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Going First Makes a Difference: Decision-Making Dynamics in Arbitration by M.A. Cymrot and P.M. Levine

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GOING FIRST MAKES A DIFFERENCE:
DECISION-MAKING DYNAMICS IN ARBITRATION

By: Mark A. Cymrot
Paul Levine*

The chairman calls the hearing to order. Claimant's counsel stands, calls the first witness, and, instead of asking questions, sits down, looking apprehensive. His opponent rises with a glint in his eye and a slight smirk on his lips, and starts telling the respondent's story through his cross-examination of the claimant's chief executive officer. This sophisticated executive becomes frustrated trying to explain his company's narrative. A skilled cross-examiner keeps him boxed in with short, direct questions. The tribunal listens intently. Although they are well prepared by written witness statements and legal briefs, the arbitrators are developing their first impression from the oral evidence. Respondent must be prepared to benefit from this procedural advantage, and claimant must develop strategies to thwart it.

Strategy in international arbitration requires adjustments for both civil law-trained and common law-trained lawyers. The common law system is principally built on oral presentations of evidence, whereas the civil law system is structured around written evidence. The international arbitration model is a hybrid. Prehearing memorial, including legal arguments and written witness statements, are followed by an abbreviated hearing in which opening statements and direct examination are often discouraged, cross-examination of the opponent's witnesses is the principal purpose, and final arguments can be dispensed with or limited to written post-hearing briefs. The compromise accommodates the participation of lawyers from multiple legal

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regimes and the goal of efficiency.[1] However, this procedure changes the decision-making dynamics of international arbitrators from those of judges (or jurors) in either the civil law or common law systems.

This article focuses solely on the impact of the order in which the arbitrators hear evidence at an arbitration hearing. Does oral advocacy matter when sophisticated arbitrators read long pre-hearing memorials before the first word is spoken? Does respondent gain an advantage when hearings begin with the cross-examination of claimant's witnesses as many hearings do? If the procedural adjustments matter, how should arbitration counsel strategize for international arbitration proceedings?

Winning and losing in arbitration – like any other dispute resolution mechanism – is influenced by many factors. Our experience tells us that the order of evidence is one factor that many advocates overlook. We suggest more attention needs to be paid to this strategic dynamic.

1. POWER OF ORAL ADVOCACY

Many lawyers have seen and felt it. It is often just a hint: the eyelids widen, perhaps a small smile at the corner of the mouth, a nod of the head. The light clicks on when the decision-maker understands a point and perhaps even changes his or her mind. The experience might arise from a rousing speech, a key exchange with a witness, or just persistent argument. One colleague recently told us of a donnybrook with a judge that challenged the judge's initial conclusions about his case. I had a similar experience of being bruised and battered for two hearings when I challenged a judge's initial perception of a case; it took a third hearing before he saw our point of view and turned on our opponent. Lawyers revel in those moments; they

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[1] *See* Alan Scott Rau & Edward F. Sherman, *Tradition & Innovation In Int'l Arbitration Procedure*, 30 Tex. Int'l L.J. 89, 95 (Winter 1995).

become the stuff of legal lore. But do those moments really make a difference to arbitration outcomes? We have heard advocates recount stories of winning hearings that resulted in losing awards. The opposite, of course, is more often true. But given the opportunity, most advocates would choose the strategy that wins the hearing, expecting the award will follow.

How important are hearings to arbitration results? Under current international arbitration procedures, claimant generally has the first written word and respondent, with its rejoinder, the last before the hearing. The effects of the order of written presentations are uncertain; decision-makers read briefs differently and not necessarily in the order presented, concentrate in varying degrees, and absorb information in different ways.[2] At an oral hearing, the effects are more clear-cut. Claimant has the burden of proof but is not given the opportunity to make a coherent presentation at the hearing. Respondent is given the opportunity to make the first impression through its cross-examination of claimant's witnesses. Claimant responds through cross-examination of respondent's witnesses. Respondent is given the last impressions by cross-examining claimant's rebuttal witnesses. Simultaneous briefs following the hearing are neutral but may be too late to change minds; they most often help the arbitrators write a coherent and complete award.

