CHAPTER 3

Cross-Examination in International Arbitration

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§3.01 INTRODUCTION

Knowing when and how to cross-examine witnesses is an essential part of properly representing clients in international arbitrations. Cases have been won by good cross-examination and lost by bad cross-examination.

We all learn to cross-examine by cross-examining, rather than by reading books and articles about cross-examination. In other words, there is no substitute for actually doing it. This notwithstanding, it is usually helpful to obtain some basic practical and theoretical guidance, however limited, before starting to cross-examine. It is hoped that this contribution will provide some such guidance, albeit in a modest way.[1]

§3.02 SPECIFIC CONSIDERATIONS WITH RESPECT TO INTERNATIONAL ARBITRATION

The legal and regulatory framework surrounding international arbitration and the practice of international arbitration suggest that there are a number of specific considerations which must be taken into account when cross-examining witnesses in international arbitrations.

First, it is important always to keep in mind that the decision-maker is the arbitral tribunal. That decision-maker is both the trier of the facts and the body that applies the law to facts as it finds them. Thus, an international arbitration is not tried to a judge and jury, or to a single judge or group of judges, from the same nation as the lawyers, but

1. For a more detailed discussion, *see* Hobér and Sussman, *Cross-Examination in International Arbitration. Nine Basic Principles* (2014), on which this contribution draws.

instead is presented to an arbitral tribunal consisting of three arbitrators who may well come from three different legal and cultural traditions.

Counsel's task is to convince the decision-makers, i.e., the arbitrators, not the client, the opposing party or its counsel, or anyone else. In working to accomplish that task, counsel must take into account these characteristics of the arbitrators and of the process that are so different from what counsel encounters in purely domestic dispute resolution contexts.

In addition, the overwhelming majority of arbitrators who serve in international arbitrations are lawyers, usually lawyers of very considerable experience. They are, as a general matter, accustomed to unravelling complex factual and legal matters.

They are likely to have studied the file and to have at the start of the main hearing a very considerable grasp of what the dispute is about. They are busy people and do not take kindly to anyone wasting their time. They may well also be proud people who do not take kindly to anyone insulting their intelligence or competence.

Second, each of the arbitrators may come from a legal and cultural tradition that is different from that of the other arbitrators, and also quite possibly different from the legal and cultural traditions from which any of counsel come. The arbitrators may have no mother tongue in common, and counsel may have a mother tongue different not only from that of any of the arbitrators, but also from that of one or more other counsel. Each of the arbitrators will have had different professional experience and outlook, probably also different legal education and training, and maybe different capability in the language of the arbitration proceeding. Counsel will need to take these multicultural factors into account in everything counsel does throughout the proceeding.

Third, unless the parties have agreed otherwise, no national rules of evidence will apply. The arbitrators will determine what evidence to admit based on whatever rules are applicable to the arbitration involved, and are likely to be more liberal in admitting evidence than a national court would be. The corollary is that arbitrators have the right and the duty freely to evaluate evidence.

The absence of national rules of evidence also means that some conduct which is customary, or even obligatory, under some national systems has no place in international arbitrations. As an example, the practice of 'putting' a contention to a witness need not be used in international arbitrations, and its use can often be counter-productive because one or more of the arbitrators may find it uncongenial, or even offensive, or time-wasting.

Fourth, most international arbitrations are 'document-heavy' both because the kinds of disputes that are dealt with tend to involve many documents and because they often involve written witness statements, rather than oral direct testimony. Since the arbitrators will have studied these documents, it is generally counter-productive during cross-examination simply to repeat the contents of documents. Simply repeating the contents of documents is also not usually the most effective way to use them in cross-examination, though documents when properly used can serve as a vital discipline in the effort to minimize the adverse impact of the direct testimony and to keep adverse witnesses honest.

