Questions About This Publication

For assistance with shipments, billing or other customer service matters, please call our Customer Services Department at:
1- 631-350-2100

To obtain a copy of this book, call our Sales Department:
1-631-351-5430
Fax: 1-631-673-9117

Toll Free Order Line:
1-800-887-4064 (United States & Canada)

See our web page about this book:
www.arbitrationlaw.com

Copyright © 2019
by JurisNet, LLC

All Rights Reserved

Printed in the United States of America

JurisNet, LLC
Huntington, New York 11743
USA
www.arbitrationlaw.com
Summary Contents

Contents........................................................................................................... ix

Foreword by Charles B. Renfrew ............................................................... xxi

Preface to the Second Edition ...................................................................... xxiii
  by Lawrence W. Newman and Timothy G. Nelson

Preface to the First Edition .......................................................................... xxv
  by Lawrence W. Newman and Ben H. Sheppard, Jr.

About the Authors ........................................................................................ xxix

PART ONE

The Basics of Cross-Examination in International Arbitration
  .................................................................................................................. 1

CHAPTER 1 ................................................................................................. 3
Strategy (and Some Tactics) in Cross-Examination
  Lawrence W. Newman

CHAPTER 2 .............................................................................................. 17
Taking Charge: Proven Tactics for Effective Witness Control
  Ben H. Sheppard, Jr.

CHAPTER 3 .............................................................................................. 31
The Common Law Roots of Cross-Examination:
  Why They Matter in International Arbitration
  (Even When the Rules Do Not Apply)
  Timothy G. Nelson

CHAPTER 4 .............................................................................................. 63
Cross-Examining on Documents
  Wendy J. Miles
# SUMMARY CONTENTS

**CHAPTER 5** ................................................................. 71
When to Be Friendly and When to Impeach
   David R. Haigh

**CHAPTER 6** ................................................................. 85
Confrontation: Techniques for Impeachment
   J. William Rowley and Robert Wisner

**PART TWO**

Tips for the Practitioner................................................. 115

**CHAPTER 7** ................................................................. 117
Cross-Examination without Discovery: Not Blind,
but with Blinders
   Laurence Shore

**CHAPTER 8** ................................................................. 131
Intuition in Cross-Examination
   Lawrence W. Newman

**CHAPTER 9** ................................................................. 139
Polite Cross-Examination: A Symbolic Step toward
Further Uniformity in International Arbitration
   Arthur W. Rovine

**CHAPTER 10** .............................................................. 155
Identifying and Avoiding Pitfalls and Mistakes in
Cross-Examination
   Steven A. Hammond

**CHAPTER 11** .............................................................. 175
Disastrous Cross-Examination
   Rory Millson
CHAPTER 12........................................................................................ 193
Cross-Examination against the Clock
    Richard Kreindler and Christopher P. Moore

CHAPTER 13........................................................................................ 207
When to Cross-Examine and When to Stop
    Hilary Heilbron and Klaus Reichert

PART THREE
Anticipating Cross-Examination in the Presentation of Witnesses........................... 217

CHAPTER 14........................................................................................ 219
Preparing the Witness for Cross-Examination
    Robert S. Rifkind

CHAPTER 15........................................................................................ 227
The Effective Use of a Powerful Evidentiary Tool:
    Considerations for Both Counsel and Arbitrators
    C. Mark Baker

PART FOUR
Special Considerations in the Cross-Examination of Experts...................................... 239

CHAPTER 16........................................................................................ 241
Crossing the Hot Tub: Examining Adverse Expert Witnesses in International Arbitration
    John M. Townsend

CHAPTER 17........................................................................................ 247
Cross-Examining a Technical or Scientific Expert
    Kim J. Landsman
## SUMMARY CONTENTS