Your assessment of the importance of the hearing may depend upon your view of the power of oral advocacy, which is influenced by culture, training and personal learning styles. Civil law and common law legal training place significantly difference emphasis on oral

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[2] Stephen Wasby, Anthony D'Amato & Rosemary Metrailer, *The Functions of Oral Argument in the U.S. Supreme Court*, 62 Quarterly Journal of Speech 410 (1976), *available at* http://anthonydamato.law.northwestern.edu/papers-1/a76b-oral-sc.pdf (last accessed September 11, 2013); C. Athena Roussos, *Preparing an Effective Reply Brief*, The Daily Recorder (2009), *available at* http://www.capcentral.org/procedures/brief_writing/docs/replybriefs.pdf (last accessed September 11, 2013); Myron H. Bright & Richard S. Arnold, *Oral Argument? It might be crucial!*, 70 A.B.A. J. 68 (1984), *available at* http://www.appellateinstitute.com/ResourcesPDF/OralArgumentItMaybeCrucial.pdf (last accessed September 13, 2013).

advocacy. And arbitration differs from trial advocacy in either legal culture. In arbitration, sophisticated neutrals presumably are well prepared based upon written prehearing submissions. Some advocates believe that the case is largely decided before the hearing, which merely confirms the arbitrators' conclusions drawn from the written materials. Our experience (largely in common law systems), however, is that hearings can make a difference, sometimes in outcomes but often in degrees – that is, how big or small the win or loss will be.

A study in England suggests that oral advocacy matters. The same appeals for Disability Living Allowances ("DLA"), denied previously by the relevant department, were delivered to 66 panels (198 panel members, lawyers, and other professionals) divided into three groups, some receiving only written materials and others watching a video of the oral hearing. "There is a clear difference in success rates between paper cases and oral hearings in DLA cases," the study concluded. "Claimants are 2.7 times more likely to be successful after an oral hearing." The panel members attributed this difference to the additional information presented at hearings. That included, among other information, an opportunity to assess witness credibility. For instance, the mother was most believable when the panel was able to hear directly from her. The tribunals' confidence in their decisions was much higher when they followed oral hearings.[3] Other studies have reached similar results.[4]

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[3] Dame Hazel Genn & Cheryl Thomas, *Tribunal Decision-Making: An Empirical Study*, available at http://www.nuffieldfoundation.org/sites/default/files/files/Tribunal_decision_making_vFINAL.pdf; *see also* Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 Iowa L. Rev. 35 (1986-1987).

[4] Robert Thomas, *Family Visitor Appeals: An Examination of the Decision to Appeal and Differential Success Rates by Appeal Type*, 167 Immigration, Asylum and Nationality Law (2004).

In a setting more characteristic of complex business disputes, a study compared the personal grades United States Supreme Court Justice Harry Blackmun gave to lawyers at oral arguments with case results, concluding that:

> Even when controlling for the most compelling alternative explanation – a justice's ideology – and accounting for other factors affecting Court outcomes, *the oral argument grades correlate highly with a justice's final vote on the merits*.

The study found that Justice Blackmun voted with the appellant 77.9 percent of the time when his or her counsel was manifestly better than the appellee's counsel, while this likelihood decreased to 38.6 percent when the appellee was better.[5] Another United States Federal District Court decision also discussed studies submitted in evidence to support arguments that oral hearings are fundamental due process requirements.[6]

Yet another study by well-known jury consultants demonstrated that biases have an impact whether the decision-maker is a well-trained judge or a lay juror. The study concluded: "If one of the major arguments being put forth in favor of a bench trial is that judges are less affected by extralegal thought processes than jurors, the answer appears to [be] that this argument does not carry a great deal of weight. Judges, being human after all, are influenced in their decision-making by many of the cognitive shortcuts and biases as human jurors."[7]

There are many explanations for the impact of oral advocacy. The Socratic exchange of ideas among counsel and with arbitrators defines core issues, exposes vague or faulty reasoning,

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[5] Timothy Johnson, Paul Wahlbeck & James Spriggs, *The Influence of Oral Arguments on the U.S. Supreme* Court, 100 American Political Science Review 99 (2006), available at http://home.gwu.edu/~wahlbeck/articles/Johnson-Wahlbeck-Spriggs%202006%20APSR.pdf.

[6] *Kelly v. Wyman*, 294 F. Supp. 893 (S.D.N.Y. 1968).

