world there are many differences between jurisdictions. Likewise, not all common law jurisdictions follow the same procedures. Although these groupings are convenient they are often oversimplifications. Furthermore, procedures often transcend these convenient boundaries. In a desire to be all things to all people, arbitration institutions have avoided defining their procedures in many areas and have relied on the excuse of flexibility to empower the arbitral tribunal to select procedures which may be alien to one of the parties. The similarities between the plethora of different arbitration rules reflect the desire of each institution to have its rules adopted by parties with different expectations of the process. This is not true harmonisation of the various options. Tribunals seeking compromise solutions have made some progress towards harmonisation. However this has been achieved at the cost of leaving a minority of parties with their expectations unmet.

In the present stage of its development, international commercial arbitration is not ready for a detailed procedure that clearly defines international norms. Any institution that produced rules opting for one set of procedures and removed discretion from the arbitral tribunal could expect to become marginalised from the melting pot of mainstream international arbitration.

Equally, when parties make an arbitration agreement, it is unrealistic to expect them to define the arbitral procedures if their expectations are not aligned. Parties holding differing expectations who seek to agree detailed arbitration procedures during contract negotiations may frustrate formation of a contract.

The question posed by the title to this paper was:

> Do arbitration rules give tribunals too much freedom to conduct international arbitration as they think fit?

I conclude that, for a minority of parties, the answer is yes. However, any attempt to remedy this problem by producing more detailed and prescriptive rules would fail, as these rules would not be used by parties with different expectations of the process.

Cross-Examination and International Arbitration

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I. INTRODUCTION

Cross-examination is quintessentially a concept of common law procedure. It refers to the oral questioning by counsel on behalf of one of the parties of a witness called by another party during a trial or comparable stage of procedure.[1] It is conducted according to rules of practice and procedure distinct from those that apply to the oral questioning of witnesses in other circumstances.

The elements of this definition require some comment. Firstly, cross-examination is part of an oral procedure. A series of written questions put to a witness, if permitted in the applicable procedure, is not cross-examination. Second, cross-examination is always performed by counsel; questioning of a witness by a judge, arbitrator or other judicial or administrative officer is not a cross-examination. Thirdly, it refers to questioning by counsel of a witness called by another party, as counsel is not permitted the same freedom to question a witness that his client has called. Cross-examination presupposes a differential treatment of the questioning of witnesses depending on which party has called the witness. Cross-examination is therefore the complement of the examination of witnesses, which refers to oral questions by counsel on behalf of a party of a witness called by the same party (also called "examination-in-chief" or "direct examination"). Finally, cross-examination occurs in the dispositive stage of the proceedings, and can therefore be distinguished, for example, from a deposition in U.S. civil procedure.

The questioning of witnesses seems to be a self-evident good in legal proceedings, including international arbitration. It enables the tribunal to listen to the explanation of events first-hand from the participants in the events. It fills gaps in the documentary record and enables individual documents to be explained and placed in a human context. It gives the tribunal the opportunity to assess the credibility of individuals. It gives each party the opportunity to question and challenge the very individuals that stand witness against them. It can expose deceit, confusion, error and ignorance, or confirm the accuracy and integrity of critical evidence. It is immediate, direct, efficient and consistent with due process. The result is a

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[1] Bryan A. Garner (ed.) *Black's Law Dictionary* (8th ed., West, 2004) defines cross-examination as "The questioning of a witness at a trial or hearing by a party opposed to the party who called the witness to testify" (at 405).

fuller and fairer process, a better informed tribunal, more sophisticated decision-making, a more secure award and probably greater probability of immediate and voluntary compliance.

What objection can there be then to the questioning of witnesses in international arbitration? There is none at all. The oral questioning of witnesses is an established and beneficial part of international arbitral practice and will remain so. The danger lies with equating the questioning of witnesses with common law cross-examination.

