>50</sup> There is little recognition in this document of the value of advocacy or party representation to the efficient and just resolution of disputes, or as an expression of the autonomy of the parties that is the basis of arbitration.
53. Another manifestation of a negative perception of advocacy and particularly witness questioning is the assertion that witness questioning is better directed or conducted by the members of the tribunal rather than the advocates of the parties. This assumes that arbitrators are or can be as well prepared as counsel for the task of witness questioning, which appears to significantly underestimate the work and skill of the advocate. Every fact an arbitrator knows about a case is known only because the legal representatives of one of the parties has chosen to make it known. The tribunal receives a case selected and organized by counsel for the parties. There is voluminous additional material known to the legal representatives and not presented, whether by reason of its marginal relevance, its prejudicial nature, its privileged character or simply because it is context and background that was useful to counsel in the process of selection of evidence and preparation but is not necessary for proof of the case theory. Counsel comes to a hearing, or should come to a hearing, with an enormous reservoir of information and impressions that can be called upon to inform witness questioning.<sup>51</sup>

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<sup>48</sup> Paras. 69-81, ICC Time and Costs Report.

<sup>49</sup> Available at: <[http://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx)>

<sup>50</sup> On the problems raised by the IBA Guidelines on Party Representation in International Arbitration see generally Felix DASSER “A Critical Analysis of the IBA Guidelines on Party Representation” in D. FAVALLI ed. *ASA Special Series N° 37 The Sense and Non-sense of Guidelines, Rules and Other Para-regulatory Texts in International Arbitration* (Juris, 2015) pp. 33-62; Another recent document that shows a preoccupation with the abuse of advocacy is the ASA Charter of Advocacy in International Commercial Arbitration: see David J. A. CAIRNS, Book Review of *Advocacy in International Commercial Arbitration* edited by Elliot GEISINGER & Guillaume TATTEVIN, *ASA Special Series N° 36*, (2015) 31 *Arbitration International* pp. 527-530 at p. 529.

<sup>51</sup> Cf. Michael E. SCHNEIDER “Twenty-four Theses about Witness Testimony in International Arbitration and Cross-examination Unbound” in M. WIRTH, C. ROUVINEZ & J. KNOLL eds. *ASA Special Series N° 35 The Search for “Truth” in Arbitration: Is Finding the Truth what Dispute Resolution is About?* (Juris, 2011) pp. 63-68: Thesis 16, dismissing the importance of the knowledge of counsel with faint praise

54. In short, there is a view of arbitral advocacy that subordinates the function of counsel to the supervision and correction of the tribunal; what might be called ‘tribunal paternalism’. However, the relationship between the advocate and the arbitrators should not be hierarchal, but rather dynamic equality and mutual respect for different and difficult duties.
55. Another feature of witness questioning is its tendency to multiply issues. A good questioning technique breaks down a topic and addresses it through a series of simple propositions. The effect of sustained witness questioning can be the ‘atomisation’ of the evidence. The minutes of a meeting or an email exchange no longer stand on their own but might be contextualised, qualified or coloured by the oral evidence of all the participants in the meeting or communication. Witness questioning in this way permits a more nuanced interpretation of evidence, but also complicates the assessment of evidence. The atomisation of evidence means it can be reconstituted in various different forms, enabling the parties’ counsel to interpret the same evidence to favour conflicting case theories. Witness questioning therefore requires of an arbitrator a willingness to enter into detail, to recognise inconsistencies, to assess credibility and to choose between alternative recollections and interpretations of events.
56. For this very reason, effective witness questioning often requires time. Where continental and common law advocates or arbitrators differ on the utility of witness questioning, the utility includes not only the probative significance of the information obtained, but also the time and cost expended.<sup>52</sup> The scope given to the parties for witness questioning and oral advocacy generally involves choices and compromises along a time and cost continuum in the search for an optimum hearing length.<sup>53</sup>
57. Some of the issues raised by witness questioning may originate not in the abuses of counsel but in the impatience or other imperfections of arbitrators. Successful witness questioning requires preparation by the arbitrators, but also a willingness to listen, to wait, respect for counsel, and the ability to assimilate and manage detail and contradiction. Some arbitrators are less ready for the demands of witness testimony.
58. Some discussions of witness questioning are quick to presume that poor advocacy and abuses occur, or that indifferent advocacy is the norm. Poor advocacy does occur, it is costly and frustrating, but it is not widespread. Sometimes witness questioning does not go according to even the best laid plans, but remains very

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(“*Witness interrogation by the arbitrators does not make counsel redundant. Counsel’s knowledge of the case is generally superior even to that of a well prepared arbitrator....*”).