[7] For a study comparing cognitive biases in juries and judges, *see* Michael Biek, "The Psychology of Decision-Making and ADR", available at http://www.decisionquest.com/utility/showArticle/?objectID=924 (last accessed on October 15, 2013).

and tests the boundaries of the parties' positions. Studies also demonstrate that most lawyers are auditory learners. They tend to remember things better when they listen to them.[8] Over the last 40 years, advocates have learned to take advantage of new audiovisual aids to make their presentations more interesting with greater impact. As a young lawyer, we sat in at Old Bailey whenever we were in London. On one occasion, we saw a barrister hand out a thin notebook of key exhibits for the jury to follow during cross-examination, something unknown in United States trials at the time. Now PowerPoints, charts and videos are commonplace in hearings. "Multisensory learning" – using two different senses to process information – is so powerful, we have learned, because "[t]he principle of 'dual coding' indicates that information entering the system through multiple processing channels helps circumvent the limited processing capabilities of each individual channel and, thus, greater total information can be processed when spread between multiple senses."[9] Simply stated, "[p]eople in general remember 10% of what they read, 20% of what they hear, 30% of what they see, and 50% of what they see and hear."[10] Because lawyers have accepted this "dual coding" principle, demonstrative evidence is now a mainstay in international arbitration proceedings. It is also a well-defined part of counsels' persuasion strategy. "A survey of American Arbitration Association construction arbitrators has shown that the use of photos, pictures or videos, and the use of graphics or other visual aids

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[8] Bernd Ehle, *Effective Use of Demonstrative Exhibits in International Arbitration* ¶ 3.11, available at http://www.lalive.ch/data/publications/CYArb_Ehle_last.pdf (last accessed September 27, 2013).

[9] Ladan Shams & Aaron R. Steiz, *Benefits of Multisensory Learning*, Trends Cogn. Sci. 12, at 5 (2008) (citation omitted), available at http://shamslab.psych.ucla.edu/publications/Tics2008-reprint.pdf (last accessed on June 24, 2014).

[10] *Id.* (citation omitted).

were, respectively, the third and fourth types of presentation techniques that they found helpful or persuasive."[11]

2. BENEFITS OF FIRST IMPRESSIONS

Before one recent hearing, a colleague called, distressed that his opponent had submitted a 100-page rejoinder with a new witness statement and arguments. After our soothing words, he complained to the experienced and well-respected arbitrator ¬ who unfortunately seemed unmoved by this gamesmanship. Because our colleague represented the claimant, he had to sit at the beginning of the hearing through respondent's cross-examination of his witnesses. His opportunity to present his case and respond to the new evidence came days into the hearing and then only by cross-examining the new witness, a hard way to make a coherent argument. Our colleague ultimately won his case, yet thought he was entitled to a bigger victory. Did the delayed opportunity to respond affect the degree of victory? There is no way to know for sure. But the there are reasons to believe he was right.

Respondent is usually given the last written words before the hearing in the rejoinder and the first significant words at the hearing. Because opening arguments and direct witness examinations are usually brief or dispensed with entirely, respondent goes first by cross-examining claimant's witnesses. Claimant's turn comes later, in limited redirect examinations or during respondent's case. And with cross-examination as the only tool available at that point, it can be difficult for either side to present an organized storyline. The impact may be greatest on the claimant who has the burden of proof but loses the opportunity to make the first impression,

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[11] Ehle, *Effective Use of Demonstrative Exhibits in International Arbitration* ¶ 3.18; *see also* Bonnie Crane & Paige Malowitz, *Demonstrative Evidence to Captivate the Court*, 31 Fam. Advoc. 22 (2008-2009), available at http://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/famadv31&div=26&id=&page= (subscription required).

has a difficult time making a coherent presentation at an oral hearing, and has little opportunity to respond to new arguments.

Lawyers from differing backgrounds share our view of the importance of first impressions. When we moderated a panel of common law-trained lawyers, each an experienced and well-respected neutral, their consensus was the tribunal "learns" the case – meaning, fully understands the case − at the hearing. United States Supreme Court Justice William J. Brennan expressed the same view when he wrote that "[o]ften my whole notion of what a case is about crystalizes at oral argument. This happens even though I read the briefs before oral argument." And in a recent symposium of English and American litigators, an English lawyer, who works in a system that relies upon written direct testimony, related an experience of his trial being "hijacked" by defendant's effective cross-examination of his first witness. Others around the table quickly agreed.

While we have not found specific scholarship on the impact of hearings on arbitration awards, studies in comparable circumstances confirm our instincts – particularly those involving the psychological concepts of "primacy" and "recency."