The term "cross-examination" is often used as a convenient shorthand by international arbitration practitioners for "the questioning of adverse witnesses," and while it means no more than this then the term is unobjectionable. However, in common law jurisdictions cross-examination is a more intricate and technical concept than the questioning of adverse witnesses, and these intricacies and technicalities have no place in modern international commercial arbitration. To date, this has largely been recognised by commentators; indeed, discussions of cross-examination in international arbitration tend to emphasise the significant differences with cross-examination in a domestic setting.[2] The danger is that the common law sense of the term cross-examination will increasingly assert itself over time, creating the expectation of the questioning of adverse witnesses subject to an array of rules, privileges and assumptions that international arbitration is much better without. This danger is encouraged by the modern tendency towards detailed guidelines, protocols and other instruments intended to harmonise procedure and evidence in international arbitration.

The current (and in our view correct) approach to the questioning of witnesses in international arbitration is to adapt the procedure as appropriate on a case-by-case basis through party autonomy or tribunal decision. If the parties choose to question witnesses on the basis of the principles of a particular jurisdiction that endorse cross-examination, or on the shared assumptions of common law jurisdictions, or the tribunal so decides in light of the background of the parties, their counsel and the arbitrators, then this is perfectly appropriate. However, the starting point in international arbitration must be a neutral concept of witness questioning.

This article will examine the nature and meaning of the common law concept of cross-examination, and its suitability for international arbitration. It will suggest that international arbitration practitioners are best to avoid this term, and should be vigilant to avoid casual acceptance

[2] See, for example, the contributions of John Beechey and Michael Hwang (discussed later in this article) in R. Doak Bishop (ed.), *The Art of Advocacy in International Arbitration* (Juris Publishing, Inc. 2004); R. D. Kent, "An Introduction to Cross-Examining Witnesses in International Arbitration," Transnational Dispute Management, Vol. 3, issue 2 (April 2006); Peter R. Griffin, "Recent Trends in the Conduct of International Arbitration—Discovery Procedures and Witness Hearings," Journal of International Arbitration, Vol 17 (2000) 19-30.

of the rules that underlie it in common law jurisdictions. Instead they should maintain and defend the existing practice of a neutral and flexible concept of the questioning of witnesses.

II. APPROACHES TO CROSS-EXAMINATION IN VARIOUS LEGAL SYSTEMS

A. *Cross-Examination in Common Law Jurisdictions*

The dichotomy between examination-in-chief and cross-examination is fundamental to understanding both concepts. This dichotomy requires different modes of questioning of a witness depending upon whether counsel is conducting examination-in-chief or cross-examination. These different modes of questioning are based on *acquired techniques* and *prescriptive rules*.[3]

The acquired techniques form part of advocacy rather than evidence, and are the accumulated wisdom of practitioners working to maximise their case presentations within the framework of the prescriptive rules. These techniques serve a particular purpose of complying with the prescriptive rules of examination-in-chief and cross-examination, and also a more general purpose of developing the questioning of a witness in a logical, readily comprehensible and ultimately persuasive manner in the case of direct examination, and to reveal error, uncertainty or falsity in cross-examination. The techniques of good questioning are usually acquired through experience and form part of the skill-set of an individual lawyer. The techniques of good questioning are readily transferable to any forensic context involving the questioning of witnesses, including international arbitration. Needless to say, the counsel that asks questions well has an advantage over the lawyer that has no developed skills in this respect.

The prescriptive rules are the rules that prescribe what is permitted and prohibited in cross-examination. They are rules of evidence originally developed to ensure a fair trial of a cause before a jury. Any set of rules originally developed in a jury context (*i.e.*, for a lay decision-maker charged with delivering a general verdict and not a reasoned decision) require careful scrutiny and justification before efforts are made to transplant them in international arbitration. The content of these prescriptive rules varies between common law jurisdictions but relates to such matters as the proper scope of cross-examination, limits on questions as to the credibility of a witness, prior inconsistent statements, cross-examination about documents, questions involving assumptions or

[3] Cf. Irving Younger *The Art of Cross-Examination* (ABA Litigation Monograph Series N° 1, 1976) at 1, who describes the acquired techniques as the "art of cross-examination" and the prescriptive rules as the "technology or doctrinal foundation" of cross-examination.

evidence not yet presented, or the evidential effect of failure to raise contested issues with a witness in cross-examination.[4] However, the most characteristic prescriptive rule of the questioning of witnesses in common law jurisdictions, and indeed a rule so fundamental that it is universal in common law jurisdictions and defines the dichotomy between examination-in-chief and cross-examination, is that leading questions are generally prohibited in examination-in-chief but permitted in cross-examination.