<sup>52</sup> See Jan PAULSSON “Cultural Differences in Advocacy in International Arbitration” in D. BISHOP, E. G. KEHOE (eds) *The Art of Advocacy in International Arbitration* (2<sup>nd</sup> ed. JurisNet LLC, 2010), Chapter 1 at 21.

<sup>53</sup> The focus should be on an efficient hearing and not time and cost minimization; there is an optimum level of oral advocacy in every case: see David J.A. CAIRNS “Advocacy and Time Control in International Arbitration” in A. J. Van den Berg ed. *Arbitration Advocacy in Changing Times* (ICCA Congress Series N° 15, Kluwer Law International, The Netherlands, 2011) pp. 181-201.

important to very good advocates, at least some of the time. On the other hand, the discussions of the time and cost of witness questioning and oral advocacy generally should not be separated from the great value to international arbitration of the satisfaction of the users, and the protection of arbitral tribunals from overhasty and under-informed decision-making. Arbitrators are not omnipotent, but fortunately they do have the assistance and guidance of counsel.

### **III. EVALUATING STANDARD PRACTICES IN WITNESS QUESTIONING:**

59. This review of the premises of witness questioning demonstrates how many premises there are to witness questioning in international commercial arbitration, and how fundamental and indeed irreconcilable the different premises are. The common law and continental systems are divided in particular in their respective evaluations of the potential usefulness of witness testimony, and the validity of the rhetorical exploitation of witness questioning.
60. In these circumstances, it might be considered an achievement that international arbitration has developed a standard procedure for witness questioning. Written witness statements, followed by cross-examination works well, partly because it is adjustable to the different traditions in particular cases. A case that in England might produce detailed witness statements followed by the allocation of a week to cross-examination, might in Spain result in more general statements and require only a day or two for cross-examination, but in each case the basic procedure is the same.
61. The advantages of the current system is its flexibility to accommodate and satisfy practitioners from both the common law and continental systems notwithstanding their irreconcilable premises. Where the parties or their counsel so wish, it is always possible to adopt rules of procedure that fully replicate the common law trial, or at the other extreme exclude witness questioning completely or require the questioning to be conducted by the tribunal. As always, party autonomy should be respected in a procedural matter of this nature. However, it is to be celebrated that the standard procedure is generally acceptable, and is likely to become more so over time as a new generation of arbitral practitioners is formed more exclusively in international arbitration and so is more removed from the premises derived from domestic legal systems.
62. Witness questioning when misconceived or poorly executed is frustrating for everyone. However, this is a problem of poor advocacy, and not a defect of the use of oral evidence and cross-examination. The very difference in premises makes unacceptable advocacy more likely, with continental lawyers with little experience of witness questioning on one hand, and common lawyers taking too much delight in the nuances of their tradition on the other. However, this problem is diminishing and likely to continue to do so over time. There are a number of active providers of advocacy training in international arbitration. The rise of mooting means young practitioner have a greater self-awareness of their advocacy than ever before. The fact that arbitral practitioners increasingly develop their careers in international arbitration rather than domestic procedure justify an expectation that the quality of



arbitral advocacy, including witness questioning and cross-examination, are going to rise.