Fifth, because the arbitrators will almost certainly have a highly developed familiarity with the factual and legal issues involved in the case, there is considerable

pressure on counsel to make their cross-examinations succinct and efficient. Lengthy examinations of the kind often encountered in Anglo-American courts are very rare in international arbitration. Attempts to conduct that kind of lengthy cross-examination will often be counter-productive.

In addition, because of the way documents are exchanged in advance of and in preparation for the main hearing, the chance that counsel will be able to surprise witnesses by confronting them with unexpected documents, or inconsistent statements, is far less than it would be in an Anglo-American court. If there are statements that appear to be inconsistent with what the witness tells counsel in the course of the preparation of that witness's written witness statement, such inconsistencies will have been resolved in the course of preparing that written witness statement. The same is true if the witness is being prepared to give oral direct testimony; counsel and the witness will resolve such inconsistencies in the course of the preparation of the witness. Inconsistent statements made by the witness after the preparation of the written witness statement, or after the completion of the witness' preparation to provide oral direct testimony, but before the main hearing, as the case may be, will almost certainly be among the documents exchanged between counsels, and given to the arbitrators, in advance of the main hearing. Thus the witness will probably know of the existence of such inconsistent statements, and may well have worked out with counsel how to deal with the inconsistency or inconsistencies involved.

§3.03 STARTING POINTS

The purpose of cross-examination is to reduce, to the extent reasonably possible, the adverse impact of the witness's direct testimony on your client's case. Everything you do in cross-examining a witness, or in deciding not to cross-examine, must be directed towards that goal.

Cross-examination of witnesses takes place in the course of the main hearing and before the closing arguments which are usually made by counsel as the final phase of the main hearing, or in writing after it has been concluded, or both.

Cross-examination is a particular way of asking questions of a witness who has testified. Often the questions asked on cross-examination, and the answer that the witness gives to them, are intended to destroy entirely the credibility of the witness. At other times those questions, and the answers given to them, are aimed only at showing that some part, but not all, of what the witness has said in the direct testimony is not to be believed. At a minimum, the questions and answers are intended to reduce the adverse impact of the witness's direct testimony on your client's case, to the extent this can be done without undue risk of further damage to that case.

Almost invariably, the witness who is cross-examined will be a witness adverse to the position of your client. The witness may even be actively hostile towards your client. As a result, the witness will often try to find ways during the cross-examination to hurt your client's case even more than the direct testimony did.

Cross-examination is aimed at persuading the *arbitrators*. It is not aimed at persuading the witness, or your client, or the adversary, or the adversary's counsel, or

anyone else. It makes no difference whether or not any of these others agrees with what you are trying to accomplish, so long as the points made during the cross-examination are clear to the arbitrators. While the aim is to persuade the arbitrators, an effective cross-examination may nevertheless sometimes influence an adverse party's conduct and even on very rare occasion lead to a settlement on terms more favourable to your client than would otherwise have been available.

Before undertaking a cross-examination, you must make a conscious and carefully considered decision whether to cross-examine at all. That is because cross-examination can easily make things worse than they were at the end of the direct testimony, or in the written witness statement, as the case may be. You must balance that risk against the chance that the cross-examination will make things better.

No cross-examination should be undertaken unless the damage done by the direct testimony was serious and the likelihood of being able to make things better is significantly greater than the risk of making things worse. Even then, you must consider whether you are likely to be able to keep control of the witness so as to keep the witness from saying things you do not want to hear and do not want the arbitrators to hear.

Making things worse is particularly likely if you lose control of the witness. When that happens the witness may be able to find an opening to repeat especially hurtful parts of the direct testimony, or to say something even more hurtful than the direct testimony was.

Things can be made worse even if you manage to keep control of the witness and thus keep the witness from saying hurtful things. Failure to make progress against a witness despite an obvious effort to do so will often tend to reinforce the witness's direct testimony.

These risks are avoided if there is no cross-examination. Thus the wiser course will often be not to cross-examine. As a corollary, you should never permit your client to bully or shame you into cross-examining when your professional judgment is that cross-examination should not be undertaken. Many cases have been lost by unwise cross-examination.