Two examples from the federal legislation of common law jurisdictions demonstrate that leading questions are the defining feature of common law cross-examination, and this privilege in cross-examination is inseparable from the prohibition of leading questions in direct examination. Firstly, Rule 6.11 of the Federal Rules of Evidence in the United States reads as follows:

> *Rule 6.11. Mode and Order of Interrogation and Presentation*
> *(a) Control by court.*
> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to
> 1. make the interrogation and presentation effective for the ascertainment of the truth,
> 2. avoid needless consumption of time, and
> 3. protect witnesses from harassment or undue embarrassment.
>
> *(b) Scope of cross-examination.*
> Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.
>
> *(c) Leading questions.*
> Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

The second example is from sections 37 and 42 of the Australian Evidence Act 1995 (Cth), which read as follows:

[4] Cf. Irving Younger (n3) "All of us, of course, have whirling about in our minds a million or so miscellaneous rules, customs, techniques, and tricks of the trade which, collectively, add up to the law of evidence. A major part of this vast miscellany deals with cross-examination. . ."

> *37. Leading questions*
> (1) A leading question must not be put to a witness in examination in chief or in re-examination unless:
> (a) the court gives leave; or
> (b) the question relates to a matter introductory to the witness's evidence; or
> (c) no objection is made to the question and (leaving aside the party conducting the examination in chief or re-examination) each other party to the proceeding is represented by an Australian legal practitioner, legal counsel or prosecutor; or
> (d) the question relates to a matter that is not in dispute; or
> (e) if the witness has specialised knowledge based on the witness's training, study or experience—the question is asked for the purpose of obtaining the witness's opinion about a hypothetical statement of facts, being facts in respect of which evidence has been, or is intended to be, given.
>
> [. . .]
>
> *42. Leading questions*
> (1) A party may put a leading question to a witness in cross-examination unless the court disallows the question or directs the witness not to answer it.
> (2) Without limiting the matters that the court may take into account in deciding whether to disallow the question or give such a direction, it is to take into account the extent to which:
> (a) evidence that has been given by the witness in examination in chief is unfavourable to the party who called the witness; and
> (b) the witness has an interest consistent with an interest of the cross-examiner; and
> (c) the witness is sympathetic to the party conducting the cross-examination, either generally or about a particular matter; and
> (d) the witness's age, or any mental, intellectual or physical disability to which the witness is subject, may affect the witness's answers.
> (3) The court is to disallow the question, or direct the witness not to answer it, if the court is satisfied that the facts concerned would be better ascertained if leading questions were not used.
> (4) This section does not limit the court's power to control leading questions.

The prohibition on leading questions in direct examination means that common law advocates acquire the techniques of effective questioning using non-leading questions, such as the appropriate use of open and closed questions, keeping questions brief, incremental questioning, repetition and emphasis, techniques for linking questions, and the importance of structure and chronology. In cross-examination the privilege of asking leading questions has given rise to a powerful forensic convention of always asking leading questions in cross-examination. The discipline of the technique of leading questions must be acquired by counsel, who must learn never to ask an open question, nor comment on an answer, nor ask a witness to explain, nor argue with a witness in cross-examination. A disciplined technique of leading questions controls the witness. Ideally counsel should be brief and never ask a question to which they do not already know the answer.[5] *"The cardinal rule on cross-examination is to use leading questions. The cardinal sin is to abandon that tool."*[6]

The effect of the distinction between direct and cross-examination, as manifested in different techniques of questioning based on the leading/non-leading distinction, is to increase the partisanship of witnesses. In common law theory "there is no property in a witness" and so either party may invite or summon any fact witness to testify. In practice, witnesses are "theirs" and "ours," and nothing so manifests this partisan conception of witnesses as the rules and techniques of questioning. "Our" witnesses must be guided but not led through their evidence, encouraged to explain in their own words without counsel suggesting an answer or simply asking "is it correct that . . .". However, "their" witnesses can and should be led, words should be aggressively put into their mouths, they should be challenged, and if they still do not say what counsel wishes them to do, then counsel can move from the facts in dispute to the character and credibility of the witness. Cross-examination can be aggressive, adversarial and destructive, and in this manner the dichotomy between direct and cross-examination means that witnesses cease to be neutral reporters of fact and are made partisan players in the adversarial process.[7]

[5] These techniques are the staple of trial practice handbooks, *e.g.* Steven Lubet, *Modern Trial Advocacy: Analysis and Practice* (3rd edition, NITA, 2004) at 65–76 and 102–144; Iain Morley, *The Devil's Advocate: A short polemic on how to be seriously good in court* (Sweet & Maxwell, 2005) chapters XII and XIII.