<table>
<thead>
<tr>
<th>CHAPTER</th>
<th>TITLE</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>18</td>
<td>Chapter 18: Cross-Examining the Legal Expert</td>
<td>261</td>
</tr>
<tr>
<td></td>
<td>George A. Bermann</td>
<td></td>
</tr>
<tr>
<td>19</td>
<td>Chapter 19: Ten Guidelines for the Cross-Examination of Financial</td>
<td>273</td>
</tr>
<tr>
<td></td>
<td>and Technical Experts</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Carolyn B. Lamm, Francis A. Vasquez Jr., and Matthew N. Drossos</td>
<td></td>
</tr>
<tr>
<td></td>
<td>PART FIVE: Cultural Issues</td>
<td>299</td>
</tr>
<tr>
<td>20</td>
<td>Chapter 20: Cross-Examination in International Arbitration: Is It</td>
<td>301</td>
</tr>
<tr>
<td></td>
<td>Worthwhile?</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Bernardo M. Cremades and David J.A. Cairns</td>
<td></td>
</tr>
<tr>
<td>21</td>
<td>Chapter 21: Cross-Examining Witnesses before Civil Law Arbitrators</td>
<td>321</td>
</tr>
<tr>
<td></td>
<td>Robert H. Smit</td>
<td></td>
</tr>
<tr>
<td>22</td>
<td>Chapter 22: The English Approach to Cross-Examination in International</td>
<td>331</td>
</tr>
<tr>
<td></td>
<td>Arbitration</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Sophie Nappert and Christopher Harris</td>
<td></td>
</tr>
<tr>
<td>23</td>
<td>Chapter 23: Effective Cross-Examination in Asian Arbitrations</td>
<td>347</td>
</tr>
<tr>
<td></td>
<td>Michael Hwang and Colin Y. C. Ong</td>
<td></td>
</tr>
<tr>
<td>24</td>
<td>Chapter 24: Understanding Cultural Challenges in the Cross-Examination</td>
<td>375</td>
</tr>
<tr>
<td></td>
<td>of Asian Witnesses</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Joel Richardson</td>
<td></td>
</tr>
</tbody>
</table>
SUMMARY CONTENTS

CHAPTER 25 ....................................................................................... 389
Effective Cross-Examination in International Arbitrations Involving Latin America
Henri C. Alvarez

CHAPTER 26 ....................................................................................... 403
Cross-Examination of Witnesses from Former Soviet Union Countries
Karyl Nairn

CHAPTER 27 ....................................................................................... 419
The Perils of Cross-Examination in a Language Other than the Language of the Proceeding
James H. Carter

PART SIX
Emerging Issues ................................................................. 427

CHAPTER 28 ....................................................................................... 429
Are There Special Considerations for How to Handle Cross-Examination in Investment Arbitration?
Tai-Heng Cheng

CHAPTER 29 ....................................................................................... 437
Cross-Examination by Videoconference
David Roney
Contents

Foreword by Charles B. Renfrew ............................................................... xxi
Preface to the Second Edition
   by Lawrence W. Newman and Timothy G. Nelson ............... xxiii
Preface to the First Edition
   by Lawrence W. Newman and Ben H. Sheppard, Jr. .......... xxv
About the Authors..................................................................................... xxix

PART ONE

The Basics of Cross-Examination in International Arbitration
................................................................................................... 1

CHAPTER 1............................................................................................... 3
Strategy (and Some Tactics) in Cross-Examination
   Lawrence W. Newman
I.   The Importance of Oral Testimony in Hearings ......................... 3
II.   How to Respond to Witness Statements ...................................... 4
III.  When Witness Statements Are Harmful – What to Do?.............. 6
IV.   Laying the Groundwork for the Cross-Examination.................... 7
V.    The Cross-Examiner’s Most Important Weapon –
       Documents ................................................................................... 9
VI.  Preparation for Cross-Examination............................................... 10
VII.  Ad Hominem Cross-Examination.............................................. 13
VIII. The Cross-Examiner’s Style....................................................... 14
IX.   Summing Up ..................................................................................... 15
CHAPTER 2 ............................................................................................ 17
Taking Charge: Proven Tactics for Effective Witness Control
Ben H. Sheppard, Jr.