Primacy explains that presenting an argument first has an advantage in forming decision-makers' opinions and coloring later heard evidence – you never forget your first impression. At least two aspects of human nature are at work. During the first moments of presentation, the interest of the audience is greatest, which translates into better retention of the information later. First impressions are also formed, which are nearly impossible to change later on (hence the phrase, "you never get a second chance to make a first impression."). Once people form an

impression, they will explain away contrary information acquired later, rationalizing its meaning so that they avoid having to change their view.[12]

According to one study, "[t]he side of a controversial issue having the advantage of first position in the order of presentation is more effective in changing opinion that the side presented last, all other factors being equal."[13] Another article stated: "most jurors make up their minds by the conclusion of opening statements. In one study, 80% of the jurors made up their minds on questions of liability after the opening statement."[14] This concept was first explored in psychology experiments in the 1920's, when audiences listened to arguments on topics such as "should all men have equal political rights." The pro and con arguments were equally lengthy and equally persuasive, but in one group the "pro" group presented first and in another group the "con" group presented first. More listeners favored the side arguing first. Similar findings were made in other experiments concerning such diverse topics as protective tariffs and monogamy (apparently a hot topic in the 1920's).[15]

The first arguments are believed to have "the greatest impact on the audience" because decision-makers are believed to form initial opinions.[16] Later arguments and evidence are judged against these initial opinions, which sometimes are still believed even though later proven

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[12] Timothy Perrin, Harry M. Caldwell, Carol A. Chase, *The Art & Science of Trial Advocacy*, LexisNexis (2011), P 23/24, available at http://books.google.com/books?id=kqKm5XbsRYgC&printsec=copyright#v=onepage&q&f=false (last accessed October 09, 2014).

[13] Robert G. Lawson, *Order of Presentation as a Factor in Jury Persuasion*, 56 Ky. L.J. 523, 525 (1968).

[14] R. Doak Bishop and Sashe D. Dimitroff, *Psychology of Persuasion* at 6 (citing Edward T. Wright, *How to Use Courtroom Drama to Win Cases* at 124 (1987)), available at https://www.scribd.com/doc/34181142/Psychology-of-Persuasion (last accessed October 10, 2014).

[15] Lawson, 56 Ky. L. J. at 525.

[16] James Voss, The Science of Persuasion: An Exploration of Advocacy and the Science behind the Art of Persuassion in the Courtroom, 29 Law & Psycol. Rev. 301, 311-312 (2005).

illogical.[17] Impressions can be hard to change once formed; people like to believe they are correct (egocentric bias) and will attempt to maintain their positions in the face of equally persuasive facts and arguments.[18] Listeners have limited focus, which is best retained when listening to a point for the first time.[19] Hearing new arguments and facts structures how a listener will perceive later information on the same point, including the opponent's evidence and argument, and listeners will attempt to make the new information fit into their already formed impressions.[20] The side presenting novel facts and arguments thus gets to make the first impression and take advantage of the primacy effects. The primacy effect is so powerful because of the existence of an intuitive system in each person through which decisions are made. As explained by Nobel Prize winner Daniel Kahnemann, this intuitive system coexists with a deliberative system. "[W]e cannot function without both and that human decision-making operates with System 1 making intuitive judgments, which are sometimes modified by System 2's deliberative process."[21] United States Supreme Court Justice Antonin Scalia has also acknowledged this reality: "While computers function solely on logic, human beings do not. All sorts of extraneous factors – emotions, biases, preferences – can intervene, most of which you can do absolutely nothing about (except play upon them, if you happen to know what they

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[17] *Id.*

[18] Lawson, 56 Ky. L. J. at 535.

[19] *Id.* at 530.

[20] *Id.* at 530-32.

[21] Edna Sussman, *Arbitrator Decision Making: Unconscious Psychological Influences and What you can Do about Them*, Am. R. of Int'l Arb. 487, 489 (2013).

are)."[22] The prominent international arbitrator, Doak Bishop, referring to similar research, wrote: "What this means is that not only do first impressions count – they count disproportionately!"[23]

Likewise, prehearing briefing tends to increase, not decrease, the primacy effect. Familiarity fuels the primacy effect by "priming" the pump. "In groups that have been made familiar with a topic as part of the experimental situation, or who are familiar with a topic but do not belong to an intact group which was formed emphasizing familiarity with a given topic, opinion is apparently more flexible and change occurs in the direction of primacy."[24]

We had our own experience with the powerful impact of primacy on an oral hearing in a four-week bench trial to assign responsibility for breaches of the levees after Hurricane Katrina. Before the trial, the judge had read extensive briefing. Then plaintiffs' leadoff witness presented a series of historical studies, which forced us to minimize these studies as one just opinion out of many throughout the remainder of the trial. Those studies, however, were cited prominently in the final opinion.[25] While we won on appeal, the plaintiffs' first witness placed an almost irrefutable burden on our factual case at trial. In arbitration, we would not have gotten to appeal.