[6] Lubet (n5) at 115.

[7] Cf. the prominence given to questioning the credibility of a witness in cross-examination. For example, Bryan A. Garner (ed.) *Black's Law Dictionary* (8th ed., West, 2004) states

> The purpose of cross-examination is to discredit a witness before a fact-finder in any of several ways, as by bringing out contradictions and improbabilities in earlier testimony, by suggesting doubts to the witness, and by trapping the witness into admissions that weaken the testimony. The cross-examiner is typically allowed to ask leading questions. . .

(at 405).

More pernicious consequences follow as a matter of course. If "our" witness is to be subject to a testing cross-examination then surely it is best that they are prepared for it. Cross-examination encourages the practice of "coaching" witnesses, an accepted form of trial preparation in common law jurisdictions. Witnesses rehearse with their legal advisers for the examination-in-chief where they may be taught to recognise the "cues" in the questioning to elaborate certain themes, or to express certain facts in a manner that not only puts them in the best possible light for "their" party but provides the minimum of ammunition for the opposing counsel in cross-examination. They are prepared to anticipate difficult questions in cross-examination, express their answers well, and introduced to the "experience" of aggressive leading questions through mock cross-examinations. The distinction between direct and cross-examination may also have contributed to the growing problem in common law jurisdictions of the partisanship of experts, whose evidence by definition should be objective, and a neutral expression of professional skill and judgement. This was a serious problem identified by Lord Woolf in his reviews of English civil procedure in the 1990s.[8] The problem was succinctly expressed by the English Court of Appeal in *Abbey National Mortgages plc v Key Surveyors Nationwide Ltd.*[9]

> For whatever reason, and whether consciously or unconsciously, the fact is that expert witnesses instructed on behalf of parties to litigation often tend . . . to espouse the cause of those instructing them to a greater or lesser extent, on occasion becoming more partisan than the parties.

Cross-examination is a well-established, intricate and embedded element of common law procedure. Its prescriptive rules and acquired techniques are not easily severable from each other, or from the epistemological and procedural assumptions that underlie them, or from the trial practices, preparatory techniques and attitudes to witnesses that have grown up around them. Cross-examination is a highly culturally specific concept; far from a mere synonym for the questioning of witnesses.

Halsbury's Laws of England (Evidence) para. 1043 (Purpose of cross-examination):

> Cross-examination is directed to (1) the credibility of the witness; (2) the facts to which he has deposed in chief, including the cross-examiner's version of them; and (3) the facts to which the witness has not deposed but to which the cross-examiner thinks he is able to depose.

(internal citations omitted); Irving Younger, *The Art of Cross-Examination* (ABA Litigation Monograph Series N° 1, 1976) at 1–16 (the "Nine Modes of Impeachment").

[8] Lord Woolf, *Access to Justice: Interim Report* (HMSO, June 1995) and *Access to Justice: Final Report* (HMSO July 1996). See generally David J.A. Cairns, "England's Procedural Revolution and Procedures Under Woolf," (2000) New Zealand Law Journal 323 and 395.

[9] [1996] EGCS 23.

B. *Oral Evidence in Civilian Jurisdictions: The Example of Spain*

In civilian jurisdictions this entrenched distinction between examination-in-chief and cross-examination is unknown. The questioning of parties and witnesses can occur without this distinction, and beginning from a non-partisan concept of the witness. The civil procedure of Spain provides an example of oral evidence without any distinction between direct and cross-examination.

