

TAKE THE WITNESS: CROSS-EXAMINATION IN INTERNATIONAL ARBITRATION, 2ND ED

LAWRENCE W NEWMAN AND TIMOTHY G NELSON, EDS
(HUNTINGTON, NY: JURIS, 2019)

*Reviewed by Janet Walker, C. Arb**

In a world of increasing diversity in the conduct of international arbitrations, one of the common challenges and aspirations for counsel from all legal traditions is that of effective cross-examination. Few skills are more elusive, and few are more effective when mastered. So there is reason to celebrate the release of the second edition of the very engaging and useful *Take the Witness: Cross-Examination in International Arbitration*—a work that will be indispensable to those who are unfamiliar with the relevant techniques, and equally enjoyable to those whose practices are steeped in them.¹

Lawrence Newman returns as editor and, following the untimely passing of Ben Sheppard, his co-editor in the first edition, he is joined by Timothy Nelson. Together they present a series of 29 chapters written by a team of more than three dozen authors, whose stellar reputations ensure the quality of the guidance provided. The authors include many from the first edition, whose chapters have been lightly updated, and a number of new contributors from among the ranks of the best known and most qualified international arbitration practitioners.

As can be expected, many of the authors are common lawyers writing about classic subjects of continuing general

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¹ Lawrence W Newman & Timothy G Nelson, eds, *Take the Witness: Cross-Examination in International Arbitration*, 2nd ed (Huntington, NY: Juris Publishing Inc, 2019).

interest, but there are also contributors from the civil law and some very useful new chapters among the wonderful mix of topics. Part I includes chapters on strategy and tactics by Lawrence Newman and on effective witness control by the late Ben Sheppard. Lawrence Newman focuses on best practices in dealing with one of the distinctive features of cross-examination in international arbitration—that it responds to witness statements, rather than pleadings and discovery transcripts—and he offers some gems from his experience on the place for *ad hominem* cross-examination and the need to develop one’s own style.² The late Ben Sheppard’s chapter, drawn from a background in American trial advocacy, highlights the tried and true techniques for taking charge of a process that might otherwise be fraught with uncertainty.³

Part I also reprises two chapters on one of the greatest challenges in the art of cross-examination: that of impeaching a witness. David Haigh encourages readers to be mindful of the consensual and multicultural nature of international arbitration, particularly where it occurs in commercial disputes. He counsels readers to appreciate that, even in the course of an adversarial proceeding, open hostility to a witness can be jarring and is rarely persuasive.⁴ William Rowley and Robert Wisner highlight the varying purposes of cross-examination—attacking credibility, establishing the truth, arguing one’s case—and how to adapt one’s approach to achieve each of these ends.⁵

² Lawrence W Newman, “Strategy (and Some Tactics) in Cross-Examination” in Newman & Nelson, *supra* note 1 at Chapter 1.

³ Ben H Sheppard Jr, “Taking Charge: Proven Tactics for Effective Witness Control” in Newman & Nelson, *supra* note 1 at Chapter 2.

⁴ David R Haigh, “When to Be Friendly and When to Impeach” in Newman & Nelson, *supra* note 1 at Chapter 5.

⁵ J William Rowley & Robert Wisner, “Confrontation: Techniques for Impeachment” in Newman & Nelson, *supra* note 1 at Chapter 6.

They explain the “rule in *Browne v. Dunn*”,⁶ a common reference point that often eludes those who have not studied or practised in a common law jurisdiction, and then give step-by-step instructions on the various methods of impeachment.

Rounding out Part I are two new chapters on topics of fundamental interest. Timothy Nelson helpfully locates cross-examination in its historical context, highlighting some traditional features of cross-examination that remain valuable in the current environment of international arbitration.⁷ And Wendy Miles explains the importance of documents to cross-examination and how best to use them to advantage.⁸

Part II moves on to specific practical tips for practitioners, carrying over from the first edition a series of useful “how-to” chapters. Lawrence Shore gives readers an excellent checklist of ground rules to establish with the tribunal in advance, in order to enable effective cross-examination when working, as one does, without discovery transcripts; and he gives readers another useful list of points to help in counsel’s preparation for this task.⁹ This chapter is followed by Lawrence Newman’s account of the role of intuition in developing a rapport with the witness and in making the most of the unintended candour this rapport might evoke.¹⁰ The final “how-to” chapter is Arthur Rovine’s equally illuminating account of his experience with the evolving tone of cross-examination over the years, as the

⁶ *Browne v Dunn*, [1893] J.C. No 5, (1894) 6 R 67 at para 22.

⁷ Timothy G Nelson, “The Common Law Roots of Cross-Examination: Why They Matter in International Arbitration (Even When the Rules Do Not Apply)” in Newman & Nelson, *supra* note 1 at Chapter 3.