Under current arbitration procedures, respondent also gets the final say by cross-examining the claimant's rebuttal witnesses. "Recency" explains that what the decision-makers hear last is what they will remember most. Start strong and finish strong is the advocate's mantra. This principle is rooted in the common sense notion that attention improves as the

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[22] *Id.* at 490 (quoting Antonin Scalia, Making your Case: The Art of Persuading Judges (2008)).

[23] R. Doak Bishop and Sashe D. Dimitroff, *Psychology of Persuasion* at 6. The authors then provide an explanation on how to deal with this tendency in trial: "Psychological studies show that you have four minutes to catch the jurors' attention or they will tune you out – so start with a strong impression and don't waste it." *Id*. at 10. In addition, "novel information is remembered well" by jurors. *Id.*

[24] Robert E. Lana, *Existing Familiarity and Order of Presentation of Persuasive Communications*, 15 Psycological Reports 607, 610 (1964).

[25] *In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d 644 (E.D. La. 2009), *rev'd* 696 F.3d 436 (5th Cir. 2012).

listener perceives that the end of the presentation is near and, therefore, the listener recalls the last portions better.[26] Most studies, though, find that primacy has the more significant and lasting impact. As a result, any primacy advantage claimant may have during the briefing process is eroded, and respondent's advantage of primacy and recency at the hearing can be a distinct advantage if used properly.

Recency attaches importance to presenting last at a hearing because "people are more likely to remember what they have been exposed to most recently."[27] Going last affords the presenter an opportunity to make a memorable impression and finish strong. Lawyers once believed recency was the stronger phenomenon because the first party could not refute it later and decision-makers will remember their final impressions more than their initial impressions.[28] However, research shows "the recency effect is far less powerful [than primacy], as it is a simple enhancement of short-term memory due to recent exposure to that information."[29]

3. IMPACT OF ARBITRATION PROCEDURE ON ADVOCACY

What should an advocate do about these procedural dynamics? Our observations lead us to believe that both sides ought to consider taking steps to take advantage or mitigate the impact of first and last impressions. Failing to do so ignores a potentially important strategic consideration that should be addressed.

Be aware of these considerations when discussing procedures at preliminary hearings at the outset of an arbitration. A claimant should sensitize the tribunal to the impact of primacy and

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[26] *The Art & Science of Trial Advocacy, op. cit.,* p. 24/25.

[27] Voss, 29 Law & Psycol. Rev. at 312.

[28] Lawson, 56 Ky. L. J. at 526-27.

[29] Bill Kanasky, The Primacy and Recency Effects: The Secret Weapons of Opening Statements (2011).

recency starting with arbitrator interviews and the preliminary hearing. Claimants ought to insist upon a fuller, more complete hearing process. Respondent should resist changing the "tried and true" procedures.

4. Interviewing prospective arbitrators provides a good opportunity to learn their opinions about opening statements, direct examinations, preliminary hearings and deliberations. And the background of the arbitrator may make a difference. For instance, civil law arbitrators are less prone than their common law counterparts to be persuaded by oral presentations. "The common law tends to be [skeptical] that the sun has risen unless a witness can be found to testify under oath that he saw it do so. The civil law believes that the best evidence comes from documents . . . "*the civil law generally gives far less weight to live testimony than the common law* . . ."[30] The IBA Country Guides on the Practice of Arbitration in civil law countries reaffirms this tradition.[31]

Claimants should sensitize the tribunal at the initial conference to the potential impact of the usual procedures and thus request a brief opening statement and direct examination of witnesses. There, claimant should strive to present its case in a brief but organized manner and immunize the tribunal to respondent's case.[32] It should also emphasize the importance of the arbitrator's non-exclusive reliance on memory, as this will reduce the primacy effect.[33] Studies

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[30] Siegfried H. Elsing & John M. Townsend, *Bridging the Common Law Civil Law Divide in Arbitration* at 4, available at http://www.hugheshubbard.com/ArticleDocuments/648489.pdf (last accessed September 27, 2013) (emphasis added).