I. Preliminaries: A Disclosure, a Concession and a Declaration ................................................................. 17
II. Proven Tactics for Effective Witness Control .............................................. 18
   A. First Tactic: Be Prepared ........................................................................ 19
   B. Second Tactic: Ask Leading Questions ................................................. 19
   C. Third Tactic: Ask Only Questions to Which You Already Know (and Can Prove You Know) the Answer ........................................................................ 22
   D. Fourth Tactic: Ask Clear, Simple Questions ........................................ 23
   E. Fifth Tactic: Do Not Let the Witness Merely Repeat Direct Testimony ......................................................................................... 25
   F. Sixth Tactic: Do Not Quarrel with the Witness ..................................... 25
   G. Seventh Tactic: Save the Argument for Closing ................................ 25
   H. Eighth Tactic: Use Cross-Examination to Highlight Favorable Documents ......................................................................................... 26

CHAPTER 3 ............................................................................................ 31
The Common Law Roots of Cross-Examination: Why They Matter in International Arbitration (Even When the Rules Do Not Apply)
Timothy G. Nelson

I. The “Audience” and the Record ........................................................................ 32
II. Direct Testimony and Cross-Examination ......................................................... 34
III. Nature of Direct and Cross-Examination ....................................................... 41
IV. Expert Testimony .......................................................................................... 45
V. Cross-Examination: Exhibits that Can Be Used ........................................ 48
VI. The Rule in Browne v. Dunn ........................................................................ 56
CONTENTS

CHAPTER 4 ............................................................................................. 63
Cross-Examining on Documents
Wendy J. Miles
I. The Importance of Documents for Cross-Examination..............64
II. Using the Documents in Cross-Examination..........................67

CHAPTER 5 ............................................................................................ 71
When to Be Friendly and When to Impeach
David R. Haigh

CHAPTER 6 ............................................................................................ 85
Confrontation: Techniques for Impeachment
J. William Rowley and Robert Wisner
I. Why Impeach ..................................................................................... 86
   A. Impeachment to Attack Credibility ........................................86
   B. Impeachment to Establish the Truth ......................................87
   C. Impeachment to Argue Your Case ........................................88
   D. Must You Impeach? The Common Law Rule in
      Browne v. Dunn ........................................................................89
II. When to Impeach .............................................................................. 92
   A. The Need for a Clean Impeachment .......................................92
   B. The Need for a Material and Helpful Impeachment.............95
   C. Start Strong, Finish Strong ....................................................96
III. How to Impeach ................................................................................ 97
   A. The Classical Method: Recommit Prior Testimony, Validate, Confront ...................................................................... 97
   B. The Modern Method: State Desired Proposition, Validate, Confront ...................................................................... 99
   C. The Dramatic Method: Recommit/State, Confront, Validate ............................................................................. 99
   D. An Alternative Method: Validate, Confront, Compare to Prior Testimony ................................................................. 101
IV. What to Use for Impeachment .......................................................... 103
   A. Prior Inconsistent Statements by the Witness .....................103
   B. Other Inconsistent Statements .............................................104
   C. Impeachment by Omissions .....................................................105
D. Impeachment by Motives/Bias/Bad Character ............ 107
E. Impeachment by Limited Testimonial Capability .......... 108

Appendix A – Cross-Examination of a Legal Expert:
Modern Method ................................................................. 110

Appendix B – Cross-Examination of a Valuation Expert:
Dramatic Method ............................................................. 112

PART TWO

Tips for the Practitioner ..................................................... 115

CHAPTER 7 ........................................................................... 117
Cross-Examination without Discovery: Not Blind,
but with Blinders
Laurence Shore
I. Some Preliminaries .......................................................... 121
II. Some Preparation Points ............................................... 125

CHAPTER 8 ........................................................................... 131
Intuition in Cross-Examination
Lawrence W. Newman
I. How Intuition Leads to Rapport .................................... 131
II. Disrupting the Intuitive Relationship ......................... 136
III. How Much of It Is Intuition and How Much of It Is Something Else? .................................................. 136