⁸ Wendy J Miles, “Cross-Examining on Documents” in Newman & Nelson, *supra* note 1 at Chapter 4.

⁹ Lawrence Shore, “Cross-Examination without Discovery: Not Blind, but with Blinders” in Newman & Nelson, *supra* note 1 at Chapter 7.

¹⁰ Lawrence W Newman, “Intuition in Cross-Examination” in Newman & Nelson, *supra* note 1 at Chapter 8.

practices of the common law converge with those of the civil law.¹¹

This edition also carries forward the especially useful “how-not-to” chapters, including those on: identifying and avoiding pitfalls and mistakes by Steven Hammond;¹² working against the clock by Richard Kreindler, now joined by Christopher Moore;¹³ and Hilary Heilbron’s and Klaus Reichert’s sage guidance on when to cross-examine—and when to stop.¹⁴ Part II is completed by a new chapter by Rory Millson on disastrous cross-examinations that underscores salutary points such as: failed impeachment is worse than no impeachment at all; once the tribunal gets the gist, move on; and rudeness will only drive the tribunal to the witness’s defence.¹⁵

Parts III and IV reprise the valuable guidance from the first edition on two specialized topics: placing cross-examination in the larger framework of case presentation, and cross-examining experts. On the first topic, Robert Rifkind offers detailed instructions on the delicate balance of appropriate but effective witness preparation—a much-vexed question in the increasing engagement between diverse legal cultures in international arbitration.¹⁶ Mark Baker provides the all-important reminder

¹¹ Arthur R Rovine, “Polite Cross-Examination: A Symbolic Step toward Further Uniformity in International Arbitration” in Newman & Nelson, *supra* note 1 at Chapter 9.

¹² Steven A Hammond, “Identifying and Avoiding Pitfalls and Mistakes in Cross-Examination” Newman & Nelson, *supra* note 1 at Chapter 10.

¹³ Richard Kreindler & Christopher P Moore, “Cross-Examination against the clock” in Newman & Nelson, *supra* note 1 at Chapter 12.

¹⁴ Hilary Heilbron & Klaus Reichert, “When to Cross-Examine and When to Stop” in Newman & Nelson, *supra* note 1 at Chapter 13.

¹⁵ Rory Millson, “Disastrous Cross-Examination” in Newman & Nelson, *supra* note 1 at Chapter 11.

¹⁶ Robert S Rifkind, “Preparing the Witness for Cross-Examination” in Newman & Nelson, *supra* note 1 at Chapter 14.

to stay laser-focused on the forensic objective of the cross-examination, and he does not hesitate to point out the tribunal's role in giving counsel the necessary time and freedom from interference to pursue their line of questioning effectively.¹⁷

Turning to the examination of experts, John Townsend shares with readers a trick of the trade in dealing with paid liars: there may be nothing to be done other than to attack, but it should be done politely, seated, and with a smile. He goes on to give helpful tips for effective navigation of "hot tubs".¹⁸ Kim Landsman provides detailed instructions on the many techniques that can assist in dealing with technical experts, among them: the importance of acquiring a "plundering" knowledge of the subject matter, if not an intellectual one; getting the low-down on the opposing expert; and knowing when to aim to discredit the expert, or the conclusions in the report, and when simply to try to elicit kind remarks about your own expert.¹⁹ George Bermann offers a most thoughtful discussion on what constitutes good expert testimony on the law—useful guidance for both expert witnesses and counsel cross-examining them.²⁰

Part IV is rounded out with Irving Younger's Ten Commandments of Cross-Examination, adapted by Carolyn Lamm, Francis Vasquez, and Matthew Drossos for the

¹⁷ C Mark Baker, "The Effective Use of a Powerful Evidentiary Tool: Considerations for Both Counsel and Arbitrators" in Newman & Nelson, *supra* note 1 at Chapter 15.

¹⁸ John M Townsend, "Crossing the Hot Tub: Examining Adverse Expert Witnesses in International Arbitration" in Newman & Nelson, *supra* note 1 at Chapter 16.

¹⁹ Kim J Landsman, "Cross-Examining a Technical or Scientific Expert" in Newman & Nelson, *supra* note 1 at Chapter 17.