[31] IBA Country Guides on the Practice of Arbitration, available at http://www.ibanet.org/Article/Detail.aspx?ArticleUid=a646cf32-0ad8-4666-876b-c3d045028e64&goback=%2Egde_2122809_member_274627314#%21 at 12.

[32] In a groundbreaking study published in 1961, William J. McGuire developed the Inoculation Theory. "[W]e find that the pre-exposure (either actively or passively) to refuted counterarguments produces considerable generalized immunity. In neither active nor passive condition is there a significant difference between the resistance to same and novel counterarguments . . ." William J. McGuire, *Resistance to Persuasion Conferred by Active and Passive Prior Refutation of the Same and Alternative Counterarguments*, Journal of Abnormal and Social Psychology, 1961, Vol. 63, No. 2, at 330, available at http://www.communicationcache.com/uploads/1/0/8/8/10887248/resistance_to_persuasion_conferred_by_active_and_passive_prior_refutation_of_the_same_and_alternative_counterarguments.pdf (last accessed September 27, 2013).

[33] Sussman, Am. R. of Int'l Arb.at 507.

suggest that the primacy effect is reduced when arguments or ideas are presented at a faster rate.[34]

Briefing wisely can help reduce the impact of respondent's primacy advantage. Claimant should strive for brevity,[35] as this will permit arbitrators to absorb his message thoroughly. More so than usual, only reasonably persuasive arguments should be made in briefs. Psychological studies have long ago demonstrated that weak arguments may end up having a boomerang effect.[36] These studies demonstrate the importance of how the story is framed, and the words used when telling it.[37]

Rejoinder games – like those faced by my colleague – can provide claimant with an additional argument to support the need for these opportunities. A claimant should stand firm on the need for a focused opening statement. Although witness statements are the preferred mode of direct examination, Article 8(3)(a) of the commonly used IBA Rules on the Taking of Evidence contemplates direct testimony. Here, claimants can thus find additional support for any direct examination request. The importance of these Rules should not be underestimated. A glance to the IBA Country Guides on the Practice of Arbitration in different countries reveals the

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[34] Michelle Lynn Smith, *The Forgotten Middle Child of Memory: The Serial Position Effect*, available at http://capone.mtsu.edu/sschmidt/Cognitive/sample_report.htm (last accessed on September 27, 2013).

[35] Kevin Dubose, *Writing a Persuasive Supreme Court Brief*, at 6, available at http://www.adjtlaw.com/assets/kd_persuasive_brief.pdf (last accessed on September 27, 2013).

[36] Richard E. Petty & John T. Cacioppo, *The Effects of Involvement on Responses to Argument Quantity and Quality: Central and Peripheral Routes to Persuasion*, Journal of Personality and Social Psychology, 1984, Vol. 46, No. 1, at 70, available at http://psychology.uchicago.edu/people/faculty/cacioppo/jtcreprints/pc84a.pdf (last accessed September 27, 2013) ("If the arguments are found to be weak and specious, they will be counterargued and the message will be resisted--or boomerang (change opposite to that intended) may even occur"). An additional advantage of only using persuasive arguments is that counsel will be positioned as a credible advocate.

[37] For an example of the framing bias, see Elizabeth F. Loftus & John C. Palmer, Reconstruction of Automobile Destruction: An Example of the Interaction between Language and Memory, 13 J. of Verbal Learning and Verbal Behavior 13, at 385-386 (1974).

largely contrasting approaches to direct examination.[38] Once again, a focused, substantive direct examination seems to be an important element of the claimant's case. In a recent hearing, we (as respondent) insisted on a short direct examination because – as is natural at hearings – certain issues gained importance during the give and take of cross-examinations. We presented our themes quickly with three choice questions before the claimant changed the subject with cross-examination.