Spanish civil procedure is codified in the Civil Procedure Law (*ley de Enjuiciamiento Civil* ["LEC"]). The LEC draws a fundamental distinction between three classes of persons that might give oral evidence: parties (including the legal representatives of a juridical person), witnesses and experts. These categories of witnesses have different rules as to the subject matter of their evidence (facts in the case of parties or witnesses; expert knowledge or opinion in the case of expert evidence); the manner of presentation of their evidence (entirely oral for parties and witnesses; preceded by a written report for experts); the presumptive neutrality of the witness (an oath or declaration required from fact and expert witnesses, but not from parties); and the rules for weighing their evidence.[10] Specific rules relate to the manner and subject matter of questions that counsel may put to a witness, but no distinction is made between examination-in-chief and cross-examination. The same rules apply to both counsel for all witnesses irrespective of the party that proposed their testimony.

In Spanish civil procedure, the questioning of witnesses, as in the common law system, begins with the counsel representing the party that proposed the witness, followed by opposing counsel and then questions from the tribunal.[11] There is a right to object to inadmissible questions.[12] However, the standard for the content and admissibility of questions in Article 368 is the same for all counsel, irrespective of whether the party they represent proposed the witness or not.[13] Article 368.1 LEC provides as follows:

> *Article 368. Content and admissibility of questions asked*—1. The questions that are put to a witness shall be asked orally, in an affirmative sense, and with due clarity and precision. They shall not include opinions or comments and if these are included they shall be deemed not made.

This is a straightforward standard, with the exception of the requirement that questions be in an "affirmative sense." The requirement of clarity and precision is intended to exclude questions that are confusing,

[10] See Articles 316, 348 and 276 LEC.
[11] Article 371 LEC.
[12] Article 369 LEC.
[13] The same standard also applies to questions to parties and party representatives: see Article 302.1 LEC.

excessively long, or that contain multiple questions. The witness should confine their evidence to the facts, and therefore should not be asked questions requiring an expression of opinion or value judgement. The requirement that questions are formulated in an "affirmative sense" is ambiguous and has been much criticised in doctrinal writing. Negative questions are by their very nature often confusing or unfair and their exclusion is understandable, but doubts remain as to what else this requirement excludes. In particular, there have been suggestions that it may require counsel to formulate an affirmative proposition to which the witness can answer *yes* or *no* (in common law terms, therefore, to formulate each question as a leading question). This possibility has been criticised for "straitjacketing" the questioning of witnesses and substantially reducing its utility[14] and in practice counsel routinely ask leading and non-leading questions.[15] While the techniques of questioning witnesses are not developed in Spain in the manner of the common law world, the point for present purposes is that there is no suggestion in the law or professional writing that legal requirements for questioning witnesses vary depending on whether or not the questioning counsel represents the party that has called the witness.[16]

To sum up, Spanish civil procedure has detailed rules relating to the oral testimony of parties, witnesses and experts, without ever having developed the distinctive concept of cross-examination as it exists in common law jurisdictions. A witness (as distinct from a party or a party representative) is presumed by the procedure to be neutral, and the rules and practices of questioning witnesses do not create the dynamic of partisanization of witnesses as occurs with common law cross-examination.

III. THE QUESTIONING OF WITNESSES IN INTERNATIONAL COMMERCIAL ARBITRATION

The questioning of witnesses has not been a source of significant problems or commentary in international arbitration. Existing practices regarding the questioning of witnesses seem to be functioning well.

[14] Lorca Navarette, *Comentarios a la Nueva Ley de Enjuiciamiento Civil* (Tomo II) (Lex Nova, Valladolid, 2008) 74–75; Lluch and Oicó i Junio, *El Interrogatorio de Testigos* (Bosch, 2008) 74–75.
[15] There is case law to the effect that the requirement that questions be in an affirmative sense does not prohibit open questions "provided that they do not suggest the answer, confuse the witness or ask for comment on the facts:" Sentencia, Audiencia Provincial, Secc. 1ª, de 3 de diciembre de 2002 (JUR 2003/20445). The tendency in Spain towards leading questions may be explained by the historic practice of proposing questions in writing, which tended to be introduced with the expression "Is it correct that . . ."
[16] Where there are serious contradictions between the evidence of witnesses, then Spanish procedure provides for the procedure of confrontation of witnesses: Article 373 LEC.