§3.04 PLANNING THE CROSS-EXAMINATION

The initial step in planning a cross-examination is to be fully prepared. Being fully prepared means, to begin with, knowing thoroughly all the facts and all the law that bear on the dispute. It means having developed a full understanding of what your client's case requires, and of what you will do to try to accomplish it.

A useful discipline is to prepare your closing argument as early as possible in the preparation of your client's case, and then to refine that argument as you learn more about the dispute both before and during the main hearing. Having your closing argument in hand, even if only in the form of a preliminary draft, will provide you with a framework within which to develop all of the cross-examinations you plan to conduct, since everything you do in the course of an arbitration should be governed by what you propose to argue in your closing argument. Your closing argument, in turn,

will depend upon your theory of the case, that is, the basis or bases upon which you claim that your client should win and that the other party or parties should lose. Needless to say, you will need to adjust and refine your draft closing argument as you learn more about the case, both in your investigation before you file your request for arbitration and as the arbitration progresses. It is, however, critical and very helpful to define your objective early on, and 'work backwards' to determine what you need to do to achieve your objective.

Generally speaking, your closing argument should do three things:

(1) explain your theory of the case; in most cases this would have been done earlier in your written submissions, but in the closing argument you will explain the theory again, subsequent to and against the background of the presentation of the evidence at the main hearing;
(2) persuade the arbitrators to accept your theory; and
(3) persuade the arbitrators to reject the theory of the adverse party or parties.

Once you have worked out the theory of your case and started to prepare your closing argument, only then it is time for you to start thinking about the cross-examinations as a means of achieving your objective as reflected in your theory of the case.

As a general rule, you should only cross-examine a witness to the extent necessary to secure ammunition that you need to support your theory of the case, including whether what the witness says is to be believed. A critical threshold question is thus if you can obtain all of that ammunition from other sources. If the answer to this question is 'yes', there is no need to cross-examine – and you should not. The first, indeed the primal, rule of cross-examination is thus very often: 'Don't'. And that is even more true in an international arbitration, because of the structure of that process, than it is in the ordinary case conducted in the Anglo-American manner.

In answering the threshold question mentioned above – whether or not to cross-examine – there are several aspects to consider:

(i) remember that the objective in cross-examination is not to extract new facts from the witness, or to convince the witness or the opposing party or parties of your theory of the case; instead, the purpose is to provide the arbitrators with information that will bear on the credibility of the witness and on the weight that the arbitrators should give to the witness's testimony in light of all of the factors that may bear on evaluating that witness's testimony;
(ii) in the great majority of international arbitrations the witness in question will have submitted a written witness statement, often with exhibits, which will serve as the direct testimony of the witness and which will in most cases stand in lieu of direct oral examination; and
(iii) in international arbitrations the parties will have submitted their written evidence, and other supporting documentation together with their written submission, usually well in advance of the oral hearing.

It follows from the foregoing that in many arbitrations you will probably have most of the facts you need to support your theory of the case, without having to resort to cross-examination. This takes us back to the first rule of cross-examination: 'Don't'!

Being fully prepared also means anticipating what adversary counsel is likely to do. The written materials in an international arbitration will provide a good start in understanding the adversary's case. They will set out the arguments that adversary counsel intends to make, as well as an outline of the evidence on which those arguments will be based. They will also identify each witness on whom the adversary will rely. In addition, in most cases they will provide a written witness statement for each such witness, and even without such a statement they will provide information about what that witness will testify to.

It is essential, however, to go beyond what you can learn from the adversary's presentation. You must make a serious and thoroughgoing effort to find out everything you can about the dispute, about the witnesses the adverse party will call, about what material you will need for cross-examining them, and about what opposing counsel is likely to do. When written witness statements are provided, you will know in advance of the main hearing, both the identity of the witnesses and the precise content of their direct testimony. Even when the direct testimony will be given orally you will know who the witnesses will be, and roughly what their testimony will cover. Given a proper grasp of the dispute, you will then have a pretty clear idea of what each witness whose direct testimony will be given orally ought to say if being entirely truthful, as well as a pretty clear idea of what each such witness is likely to say in reality.