Cross-examination is perhaps the most controversial and least understood aspect of the current arbitration system. No common law court would admit testimony without the opportunity to cross-examine to test the credibility of the witness. On the other hand, "[c]ivil law lawyers do not generally find much point in questioning that adds nothing to the information that is already in statements or documents before the tribunal. It is often an unstated assumption that witness statements are party-generated."[39] When we raised an issue about cross-examination at a recent LCIA symposium, the civil-trained moderator groaned: "I suppose if you want to talk about it, but it is usually boring and a waste of time." In some countries, the practice of American-style cross-examination is prohibited and otherwise insulting to the ultimate decision-makers.[40] The prominent arbitrator and counsel, Robert Smit, recounts a clash of cultures when he thought he was doing an excellent job undermining the credibility of the witness. The German chairman stopped him, saying: "Mr. Smit, I am uncomfortable because, as you may know, where I come from in Germany, representatives of a party historically have

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[38] IBA Country Guides on the Practice of Arbitration, available at http://www.ibanet.org/Article/Detail.aspx?ArticleUid=a646cf32-0ad8-4666-876b-c3d045028e64&goback=%2Egde_2122809_member_274627314#%21.

[39] Lew & Shore, 54 Disp. Resol. J. at 34; *see also* Elsing & Townsend, *Bridging the Common Law Civil Law Divide in Arbitration* at 4.

[40] Cornelis D. van Boeschoten, *Hague Conference Conventions & the United States: A European View*, 57 Law & Contemp. Probs. 47, 51 (Summer 1994).

never been required to testify against the company they represent. But for this witness to answer truthfully to the questions you are posing him, he would have to give answers that are completely at odds with the positions that the party he represents is taking in this arbitration . . ."[41]

Cross-examination may have a bad name in some circles because its purpose in sophisticated business cases is, at least partially, misunderstood. The wilting, weeping witness ravaged by counsel is the thing of TV lore but not reality or even the most important point. We once participated in a trial in which two hardened, experienced business executives broke down during *direct* examination due to the intensity of their dispute. The judge was disgusted and called a recess. In another trial, the judge interrupted with a joke whenever our cross-examination became too intense. The point of cross-examination, particularly in arbitration before sophisticated neutrals, is to emphasize key strengthens in your case and weaknesses in your opponent's case.

If respondent is going to take advantage of its primacy advantage, it will have to tell its story through the cross-examination of claimant's witness. Counsel who can control a witness using the techniques of cross-examination can tell his or her story and point out the weaknesses in the opponent's case through the mouth of the opposing witness.[42] That is a powerful way to have an impact, if done right, and risky or ruinous, if done wrong.

When a hearing starts with cross-examination of claimant's witnesses, respondent has a significant advantage in primacy only if he or she takes advantage of it through a focused cross-examination. Respondent can frame the issues, identify the areas of agreement and dispute, and

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[41] Lawrence W. Newman & Ben H. Sheppard, Jr., *Take the Witness: Cross-Examination in International Arbitration*, 251-52 (Juris 2010).

[42] Mark A. Cymrot "Cross-Examination in International Arbitration" *Dispute Resolution Journal*, vol. 62, no. 1 (Feb.-April 2007).

present his or her arguments before the claimant can say a word. To mitigate this advantage, claimant should argue for a limited direct examination, and if that approach is unacceptable to the tribunal, prepare re-direct examinations for its key witnesses that tell its side of the same story. Respondents, nonetheless, can steal the first impression.

A closing argument will afford claimants one more opportunity to make an oral presentation to the tribunal. Claimants should seize the opportunity to make oral presentations to the tribunal to keep chipping away at the lost chance to present their case first and the recency advantage respondent gains by cross-examining the claimant's rebuttal witnesses. While these arguments may be presented in briefs later on, making a final impression on arbitrators while at the oral hearing could leave them with something to think about in the time before final submissions are received. Also, since arbitrators often start their deliberations immediately after the close of the hearing, they are likely to form a view on most of the issues, which may be difficult to change with a written closing some weeks later.[43]

5. CONCLUSION

The party presenting first at a hearing has the advantage of making the first impression. Even at procedural hearings, we try to frame the issues by talking first. At the merits hearing, the process is more formalized but still the result of party agreement. In negotiating an arbitration procedure, advocates should be mindful of the impact of who gets to make the first impression. Short opening statements and direct examinations help claimants define the issues and give the first impression to the tribunal, something respondents can easily argue against in the current atmosphere. The last word is also important but seemingly less important than the

[43] Audley Sheppard, *Closing Arguments*, in Doak Bishop and Edward G. Kehoe, eds., The Art of Advocacy in International Arbitration (Juris, 2010). P.467.

first impression. It is, of course, undeniable that other biases and other factors affect outcomes. But in a close dispute, addressing the special procedural dynamics of the current arbitration proceedings can make the difference between winning and losing or the degree of the outcome. There is plenty to think about.