The questioning of witnesses is normally dealt with by agreement between the parties or in a procedural order of the arbitral tribunal, after consultation with the parties. Where the counsel are both from a common law tradition there may be greater attention to the detail of questioning of witnesses, but the procedure is likely to be much less prescriptive than in any common law jurisdiction. Rather than detailed rules, counsel are likely to rely on their common culture to ensure that the questioning of witnesses proceeds in accordance with shared expectations. Counsel are likely to frame their questions, to lead or not to lead, and make their objections, in accordance with a familiar procedure.

Where counsel are not from common law backgrounds they are likely to expect witnesses to be examined in a logical order, but without rules except for relevance, clarity, courtesy and common sense in the questioning of witnesses. They will be more idiosyncratic in their questioning techniques than their common law counterparts. The combination of counsel from both common law and non-common law backgrounds may be the most difficult from the point of view of the tribunal as it must meet distinct expectations, but an experienced international arbitrator is accustomed to this type of cultural accommodation.

The questioning of witnesses is often referred to in the rules of the major international arbitral institutions, but any prescriptiveness or use of the term "cross-examination" are avoided. Articles 20 and 21 of the ICC Rules of Arbitration do not specifically provide for questioning of witnesses by counsel. Article 20.3 provides that "the Arbitral Tribunal may decide to hear witnesses, experts appointed by the parties or any other person in the presence of the parties, or in their absence provided they have been duly summoned." The modes of questioning are for party agreement or tribunal discretion. Article 25 of the UNCITRAL Arbitration Rules provides for oral hearing where the arbitral tribunal "is free to determine the manner in which witnesses are questioned" and that the arbitral tribunal "shall determine the admissibility, relevance, materiality and weight of the evidence offered."[17] Article 20 of the AAA/ICDR International Arbitration Rules (amended and effective March 1, 2008) follows the approach of the UNCITRAL Arbitration Rules, as does Article 25 of the Swiss Rules of International Arbitration.[18] Similarly, Article 20.5 of the LCIA Rules provides that any witness "may be questioned by each of the parties under the control of the Arbitral Tribunal."

In these circumstances it is not surprising that leading commentators on international arbitration stress that the arbitral tribunal is not bound by

[17] Article 25.4 and 25.6 UNCITRAL Arbitration Rules.

[18] In force from January 1, 2004. Article 25.6 recognises the different ethical perceptions of prior contact with witnesses in providing that "It shall not be improper for a party, its officers, employees, legal advisers, or counsel to interview witnesses, potential witnesses or expert witnesses." A similar provision appears in article 26 of the LCIA Rules.

any fixed rules in the questioning of witnesses, and emphasise the importance of consultation with the parties and predictability. Craig, Park and Paulsson, for example, describe the prevailing practice under the ICC Rules in these terms:[19]

> Ideally, the rules for examination of witnesses should be established in the Terms of Reference or by a procedural order of the tribunal issued well before the presentation of witnesses. The method of hearing testimony should not be left unclear until witnesses are on the stand. An early definition of the manner in which witnesses are to be heard is necessary to permit the parties to prepare their case free from doubt or conflicting concepts concerning the procedure. Since the rules of evidence in international arbitration are relaxed, the examination of witnesses is almost always quite informal even if common-law procedures are adopted as a general principle.

There are many reasons to maintain this approach and avoid any efforts to develop a distinctive concept of cross-examination in international arbitration on the common law model. Cross-examination presupposes a foundation of evidential rules that do not usually exist in international commercial arbitration, or only exist by reason of agreement between the parties. The written and documentary record in an international arbitration is more developed than in common law procedure, meaning there is less need for extensive oral evidence.[20] The faith of common lawyers in cross-examination as a good way of getting to the truth arguably lacks scientific basis, particularly in a cross-cultural context.[21] Oral evidence is "very extravagant in time" and international arbitrators are rightly skeptical of the value of lengthy testimony in commercial cases.[22] Extensive cross-examination is not an essential element of due process, even in common law jurisdictions.[23] Continental

[19] Craig, Park and Paulson, *International Chamber of Commerce Arbitration* (3rd ed., 2000) at 438 (footnote omitted). See also Derains and Schwartz, *A Guide to the New ICC Rules* (Kluwer Law International, 2nd edition, 2005) at 289–290.

