Bond University Symposium

Internationalisation, Curriculum and the Future Practice of Law

Does Cross-Examination Translate?

Justice James Douglas

Supreme Court of Queensland

24 November 2012

Many international commercial arbitrations are conducted according to procedural rules similar to those applying in common law jurisdictions, including the use of disclosure and cross-examination. Some civilian lawyers argue that those procedural steps cause delay and that the use of civilian procedure would increase the efficiency of the arbitral process. Most of the hybrid forms of procedure devised for use in such arbitrations assume, however, that disclosure and cross-examination will occur. Does this place lawyers from civil law jurisdictions at a disadvantage? In France the law changed 12 years ago to permit cross-examination in criminal cases. In civil cases the questioning is still performed by the judge who may ask questions suggested by the parties. French lawyers who practise in commercial arbitration maintain that they have developed skill in cross-examination, can teach other French lawyers the techniques and forecast that more widespread use of cross-examination will affect the administration of French justice significantly. The paper considers the likelihood of this occurring and the significance of the topic for the international harmonisation of procedural rules given Paris's importance as the base for the International Chamber of Commerce's International Court of Arbitration.

Maritime law is one of the key areas of practice where internationalisation, curriculum and the future practice of law coalesce. One of the main forums for discussing the development of maritime law internationally is the Comité Maritime Internationale, an organisation based in Antwerp in Belgium and currently headed by the prominent Australian maritime lawyer, Stuart Hetherington. Its most recent quadrennial conference was held last month in Beijing and Shanghai. During a session on maritime arbitration there was an impassioned contribution to the debate by a Dutch maritime lawyer criticising the cost and expense associated with too many international arbitrations. She attributed the blame to the use of common law procedure, including overuse of discovery, cross-examination and the expense of engaging barristers when ordinary lawyers would do.

We all know about the problems of disclosure stemming from the huge numbers of documents used in modern commercial life and the difficulty and expense lawyers and clients experience in sorting the wheat from the chaff. As a common lawyer, however, I still find it surprising to hear cross-examination criticised as a tool of delay. I am more used to thinking of it in Wigmore's terms as "the greatest legal engine ever invented for the discovery of truth". What is not often remembered is that he said it in this context:[1]

> "Not even the abuses, the mishandlings, and the puerilities which are so often found associated with cross-examination have availed to nullify its value. It may be that in more than one sense it takes the place in our system which torture occupied in the mediaeval system of the civilians. Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovery of truth. However difficult it may be for the layman, the scientist, or the foreign jurist to appreciate this its wonderful power, there has probably never been a moment's doubt upon this point in the mind of a lawyer of experience. 'You can do anything,' said Wendell Phillips, 'with a bayonet - except sit upon it.' A lawyer can do anything with a cross-examination - if he is skilful enough not to impale his own cause upon it. He may, it is true, do more than he ought to do; he may 'make the worse appear the better reason, to perplex and dash maturest counsels' - may make the truth appear like falsehood. But this abuse of its power is able to be remedied by proper control. The fact of this unique and irresistible power remains, and is the reason for our faith in its merits. If we omit political considerations of broader range, then cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial procedure."

In the hands of a master, cross-examination can tear an opponent's case apart. In the hands of a novice, it can cause irreparable damage to his or her client. I suspect that fear of its consequences may drive many of the settlements that occur in our system – a greater proportion, I believe, than in some of the civilian systems. Proper cross-examination does, however, take time both in preparation and normally in performance and is often most effective when disclosure has been pursued in a focussed fashion. I expect that it is because of our use of disclosure and cross-examination that trials in our system take longer than equivalent trials in civil law systems.