In addition to this factual study, you will need to develop all the law that bears on the dispute. That means not only the substantive law that you will ask the arbitrators to apply to the facts, but also whatever procedural law there may be in the jurisdiction where the arbitration is held that may bear on how it is to be conducted – for instance, whether you will be able to obtain assistance from the local courts in obtaining documents. You will need to identify and retain the experts you will use to provide expert testimony, including expert testimony as to the applicability of foreign law, so that they can assist you in your preparations for examining the other side's expert witnesses.

Once you have mastered the facts and the law bearing on the dispute, the next step is to identify, as to each witness, what you want, and can reasonably expect, to achieve through the cross-examination of that witness. One part of that process is to evaluate the material within the dispute itself as potential ammunition for the cross-examination of the witness involved. Another part is to develop a full understanding of material outside of the dispute, but nonetheless having a bearing on it, that may be useful in cross-examining that witness. Yet another, and a vital, part is to learn as much as possible about that witness as a person.

You must then figure out what questions it makes sense to put to the witness involved, and whether those are questions that will advance your client's case if they are answered as you believe they should be. As a general matter, witnesses can only be asked about things that they know of their own knowledge. As an example, witnesses may be asked if they have heard a particular rumour, but it is generally not meaningful

to ask them if the rumour is true – unless you have a good-faith basis to believe that a particular witness knows the answer to that question.

In addition, you must take into account the witness's position with respect to the matter at hand and ensure that the witness is the right witness for the question you intend to ask. It will not do, as a general matter, to ask the cook in the executive dining room about corporate policy – though perhaps one could ask if the cook has overheard a conversation among the executives and, if so, what those persons said to each other. Equally, it will usually make no sense to ask the chief executive officer about the food that was served during that meeting, unless the chief executive officer is a food enthusiast and that fact is material to the case.

Having done this part of the preparation, you must then decide whether the available ammunition is likely to be sufficient to achieve what you want to achieve by the cross-examination. If you conclude that the ammunition is likely to be sufficient, you must then decide how best to use that ammunition in light of the extent of the damage to your client's case that was done by the witness's direct testimony. Those determinations require the exercise of very careful judgment.

§3.05 HOW TO DO IT

[A] Keep Control of the Witness

No matter what you do, the witness may try to take control of the examination away from you and say something you do not want to hear and do not want the arbitrators to hear. You must try to maintain as much control over the witness as possible.

The challenges you confront in trying to maintain control over the witness may well differ as a function of how the direct testimony was given. A written witness statement will have been prepared by adversary counsel who will have made an effort not to leave the witness exposed. Direct testimony given orally may provide greater scope for cross-examination, but is also likely to contain greater risks of being surprised by something the witness says.

Many things bear on the extent to which you can keep control of the witness. One of these things is the form of the questions you ask and their sequence and tempo. Another is how you utilize the witness's feelings and state of mind.

[B] Use Short, Simple, Unambiguous Questions

The *form* of the questions used is perhaps the single most important factor in trying to keep control of the witness.

If you use 'open' questions – for instance, any of the so-called journalist questions (who, what, where, when, why, how) – the witness will be invited to say whatever the witness thinks can reasonably be said in response to the question. Often that will be something that a witness thinks will be helpful to the case of the party that called that witness. That something may be a repetition of something hurtful from the witness's direct testimony, or it may be something that the witness has not said before.

You do not want to give the witness that freedom, except in the rare situation where you have reason to think that such an 'open' question may elicit something beneficial to your client's case.