[20] Claude Reymond, "Civil and Common Law Procedures: Which is More Inquisitorial? A Civil Lawyer's Response," (1989) 5 Arbitration International 357–368 at 364–365.

[21] Lord Wilberforce, "Written Briefs and Oral Advocacy," (1989) 5 Arbitration International 348–351 at 349.

[22] Lord Wilberforce, "Written Briefs and Oral Advocacy," (1989) 5 Arbitration International 348–351 at 349–350; Craig, Park and Paulson, *International Chamber of Commerce Arbitration* (3rd ed., 2000) at 428 (who describe lengthy examination and cross-examination as a "tedious practice")

[23] *Generica Limited v Pharmaceutical Basics, Inc.* 125 F.3d 1123 (7th Cir. 1997).

lawyers lack the techniques of witness examination expected of common lawyers, which are simply not useful in their procedural systems.[24]

Distinguished arbitration practitioners from common law jurisdictions recognise that the questioning of witnesses in international commercial arbitration cannot and should not take place in accordance with domestic rules of cross-examination. They may use the term "cross-examination" as a familiar short-hand for questioning witnesses called by the other party, without any implications as to any rules, techniques or assumptions that ought to apply or be expected in cross-examination. In a discussion of cross-examination in international arbitration from a Singapore perspective, Michael Hwang notes the many adjustments a common lawyer has to make with cross-examining before an international arbitral tribunal, including the absence of a foundation of evidential rules, stricter time limitations, inappropriateness of stylistic idiosyncracies typical of domestic jurisdictions (such as the U.S. style of making objections for the record), reduced role for questions as to credibility, the availability of alternative and more effective means of demonstration, the atmosphere of an arbitral hearing ("more informal, more cordial, with the Tribunal working in co-operation with counsel . . . an atmosphere not conducive to a combative and argumentative style of cross examination") and special problems relating to language where other participants are likely to be foreigners.[25] John Beechey, speaking from an English perspective, acknowledges the need for counsel to adjust their style of questioning for international arbitral tribunals (including avoidance of aggression, appearances of bullying, and questioning credibility), and notes that not only other lawyers in the arbitral procedure might be unfamiliar with cross-examination but the witnesses and experts as well, thereby drawing attention to how culturally specific the practice of cross-examination is in common law jurisdictions.[26] Cross-examination assumes a shared culture: not only all the lawyers and the members of the tribunal, but even the witnesses and experts, need to know the game.

It is significant that these practitioners do not refer to the distinction between leading and non-leading questions, the hallmark of common law cross-examination, or suggest that this distinction should apply in international commercial arbitration. Questioning for the purposes of testing credibility, another prominent feature of common law cross-examination, is likely to be counter-productive and is best avoided.

[24] Reymond (n20).

[25] Michael Hwang, "Advocacy in International Commercial Arbitration: Singapore," in R. Doak Bishop (ed.), *The Art of Advocacy in International Arbitration* (Juris Publishing, Inc. 2004) 413–437 at 424–427.

[26] John Beechey, "Advocacy in International Commercial Arbitration: England," in R. Doak Bishop (ed.), *The Art of Advocacy in International Arbitration* (Juris Publishing, Inc. 2004) 233–258 at 254–256.

Questioning must adapt to a different adjudicative atmosphere, different cultural assumptions, and perhaps different languages. What is left of common law cross-examination with all these adjustments is a form of questioning of an entirely different nature. It is not cross-examination in any meaningful common law sense; it is simply the questioning of witnesses in a flexible international sense.