²⁰ George A Bermann, "Cross-Examining the Legal Expert" in Newman & Nelson, *supra* note 1 at Chapter 18.

examination of experts in international arbitration.²¹ These are worth repeating here:

1. Know Your Purpose
2. Adapt to Your Audience
3. Do Your Homework
4. Don't Ask Questions that Have a High Probability of Hurting You
5. Focus on What the Expert Did *Not* Do
6. Look for Altered Theories from Report to Report and Confront Changes or Backpedaling
7. Simplify Complicated Concepts
8. Challenge Group Reports
9. Do Not Engage in Impromptu Debates or Complex Analysis
10. Make Appropriate Use of Technology

While these “guidelines” (as the authors respectfully describe them) largely speak for themselves, the authors have diligently provided helpful explanations of each, together with excerpts from hearing transcripts illustrating the points that they make.

Part V contains a justifiably expanded discussion of the challenges faced by cross-examination as international arbitration continues to venture beyond its traditional comfort zone in the common law to embrace the range of legal traditions in the wider world. Bernardo Cremades and David Cairns provide a reality check for common lawyers who might imagine that there is no counterpart in the civil law for effective witness

²¹ Carolyn B Lamm, Francis A Vasquez Jr & Matthew N Drossos, “Ten Guidelines for the Cross-Examination of Financial and Technical Experts” in Newman & Nelson, *supra* note 1 at Chapter 19.

examination.²² As in the first edition, this is followed by Rob Smit's valuable lessons from experience on fine-tuning the approach when appearing before civilian arbitrators.²³ The second edition also includes Sophie Nappert and Christopher Harris's insights into the English approach and how it fares in the broader international context,²⁴ Michael Hwang and Colin Ong's discussion of the issues arising in the context of Asian arbitrations,²⁵ Joel Richardson's explanation of the cultural challenges in the cross-examination of Asian witnesses,²⁶ and Henri Alvarez's discussion of cross-examination in Latin American arbitrations.²⁷ All of these chapters continue to contribute to the comprehensiveness of the work. To them is added a new chapter by Karyl Nairn on the special issues arising in cross-examining witnesses from former Soviet Union countries. These issues arise from different attitudes to authority and the wisdom of disclosure.²⁸ Part V concludes with James Carter's helpful chapter on the logistical hazards of cross-

²² Bernardo M Cremades & David JA Cairns, "Cross-Examination in International Arbitration: Is It Worthwhile?" in Newman & Nelson, *supra* note 1 at Chapter 20.

²³ Robert H Smit, "Cross-Examining Witnesses before Civil Law Arbitrators" in Newman & Nelson, *supra* note 1 at Chapter 21.

²⁴ Sophie Nappert & Christopher Harris, "The English Approach to Cross-Examination in International Arbitration" in Newman & Nelson, *supra* note 1 at Chapter 22.

²⁵ Michael Hwang & Colin YC Ong, "Effective Cross-Examination in Asian Arbitrations" in Newman & Nelson, *supra* note 1 at Chapter 23.

²⁶ Joel Richardson, "Understanding Cultural Challenges in the Cross-Examination of Asian Witnesses" in Newman & Nelson, *supra* note 1 at Chapter 24.

²⁷ Henri C Alvarez, "Effective Cross-Examination in International Arbitrations Involving Latin America" in Newman & Nelson, *supra* note 1 at Chapter 25.

²⁸ Karyl Nairn, "Cross-Examination of Witnesses from Former Soviet Union Countries" in Newman & Nelson, *supra* note 1 at Chapter 26.

examining through interpreters, as the ambiguities of language create confusion and controversy.²⁹

Finally, in an entirely new Part VI, two areas of emerging significance are explored. Tai-Heng Cheng explores whether special considerations should apply to cross-examination in investment arbitrations, particularly because the proceedings are public and the cross-examination may involve questioning an official of the host state.³⁰ And David Roney tackles the increasingly common prospect of having to cross-examine witnesses via videoconference. He details the problems that can arise and the inevitable difficulties remote cross-examination, and offers valuable guidance for minimizing the difficulties and taking advantage of the remote format.³¹

In sum, *Take the Witness* is a highly accessible and thoroughly enjoyable work. It offers a thoroughgoing foundation for those who have not previously conducted a cross-examination, and it serves as an excellent sourcebook for even the most seasoned counsel, giving them the occasion to reflect on their own experiences and insights and refine their skills. As might be hoped from a collection of concise, to-the-point pieces by the best of advocates, readers will dip into one chapter or another only to find themselves so engaged that they have finished several chapters before realizing that time has passed. A good read for all.

²⁹ James H Carter, "The Perils of Cross-Examination in a Language Other than the Language of the Proceeding" in Newman & Nelson, *supra* note 1 at Chapter 27.

³⁰ Tai-Heng Cheng, "Are There Special Considerations for How to Handle Cross-Examination in Investment Arbitration?" in Newman & Nelson, *supra* note 1 at Chapter 28.

³¹ David Roney, "Cross-Examination by Videoconference" in Newman & Nelson, *supra* note 1 at Chapter 29.