Similar difficulties arise if you use long or discursive questions. Such questions enable the witness to pick a fraction of the question to respond to. They also enable the witness to make a speech that has minimal or even entirely non-existent relation to the question. In either instances, the witness is given an opportunity to say any number of hurtful things that could otherwise have been avoided. You do not want to give the witness that freedom. Such long or discursive questions can also muddy the record and confuse the arbitrators, not desirable things to do.

So you will almost always want to use the so-called leading questions – short, simple, unambiguous statements of fact that confine the witness rather than allowing the witness to roam. Each such 'leading' question will be short – perhaps limited to about twenty-five words. Each will also generally be limited to a single, simple fact. No question should contain anything beyond what is necessary to make that single, simple fact clear and understandable. That will mean that the witness cannot easily evade answering what you want answered. It will also mean that the witness cannot honestly wander beyond the scope of what was asked.

These 'leading' questions should usually relate only to what the witness being cross-examined actually knows of that witness's own knowledge, including things that have been told to the witness or that the witness has overheard. It is generally unproductive to ask a witness a question about something the witness does not know, unless the witness' lack of knowledge is relevant to the dispute.

The term 'leading' questions is perhaps somewhat misleading, in that these 'leading' questions are not really 'questions' at all in the sense in which we usually understand what a 'question' is. We usually understand a 'question' to be a request for new information. The 'leading' questions used on cross-examination do not seek new information. Cross-examination is not the place to seek new information, though such information sometimes emerges.

Instead these 'leading' questions are statements of fact that you have carefully chosen based upon what you know about the dispute. You will put these statements of fact to the witness, and the witness will usually be expected to respond either 'yes' or 'no'.

If the witness responds 'yes', the witness has agreed with your statement of fact. A series of 'yes' answers can show that the witness agrees with your version of the facts. Those admissions will provide part of the basis for the argument you plan to make to the arbitrators in the closing argument phase of the proceeding. Such a series of 'yes' answers also tends to increase your own credibility with the arbitrators by suggesting that you are a reliable source of truth, which is of course desirable from your point of view.

If the witness responds 'no', the witness has disagreed with your statement of fact. A 'no' answer can serve to clarify the content of a factual dispute the arbitrators will have to decide.

You also have the choice as to the *sequence* in which you put these statements of fact to the witness. The sequence chosen should be one intended to help you build a

persuasive case while keeping the witness from being able to derail that case. The sequence is vital to the effect of the cross-examination on the arbitrators. Properly done, a sequence of these short, simple, unambiguous statements of fact can lead the arbitrators to reach a conclusion that you want them to reach, without your having to lecture them later on in closing argument about what you want them to conclude.

It is always better when the arbitrators figure things out for themselves and feel that they have done so than when you have to lecture them in closing argument. The feeling that they have figured things out for themselves appeals to their belief that they are intelligent and insightful and helps win them over to your side of the case. That feeling also gives them a greater psychological investment in what they have figured out, which can likewise be to your benefit.

In thinking about the sequence in which you put the questions, it is also critical that you bear in mind the *tempo* at which you put them. The tempo, and any changes in it, should be whatever is the most beneficial to the impact of the cross-examination. At times a slow tempo may be desirable, for emphasis, or because the concepts are better understood slowly. At times a rapid tempo may be desirable in an attempt to conceal from the witness where you are headed and thus prevent the witness from planning and carrying out an effective defence to your line of questions. A rapid tempo, however, also carries the risk that the arbitrators may be left at least as uninformed as the witness. A rapid tempo may also be challenging to an arbitrator whose command of the language of the proceeding is too limited to permit easy understanding of what is going on.

Short simple questions of this type are prevalent in an effective cross-examination, but there can at times be reasons to use other sorts of questions. As one example, it is not unusual to be able to formulate a fair-minded question to which any answer the witness gives will be hurtful to the case of the party that called that witness. There may also be times when the use of the open 'journalist' questions may be effective.