63. Improvements are always desirable, and means should be sought to encourage best practices in witness questioning. One positive development would be incentives to encourage parties or counsel to waive their rights of cross-examination of witnesses proposed by the other party. Although it is an accepted dogma of common law advocacy texts that counsel should not cross-examine unless it is absolutely essential for their case, doubt, inexperience, temptation or forensic over-excitement lead many counsel to conduct cross-examinations to little purpose. There are a number of relatively simple means available that might encourage counsel to waive or limit their cross-examinations:
- 63.1. Time Control: imposing time controls is, in general, a good technique to regulate advocacy<sup>54</sup>. It forces counsel to address mentally in advance how long their proposed questioning will require, and prioritize witnesses and issues so as to ensure the time is used effectively. The starting point is always an equal amount of time for each party, although the nature of the issues and the number of witnesses presented on either side requires the tribunal always to retain a discretion;
- 63.2. No Implied Acceptance of Witness Statement: A decision not to call a witness for cross-examination should never mean that the witness statement is accepted. In international arbitration counsel should be able, and indeed encouraged, to submit that a witness statement should be disregarded without cross-examination. This principle is already embodied in Article 4.8 of the *IBA Rules on the Taking of Evidence in International Arbitration*.
- 63.3. No duty to Put Contradiction to a Witness in Cross-Examination: This follows from the above. There is no place for the rule in *Browne v Dunn* and English practice in this regard in international arbitration.
- 63.4. A Witness Statement is Only Oral Evidence: Notwithstanding its written form a witness statement is oral evidence. Counsel must feel confident that they can rely on documentary evidence even when contradicted by oral testimony.
- 63.5. No Supplementary Direct: Where the opposing party waives cross-examination then there should be a clear rule that the party proposing the witness cannot call them for supplementary direct evidence, subject to only very limited exceptions.<sup>55</sup> Such a rule both encourages full disclosure of a

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<sup>54</sup> David J.A. CAIRNS “Advocacy and Time Control in International Arbitration” in A. J. Van den Berg ed. *Arbitration Advocacy in Changing Times* (ICCA Congress Series N° 15, Kluwer Law International, The Netherlands, 2011) pp. 181-201.

<sup>55</sup> As, for example, proposed in M. HWANG SC and A. CHIN, “The Role of Witness Statements in International Commercial Arbitration”, in: A. VAN DEN BERG (ed.), *International Arbitration 2006: Back to Basics?*, Montreal: ICCA Congress Series 2006, N° 13, pp. 650-660, at p. 655.

witness's evidence in the written statement, and gives an incentive to the opposing counsel to waive cross-examination.

64. An optimum style of witness questioning for international arbitration requires sufficient understanding and flexibility to accommodate the expectations of the specific tribunal members. This may involve a short explanation to the tribunal about the objectives and style of the cross-examination that counsel propose to adopt. Secondly, international arbitration demands economy and directness in witness questioning. There is no place for 'point scoring' against a witness or trying to magnify the importance of minor inaccuracies in their declarations. Openness and a willingness to forgo leading questions might be judiciously explored by counsel and earn the gratitude of the tribunal. Thirdly, respect the basics of good technique: short questions, plain words, few topics, listen, don't argue with the witness, move on when the tribunal has got the point. Fourthly, witness questioning should be confined to questions of fact, and not peripheral issues of intention, motive or interpretation that should properly be dealt with through submissions and not witnesses.<sup>56</sup> Finally, cross-examination in international arbitration is best confined to informational ends, rather than credibility or rhetorical objectives.
65. A more radical proposal for witness questioning would be the control or elimination of leading questions. This would diminish the control of counsel of a witness in cross-examination, increase the risks, and eliminate the rhetorical opportunities of cross-examination, and for all these reasons likely to reduce substantially the time devoted by counsel to cross-examination<sup>57</sup>. However, it would be a divisive proposal, replacing the consensus enjoyed by the present standard with an outright rejection of the common law tradition of witness questioning. If counsel wish to exclude leading questions, or pass the control of questioning to the tribunal, then it can be agreed that the hearing will be conducted on that basis. However, if not, counsel should be able to use the questioning techniques that they are accustomed to, although a good advocate will always be alert and sensitive to the preferences and tolerance of their tribunal.
66. The alternative of arbitrator-directed questioning might also be developed, provided that it remains no more than an option available to parties or counsel who wish to adopt it, in the same way the parties can currently agree to documents-only arbitrations.
67. The two most profound issues for witness questioning are, firstly, the real value of oral evidence given that the preparation of witnesses inevitably modifies the recollection of events through the integration of post-event information. This issue is inseparable from witness preparation and equally exists whether the witnesses are cross-examined by counsel, questioned by the arbitrators, conferenced, or simply provide their evidence in writing. There is no simple solution, although the

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<sup>56</sup> Michael HWANG "Ten Questions Not to Ask in Cross-Examination in International Arbitration" in D. BISHOP, E. G. KEHOE (eds) *The Art of Advocacy in International Arbitration* (2<sup>nd</sup> ed. JurisNet LLC, 2010), Chapter 17.