The most significant endorsement of the common law concept of cross-examination in an important instrument of international arbitration are the terms of Article 8 of the *IBA Rules on the Taking of Evidence in International Commercial Arbitration*. Article 8.2 sets out a procedure for the order of questioning of witnesses that replicates common law procedure. Article 8.2 does not use the expression "cross-examination," although it does refer to "direct" testimony. The common law inspiration of Article 8 is most clear in the only specification relating to the manner of questioning witnesses. This appears in the final sentence of Article 8.1, which reads: "Questions to a witness during direct and re-direct testimony may not be unreasonably leading." This sentence introduces the *alter ego* of cross-examination, namely the distinction between leading and non-leading questions. If leading questions are only objectionable in direct and re-direct, then questioning the other party's witnesses may presumptively be carried out differently, specifically in a leading and probably more aggressive manner. Cross-examination is implicitly endorsed, and the door is opened for its prescriptiveness and other inconveniences to enter international commercial arbitration.[27]

It is not clear why the distinction between leading and non-leading questions was introduced into the *IBA Rules on the Taking of Evidence in International Commercial Arbitration*, or what purpose it was thought to serve. Nor is it clear what response, if any, is expected from a tribunal when this precept is ignored. The best response is probably to allow counsel to continue and take into account the mode of questioning in evaluating the evidence. The lawyer that questions well is going to contribute to a more efficient procedure, and is going to convey their client's case more effectively to the tribunal. A sophisticated manner of questioning witnesses will always give counsel an advantage before a tribunal, but there is no reason at all for any prescriptive rules in international commercial arbitration relating to the mode of questioning.

In fact, the final sentence of Article 8.1 of the *IBA Rules on the Taking of Evidence in International Commercial Arbitration* is an excellent example of the dangers of well-meaning efforts to develop harmonized rules for

[27] On the questioning of witnesses pursuant to the *IBA Rules on the Taking of Evidence in International Commercial Arbitration*, see Michael Bühler & Carroll Dorgan, "Witness Testimony Pursuant to the 1999 IBA Rules on the Taking of Evidence in International Commercial Arbitration—Novel or Tested Standards?," (2000) 17 Journal of International Arbitration 3–30.

international arbitration. There has been a proliferation of such rules, guidelines and protocols in recent years relating to arbitral procedure.[28] The advantages to a busy counsel (or tribunal) of adopting a "boiler-plate" statement of international procedure rather than to particularise the procedure for an individual arbitration, with the communications this entails with the other party and the tribunal, are self-evident. However, party autonomy and procedural flexibility might be diminished in the longer term.[29] There is certainly no demonstrated need to introduce the paraphernalia of common law cross-examination, and particularly the distinction between leading and non-leading questions, into international arbitration.

IV. CONCLUSIONS

Cross-examination occupies an important place in common law procedure. However, it is not a concept that is easily detached from its common law context and transplanted into international arbitration; nor is it desirable to attempt to do so.

International commercial arbitration has developed a flexible procedure for the questioning of witnesses. The starting point is an entirely neutral concept of witness questioning. The form that this questioning should take, the evidential assumptions that may apply, the order of witnesses, the balance between oral and written procedures, the nature of the questioning permitted, are all matters that do not require prescriptive rules. These matters are best left to party autonomy and tribunal discretion in light of the background of the parties and counsel, the applicable procedural law and rules, and the particular circumstances of the case.

International arbitration is and should remain as neutral and flexible as possible in procedural terms. These characteristics give confidence to users from the different cultural and legal traditions that they will enter into the international arbitral process as equals. The modern flexibility of arbitral procedure is a result of a lengthy process of emancipation from domestic rules. Cross-examination, with its long common law history, its emotive appeal to common lawyers, its underpinning in often obscure evidential rules, and its dynamic of partisanization of witnesses is a step

[28] Another recent protocol that sets out detailed procedural rules for the presentation of witnesses is the *CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration* (2009). Section 2(g) provides for cross-examination.

[29] See C. Mark Baker & Kinan H. Romman, *Due Process Begins with the Constitution of the Tribunal: Are Parties, Counsel and Arbitrators on the Right Track?* (Paper presented at the IBA Arbitration Day, Dubai, February 2009) (". . . the guidelines and rules appear to be multiplying faster than is justified such that the soft codes no longer guide [the international arbitration system]; rather, they may be contributing to the diminution of the many virtues that commercial arbitration purports to espouse" at 15).

backwards, epitomising the type of procedural innovation that international arbitration must avoid. For the sake of clarity of thought, the term is best avoided in general discussion of international arbitral procedure.

Oral evidence, questioning of witnesses, and mastery by counsel of effective questioning techniques have a place in international arbitration. International arbitration practitioners must be vigilant to ensure their future development is not limited by the common law past of cross-examination.