It is also true that not all cross-examinations are as confrontational as the use of these short, simple questions could be taken to suggest. Sometimes an examiner can draw the witness along in an entirely amicable and non-confrontational way so that at the end of the cross-examination the witness exhibits full agreement with the examiner's position on the facts. Cross-examination need not be cross or unpleasant in order to be effective. Especially in an international arbitration unpleasant cross-examination can be very counter-productive.

Notwithstanding the care with which you prepare the cross-examination, it is unwise to use in the cross-examination itself questions that have been written out in advance, even if writing out questions may prove very useful as part of your preparation for the cross-examination. Using questions that have been written out in advance (reading them to the witness one at a time instead of engaging in a responsive question and answer interaction with the witness) will tend to make the examination far less effective. It will also impede your ability to adjust to what the witness says, to change course from what you had planned when the cross-examination has developed differently from what you had expected and you need to respond effectively to the change.

Whatever statements of fact you use, and however you use them, they must be based only on what you have a good-faith basis to believe you know about the dispute. It is thus crucial for you to be very well aware of what you believe you 'know' and of the basis upon which you believe you 'know' it.

[C] Avoid Questions about Conclusions

An effective cross-examination can accomplish many useful things. It may destroy the credibility of a witness whose direct testimony was extremely damaging. It may show that some especially hurtful things in a witness's direct testimony are not credible even if the witness is otherwise to be believed. It may correct errors or distortions in the direct testimony, whether the witness intended them or whether they were entirely innocent, so that when properly understood the facts support the arguments you intend to make to the arbitrators in the closing argument. It may elicit some fact helpful to your client's case that was omitted from the direct testimony.

Cross-examination itself is not, however, the place for argument. That is true even though cross-examination, if successful, may elicit things that will be useful in the closing argument. You should not try to argue the case during cross-examination but should instead save argument for the closing argument where it properly belongs.

You should thus not ask the witness to agree with inferences or conclusions that you intend to argue are to be drawn from the facts the witness has admitted or refused to admit. You should limit your questions to matters of fact and avoid questions about what the facts may be argued to mean.

Questions seeking the witness' agreement with inferences or conclusions can lead you into an argument with the witness. Such arguments are never good. They are almost always more hurtful to your client's case than to the case of the party that called the witness. Cross-examination should not try to use the witness as a sounding board for arguments about inferences or conclusions the arbitrators will later be asked to reach in the closing argument phase of the proceeding.

The notion that cross-examination is not the place for argument is sometimes expressed by saying that you should not ask 'one question too many'. Not asking 'one question too many' means that you should not ask a question that enables the witness to undermine what you have just accomplished by the questions that precede it. Often the 'one question too many' is a question that asks the witness to agree with a conclusion that you will later ask the arbitrators to reach. When that is the case, the question has the same kind of disadvantages as a question that asks the witness to agree with an inference or a conclusion.

[D] Observe and Use the Non-verbal

Sometimes other things taken together with the words play a more important role than the words themselves in what is conveyed, and in what is understood, and in the response which is elicited. That also bears on cross-examination because, whatever

else it is, a cross-examination is a face-to-face interaction between two people, an examiner and a witness.

Since each witness is different, the feelings and emotions are different in each cross-examination. You must be sensitive to that fact and be aware of what feelings and emotions are present at any given time, recognizing in addition that the feelings and emotions may change from time to time during a cross-examination, and sometimes very quickly.

The feelings and emotions are, for the most part, exhibited through the ways in which words are spoken and in the body language of the speaker. Thus, you must be aware of how the witness is speaking and what the witness' body language conveys. You must be equally aware of how you are speaking, and of what your body language conveys.

And it is not only you and the witness. Other people involved in the dispute observe the cross-examination. Those other people are not only the arbitrators but also the parties and their lawyers, and anyone else who happens to be in the hearing room at the time. Your awareness of their reactions to what is going on can affect what you decide to do in the cross-examination as it proceeds.