<sup>57</sup> On the other hand, where counsel decided to cross-examine, tribunals might find their patience tested by stubborn or evasive witnesses that could not be bought under control by leading questions.

starting point is for the arbitral community to engage more actively with the scientific evidence relating to memory and testimony.<sup>58</sup>

68. Secondly there is the legitimacy of using witness questioning for rhetorical purposes rather than merely for the identification of further information useful to the resolution of the dispute. On this point, the continental probative universe revolves around documents, which are a source of information and facts. On the other hand, the value of oral testimony still shines brightly in the common law probative universe where facts and information do not exist on their own without interpretation, so that the rhetorical function of witness questioning is indispensable to the evaluation of alternative case theories and the synthesis required for sophisticated arbitral decision-making.
69. There is no way to resolve these different visions of witness questioning which will be perpetuated for some time yet beneath the standard procedure that has developed. It is a testimony to the strength of international arbitration that witness questioning can function so well from such different premises.

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<sup>58</sup> The ICC Commission on Arbitration has recently established Task Force on ‘Maximizing the Probative Value of Witness Evidence’ whose mandate includes the identification of the relevance of scientific research on human memory and the impact of post event information to considerations of the probative value of witness evidence in international arbitration.

#### **IV. APPENDIX: TEN PROPOSALS FOR PERSUASIVE ADVOCACY**

Advocacy seems both to encourage and defy the preparation of lists. Having had the honour of being invited by ICCA Mauritius 2016 to participate on a panel entitled 'How to Prepare a Persuasive Case: 10 things to Do and Avoid when (i) Preparing Written Submissions, (ii) Examining Witnesses, and (iii) Presenting Oral Arguments' I am tempted and obliged to provide my 10 proposals for persuasive advocacy. Here is my list:

1. Be Selective: Selection is the key skill of an advocate: selection of facts, law, evidence, witnesses, questions, arguments. The advocate constantly has to make choices and make them well. Selection means learning to say 'No'. Excise the irrelevant, the marginal, the collateral, the incomprehensible, the decorative, and the bright plumage of excessive erudition. If you have a large legal team and masses of data then use them, don't display them.

2. Be Simple: Never underestimate the power of simplicity. Even the most complicated arguments can be made simple.

3. Be Independent: The advocate must see the case as it is, and not as the client or the tribunal wish it to be. Sometimes a client is best served by scepticism, and a tribunal by insistence. The advocate is responsible for the quality of the advocacy, the best presentation consistent with fidelity to the facts and the law, but not for the outcome of the case.

4. Know your Case: Have a case theory and know how to use it. If you cannot explain your entire case in a paragraph you are not ready for a hearing. Such precision is an expression of mastery. The tribunal must be able to trust your understanding of the case.

5. A Strong Structure: The case should be structured around strong propositions. Where so much is uncertain and disputed, beacons are needed to illuminate the obscurity. Documents are less exciting than witnesses, but a much stronger foundation for a persuasive case, particularly in international arbitration. The continental tradition was right all along.

6. Be Careful with Witnesses: Don't question witnesses unless you really need to. A rule that is constantly repeated, and constantly ignored. Unnecessary questioning is a pervasive form of forensic ill-discipline and, sometimes, cowardice.

7. Advocacy Requires Character, not Art: There is no art in advocacy; just a set of techniques of good presentation guided by wisdom, justice, courage and moderation. All art, as Oscar Wilde famously said, is quite useless (*The Portrait of Dorian Gray*, Preface). However, it is not easy to be artless; it is a form of excellence.

8. Know and Respect your Tribunal. A common sense precept of persuasion. Always remember and engage the tribunal. Enlighten the case for them; be their attentive guide. Be sensitive to the premises of the tribunal (even inside a standard procedure); in domestic litigation this might mean comfortable shared certainties; in international arbitration often concealed differences. Be particularly careful to respect a tribunal when it does not deserve it.

9. Concentrate Exclusively on the Tribunal: The use of advocacy is to persuade the tribunal and the tribunal only; not the client, the witnesses, the other side or oneself. We can forgive a person doing a useful thing as long as they do not admire it (Oscar Wilde, again). Ignore egos, particularly your own, except when you can turn the ego of the tribunal to advantage.

10. Sit down: There are many lists of 'Ten Commandments' in the literature of advocacy. This is number 10 from the best of the genre, John Davis's *The Argument of an Appeal* (The Journal of Appellate Practice and Process vol. 3, No. 2 (Fall 2001) 745). A simple way to avoid all sorts of errors and embarrassments.