To illustrate that let me mention a case I was in as a barrister more than 10 years ago. I was instructed on behalf of a German corporation in litigation here where the trial lasted 7 or 8 days in court. It eventually ended up in the High Court because of the legal issues involved but the trial, I believe, was conducted reasonably efficiently by both sides. Part of the time

---

[1] *Wigmore on Evidence* (Chadbourn Revision, Little, Brown and Co, Boston, Toronto (1974)) vol 5 §1367.

was taken by cross-examination on affidavits which had been filed previously by both sides and which were extensive. In a way, then, the procedure was a hybrid as there was evidence on affidavit as well as cross-examination. An in-house German lawyer employed by our client attended the hearing. Some time after it concluded, I was talking to him about differences between our respective systems and he said that the case would have taken a much shorter time in a German court. When I asked him how much less time, he said that it would have lasted a maximum of two days. I was surprised but, on reflection, thought that, in that case, the cross-examination by both sides probably did not affect the factual findings likely to be made by the judge to any great extent.

There is, therefore, reason for us to reflect on our own procedures and to try to streamline them. I, for one, however, would not want to do away with either disclosure or cross-examination. They can both benefit from a close focus on relevance, proper technique and ethical behaviour by counsel. Recently a leading Australian judge, and author of the leading Australian textbook on the law of evidence, giving judgment in a criminal case where the prosecutor had transgressed seriously in his cross-examination of the defendant, described some of the rules governing that process in these terms:[2]

> "[119] They are rules which necessarily developed over time once it came to be established that oral evidence should be elicited, not by means of witnesses delivering statements, and not through questioning by the court, but by means of answers given to a succession of particular questions put, usually by an advocate, and often in leading form. A cross-examiner is entitled to ask quite confined questions, and to insist, at the peril of matters being taken further in a re-examination which is outside the cross-examiner's control, not only that there be an answer fully responding to each question, but also that there be no more than an answer. By these means a cross-examiner is entitled to seek to cut down the effect of answers given in chief, to elicit additional evidence favourable to the cross-examiner's client, and to attack the credit of the witness, while ensuring that the hand of the party calling the witness is not mended by the witness thrusting on the cross-examiner in non-responsive answers evidence which that witness may have failed to give in chief. To this end a cross-examiner is given considerable power to limit the witness's answers and to control the witness in many other ways."

Justice Heydon went on to say:

> "[132] It is not unique in the law of evidence to find that the more closely the rules for admissibility are complied with, the greater the utility of the testimony from the point of view of the party eliciting it. It is certainly the case in this field. The rules permit a steady, methodical destruction of the case

---

2 *R v Libke* [2007] HCA 30; (2007) 230 CLR 559, 598-605 at [119]-[133] per Heydon J.

> advanced by the party calling the witness, and compliance with them prevents undue sympathy for the witness developing. It is perfectly possible to conduct a rigorous, testing, thorough, aggressive and determined cross-examination while preserving the most scrupulous courtesy and calmness."

My associate three years ago was a recently sworn in French judge aged 28. One of his observations to me at the conclusion of his year in Brisbane was that he was impressed by the technique and the results of cross-examination. He had the good fortune to see several fine examples of it in trials conducted before me where the result was certainly affected by counsel's skill in that area.

His overall conclusion about our system compared to the French was that he believed that ours was more expensive but designed to be fairer in the individual case while the French was more efficient and designed to achieve more expeditious justice overall. He also believes that the French system allows cases where the parties are not well off and are represented by less competent lawyers to cope with those issues better because the judge can identify a problem and ask for further investigation to occur.

We have kept in touch since 2009 and continue to compare notes about our systems and he is the source of some of the anecdotal evidence I have concerning the relatively new phenomenon in France of cross-examination in criminal cases.

Before I develop that, however, let me say something more about procedure in arbitration. It appears to be the case that a large proportion of international commercial arbitrations are conducted according to procedural rules that are at least a hybrid of common law and civil law procedural rules. An interesting recent example can be found in the *Principles of Transnational Civil Procedure* developed by the American Law Institute and Unidroit. Rule 29.4 deals with questioning of witnesses including cross-examination. The commentary says:[3]

> "The traditional distinction between common-law systems, which are based upon direct and cross-examination, and civil-law systems, which are based upon examination by the court, is well known and widely discussed in the comparative legal literature. Equally well known are also the limits and defects of both methods. The chief deficiency in the common-law procedure is excessive partisanship in cross-examination, with the danger of abuses and of distorting the truth. In the civil law the chief deficiency is passivity and lack of interest of the court while conducting an examination, with the danger

[3] *ALI/UNIDROIT Principles of Transnational Civil Procedure*, (Cambridge University Press, 2006) p 145.