To be successful, therefore, you must be aware of, and find ways to deal effectively with, all of these non-verbal factors, in addition to dealing with the words themselves. You can use the witness' emotional and psychological state, as well as your own affect in dealing with the witness, to reduce the witness's capacity to dissemble. Using the tools those factors permit, you can sometimes lead a witness to be, or to become, more forthcoming with the truth than the witness otherwise would have been.

One such non-verbal factor, and an especially important one, is anxiety – both the witness' anxiety and your own anxiety. Your own anxiety can derail an examination by leading you to make serious errors of judgment and serious mistakes. By contrast, the witness' anxiety can be used to bring about testimony that is more truthful than the witness was inclined to give.

You have immense power over the witness. You ask the questions. You can insist on their being answered. You choose the subject matter of the questions and the sequence and tempo at which they are put.

The witness may well be anxious even if you do nothing to evoke that anxiety. A witness who has never testified before may be particularly anxious.

There is thus likely to be an underlying anxiety in the witness that you can use. The point is not to scare the witness for the sake of scaring the witness; it is to recognize that the witness' anxiety can be used to discomfit a witness and thereby to elicit an admission that might otherwise have been unavailable.

Here is an example. Suppose Mr Brown is being cross-examined and is asked this question:

'Is that what you want this tribunal to believe, Mr. Brown?'

Or even:

'Is that *really* what you want this tribunal to believe, Mr. Brown?'

Any normal Mr Brown would like to answer such a question 'yes'. But if Mr Brown has been less than entirely truthful, or has even been drifting into an outright lie,

he will often find it difficult or even impossible to give a 'yes' answer. Those feelings will be heightened by the use of his name, which will remind him that the tribunal is focused on him as a specific person, with a reputation and position to protect, and is not just engaged in an abstract intellectual enterprise.

The result of the question is thus likely to be that Mr Brown will back away from what he had said that led the examiner to ask the anxiety-producing question. So Mr Brown may now say that he was 'mistaken', or 'confused', or 'just realized that he was wrong', or 'did not understand the question', or some other such thing intended to defend himself, followed by his giving a more truthful statement on the matter involved.

Even if Mr Brown is an accomplished liar, so that he can comfortably answer 'yes', in doing so, he is likely to affirm a proposition demonstrably contrary to what can be proved by other evidence. If he does that he may well destroy his credibility. You will thus not want to ask this or some other anxiety-producing question unless you are willing to risk destroying the witness's credibility.

[E] Sense the Environment

In order to decide when and how to use a question that can raise a witness's anxiety level, you will need to have a sense of the witness's state of mind. To acquire that sense, you must pay close attention to *what* the witness says, *how* the witness says it, and what the witness's *body language* suggests is happening within the witness. You must also remain aware of everything else that is happening in the hearing room, so that you can draw as much insight as possible from what is going on there.

You can learn many things that may be useful to the cross-examination from observing how the arbitrators and others in the hearing room are reacting to the witness. It is obvious that you will not want to offend or alienate any of the arbitrators. Being aware of how the arbitrators and others are reacting to the cross-examination is part of avoiding such offence and alienation. But that awareness can also give you useful insights into how the cross-examination itself is going, whether it is achieving what you want to achieve, or whether it is rather counter-productive.

[F] Getting Your Question Answered

Related to the use of anxiety-provoking questions is the principle that you should insist that the witness answer the question that you asked. A witness may try to evade a painful admission by saying something that is not an answer to your question. It is then up to you to be sure that the question that you asked actually gets answered. There are many ways to do this. One is to repeat the question. Another is to ask a series of questions after the question that was evaded so as to elicit the answer that was sought by the evaded question. Whatever the path chosen, you must not lose control of your own feelings and emotions.

[G] Exercise Self-Control

Throughout a cross-examination you must be able to exercise control over your feelings and emotions so as not to argue with the witness or become angry. Real anger tends to distort judgment and is thus particularly dangerous and therefore to be carefully avoided. Any anger, whether real or feigned, tends to alienate others and is thus undesirable – except for the rare cross-examiner who is able to use feigned anger to advance the cross-examination. So when the witness evades a question, you must manage to get the question answered without arguing with the witness, or getting angry (unless you are that rare cross-examiner who can usefully feign anger), or letting the witness explain something the witness claims prevents an answer. And you must do this without letting the witness repeat the direct testimony.