> of not reaching relevant information. Both procedures require efficient technique, on the part of the judge in civil-law systems and the lawyers in common-law systems. The problem is to devise a method effective for a presentation of oral evidence aimed at the search for truth."

The rules there, it was said, were intended to provide such a balanced method.

If lawyers from a civil law jurisdiction are not skilled in cross-examination, however, are they placed at a significant disadvantage in engaging in international litigation or arbitration? Do they need better training in technique?

In France the law changed 12 years ago with the inclusion in the *Code Of Criminal Procedure* of Article 442-1 providing that "… the public prosecutor and the advocates for the parties may put questions directly to the defendant, the civil party, the witnesses or anyone else called to testify, by asking the presiding judge for leave to speak. The defendant and the civil party may equally put questions through the presiding judge as intermediary."

Before then, Article 442 simply provided that: "The presiding judge interrogates the defendant and hears his statement before hearing the witnesses." The changes were part of a process designed to lessen the inquisitorial nature of the French criminal process.

That introduction of the new power to cross-examine occurred on 15 June 2000. It appears responsive to Article 6 paragraph 3(d) of the *European Convention on Human Rights*, which gives everyone charged with a criminal offence the right to examine opposing witnesses. That convention has been a significant driver of change in French criminal procedure.[4] Anecdotally, also, one is told that the change may have been driven by the experiences of French citizens observing American television courtroom dramas. One gathers, however, that still, even in criminal cases, cross-examination by the lawyers occurs rarely and not particularly well but the technique may be improving in the Cours d'Assises where the more serious crimes are tried. The pre-existing culture where the judge questions witnesses as a means of verifying the dossier, the information on the file, remains the main technique of examination in most cases. There has not yet been a significant cultural change. It may be more common in Paris but has been slower in filtering out to the regions.

Article 214 of the *Code of Civil Procedure* retains the old system in civil cases by which parties "neither interrupt, question nor attempt to influence the witnesses who testify, nor talk

---

[4] Jacqueline Hodgson, *French Criminal Justice* (Hart Publishing, 2005) pp 39-45.

to them directly under the penalty of exclusion. The judge, if he deems it proper, asks (on behalf of the parties) the questions that the parties have submitted to him after the examination of the witness." The rhetorical final address seems to be the main focus for the art of advocacy in French courtrooms rather than the examination of witnesses.

One of the proponents for the greater use of cross-examination in the French system, M Christophe Ayela, makes the point, however, that French advocates are quite capable of mastering the art of cross-examination in international arbitrations. He also promotes the use of cross-examination as a means of modernising the French court system while acknowledging the difficulties of changing old habits.[5] He points out that the law relating to arbitration in France has permitted the use of cross-examination since the early 1980s: so too the rules of the International Bar Association used in international arbitration, at least since 1999.[6] He says that French advocates specialising in international arbitration are perfectly accustomed to cross-examination and practise it very frequently, creating a synthesis between civil law procedures and those of the common law in this area. He believes that French criminal lawyers can learn from their colleagues who specialise in international arbitration and develop their technique in cross-examination. M Ayela teaches cross-examination for the Paris Bar School and presumably is well aware of what it means to be an effective interrogator.

In other papers, he and other authors advanced the view that the use of cross-examination can assist in avoiding some of the "judicial shipwrecks" which have occurred in recent years in France where some judges have been criticised for being out of their depth in their assessment of witnesses and in their decisions in large scale criminal prosecutions.

He emphasises the utility of cross-examination in dealing with expert evidence and argues that that will encourage experts to improve the quality of their work. He also believes that greater use of cross-examination will lead to a decline in the power of the judge in their system, that this is more consistent with the *European Convention on Human Rights* and will

---

5 *Juriste International* No 2007-1, pp 35-37.

6 See Article 8(3)(b) of the *IBA Rules on the Taking of Evidence in International Arbitration* (2010). See also the *Chartered Institute of Arbitrators Arbitration Rules* (2000 Edition) and cf Art 25(6) of the *International Chamber of Commerce Rules of Arbitration* (2012) where the default position is that the arbitral tribunal may decide the case solely on the documents submitted by the parties unless any of the parties requests a hearing.

enhance the role of the advocate in the French system.[7] One could almost embrace him as a fully fledged member of a common law bar![8]

It is also significant that, in the International Criminal Court and the International Criminal Tribunals in The Hague, English and French are the languages used. Their procedures are another hybrid of the civil and common law systems. The English Bar has, since 1999, been conducting courses in the technique of cross-examination for civilian lawyers appearing before those bodies.

As I have said, however, the anecdotal evidence suggests that this particular common law technique is still not used much in day to day French legal practice. Perhaps this is the other side of the coin of the attempt to introduce single court-appointed experts into our system. That is a model said to be based on French and German civilian practice which is yet to attract much support among local lawyers used to an adversarial form of litigation.

One other feature inhibiting the rapid adoption of techniques of cross-examination is that it is not a skill readily taught in a classroom. Rather, it is a performance skill capable of being taught but requiring experienced demonstrators and coaches rather than academic tutors. Much work has been done in this area in the common law jurisdictions since United States Chief Justice Warren Burger's criticism of the standards of advocacy in America compared to those in the United Kingdom in the 1970s. The National Institute of Trial Advocacy in the United States and similar bodies in other common law jurisdictions such as Australia, England, Ireland and other mixed jurisdictions where there are specialised Bars such as Scotland and South Africa have helped improve the standards of advocacy. Much of the coaching focuses on cross-examination. In those jurisdictions there are specialised independent groups of barristers or advocates who normally provide the training. That tradition is lacking in the civilian jurisdictions so it is probably harder to find as many experienced coaches.

The apparent ability of French lawyers who practise in international arbitration to use those skills, however, is significant. The ICC in Paris is the base for its International Court of Arbitration. It is one of the major bodies coordinating international commercial arbitration along with groups such as the Chartered Institute of Arbitrators in London and the

---

7 See *La Semaine Juridique* No 46, 15 November 2006, pp 2091-2095.

8 See also Luc Dufresne: *Interrogatoire et Contre-Interrogatoire, Clés D'un Procès Pénal Équitable, Le Figaro*, 5 April 2006.

International Bar Association. The influence of those bodies in transnational dispute resolution is significant. Although the ICC's arbitration rules' default position under Article 25(6) is that the arbitral tribunal may decide the case solely on the documents submitted by the parties unless any of the parties requests a hearing, provision can still be made for a hearing where the witnesses are also examined and cross-examined.

International arbitrations can provide a useful testing ground for changes in procedure, such as the use of "hot-tubbing" in the examination of expert witnesses. More focussed use of disclosure and cross-examination for controversial issues, leaving affidavit evidence to deal with the uncontroversial issues, is another form of hybrid technique. The development of procedural techniques among lawyers engaged in international arbitration is likely to lead to some harmonisation in the techniques of dispute resolution used also at the national level. If that can lead to some convergence between continental efficiency and common law fairness it may be a useful result. Rolls Royce litigation may eat up too much of the parties' resources but judicial inquiries may need to be subjected to vigorous testing of witnesses by a party interested in the result. That is where cross-examination shines.

To revert to the question I posed in the title to the paper, "Does cross-examination translate?" – the evidence is that it can translate into the French system. As with any significant cultural change, however, it is likely to be some time before the novel becomes the normal.