To do these things, you must be aware of your own feelings and emotions and of how to control them so that they do not interfere with the conduct of the examination. Anxiety plays a vital role here, just as it does with the witness. You must learn to recognize your own anxiety, to understand what causes it and to learn how to deal with it so that it does not interfere with your effectiveness.

Anxiety is not the only relevant feeling, of course, but it is perhaps the most important because it occurs so frequently in cross-examination. It can cause you to lose focus, to become bewildered, to become too wordy. It can also produce feelings of anger, and those feelings are particularly dangerous for you as a cross-examiner.

[H] Make No More than Three Main Points

You will want the arbitrators to remember, as to each witness, the main points you made in the cross-examination of that witness. If you make at most three main points with any given witness, or even better only one main point, all of the arbitrators are likely to remember the point or points made. You can then feel fairly confident in relying on those points when discussing that witness in closing argument. If a cross-examination makes many points with a given witness, different arbitrators may well remember different ones and the discussion of that witness in closing argument is likely to lose focus. Making at most three main points is generally recognized as 'the rule of three', and is frequently referred to in both oral and written presentations where the aim is to make a lasting impact.

To say that you should make at most three main points, however, does not mean that you should ask only three questions. Instead, you will use many, probably very many, short, simple, unambiguous statements of fact, each generally limited to a single, simple fact, to provide the basis from which the main point or points can be seen or inferred.

It also helps if the cross-examination can be structured as a narrative, if this can be done without letting the witness undermine its effectiveness. Doing so will make the examination more interesting and easier for the arbitrators to follow. But since the arbitrators will almost certainly know the chronology of the case, your narrative should as a rule be based on something other than simple chronology.

[I] Adapt to the Environment

You must also take into consideration what might be called the atmosphere or environment in which the cross-examination is being conducted. That atmosphere includes the personalities and cultural assumptions of everyone involved – the arbitrators, counsel, parties, witnesses. It also includes the nature of your client's case and how strong or weak it is, how the momentum of the proceeding affects the people involved, even the location of the hearing and the physical environment of the room in which the hearing is being held, as well as when in the course of the hearing day the cross-examination is taking place and how that timing may affect the attentiveness of the arbitrators.

But perhaps even more important if you are to adapt to an international arbitration is to be continually aware of, and to take continually into account in your conduct, the differences between international arbitration and other dispute resolution environments with which you may be familiar.

§3.06 CONCLUDING REMARKS

It is important to keep in mind that cross-examination is not a goal in and of itself. Cross-examination is rather a tool – sometimes a weapon – for you to use for the purpose of obtaining a favourable award for your client. To do this successfully you need to determine at an early stage exactly what you want to achieve with your cross-examination. This will depend upon your analysis of the facts and the law involved in the case against the background of your theory of the case.

During cross-examination you should make points of a factual nature that you will use in your closing argument. Every point you are making is one piece of the jigsaw puzzle that you must put together for the arbitrators. This you do in your closing argument, and that is when you draw the conclusions, or even better, allow the arbitrators themselves to draw the conclusions. If you ask for conclusions during the cross-examination you will seldom get the answers you want to get. This may endanger, or even destroy, not only your plan for the cross-examination, but also your entire game plan based upon your theory of the case.

When you prepare cross-examination, and when you conduct it, you must thus always keep your closing argument in mind.

When presenting your closing argument you should always strive for a certain degree of rhetorical excellence, but you are well advised to keep in mind what the Romans supposedly said about two famous orators in ancient Rome. When Cicero spoke the comment was: 'By Jove that is a beautiful speech.' But when Caesar spoke the Romans said: 'Let us march.' In other words, your closing argument must seek to induce the desired action: an award in favour of your client.