CHAPTER 9 ........................................................................... 139
Polite Cross-Examination: A Symbolic Step toward Further Uniformity in International Arbitration
Arthur W. Rovine
I. Case 1: Why Are You Not a Partner? ......................... 142
II. Case 2: “Just Send Him Home, Mr. Chairman. Just Send Him Home” ........................................................ 145
III. Toward a Greater Uniformity and a Transnational Arbitral Legal Order ......................................................... 148
CONTENTS

CHAPTER 10 ........................................................................................................... 155
Identifying and Avoiding Pitfalls and Mistakes in
Cross-Examination
Steven A. Hammond
I. The Nature of the Beast: Why the Nature of the Arbitral
   Process Itself Matters to Cross-Examination Technique .......... 157
II. KYT: Why the Design of the Cross-Examination Begins
   with Knowing Your Tribunal ......................................................... 158
III. Uncertainties Surrounding the Burden of Proof ......................... 161
IV. Other Procedural Dynamics that Derail the Unsuspecting
   Examiner: Caeveat Probatur (Let the Examiner Beware) .......... 166
   A. Limited Disclosure ................................................................. 167
   B. Time Budgets ...................................................................... 168
   C. Scope Limitations ................................................................. 170
V. The Problem of the “Ugly (Anglo-)American”: The Risks
   of an “Overly Aggressive” Cross-Examination Style ................. 170

CHAPTER 11 ........................................................................................................... 175
Disastrous Cross-Examination
Rory Millson
I. The Function and Conduct of Cross-Examination ................. 177
II. The Disasters .......................................................... 181
   A. Failed Credibility Attack .................................................... 181
   B. Enough Is Enough .............................................................. 183
   C. Do Not Be Rude ................................................................. 185
   D. Do Not Follow the Sequence of the Direct ......................... 190
   E. Do Not Overwhelm the Tribunal with “Paper” ................. 191

CHAPTER 12 ........................................................................................................... 193
Cross-Examination against the Clock
Richard Kreindler and Christopher P. Moore
I. Arbitration Proceedings against the Clock Generally ............. 193
II. Witness Examination against the Clock: General
   Considerations ................................................................. 195
III. Cross-Examination against the Clock from the Counsel and Tribunal Perspectives .............................................. 197
IV. Lessons to Be Drawn and Best Practices .......................................................... 204

CHAPTER 13 ........................................................................................................ 207
When to Cross-Examine and When to Stop
Hilary Heilbron and Klaus Reichert

PART THREE

Anticipating Cross-Examination in the Presentation of Witnesses ......................................................... 217

CHAPTER 14 ........................................................................................................ 219
Preparing the Witness for Cross-Examination
Robert S. Rifkind

CHAPTER 15 ........................................................................................................ 227
The Effective Use of a Powerful Evidentiary Tool: Considerations for Both Counsel and Arbitrators
C. Mark Baker
I. The Value of Cross-Examination in International Arbitration ................................................................. 227
II. Cross-Examination in International Arbitration:
   A Few Suggestions ................................................................. 230
   A. Tone It Down ...................................................................... 230
   B. Stay Laser-Focused ............................................................. 231
III. The Role of the Arbitrators: Facilitating Good Cross-Examination ......................................................... 234
   A. Don't Prescribe Counsel’s Time Allocation or Ordering of Witnesses .................................................. 234
   B. Let the Lawyers Ask the Questions ........................................ 235
   C. Use Witness Conferencing Sparingly .................................. 236
PART FOUR

Special Considerations in the Cross-Examination of Experts

CHAPTER 16
Crossing the Hot Tub: Examining Adverse Expert Witnesses in International Arbitration
John M. Townsend
I. Attacking the Paid Liar
II. Cultivating the Mistaken Professional
III. Operating in the Hot Tub

CHAPTER 17
Cross-Examining a Technical or Scientific Expert
Kim J. Landsman
I. Witness Conferencing
II. Arbitrator Selection
III. Learning the Subject Matter
IV. Learning about the Opposing Expert
V. Prehearing Conferences
VI. Preparing and Doing the Cross-Examination

CHAPTER 18
Cross-Examining the Legal Expert
George A. Bermann
I. Deep Knowledge of the Law
II. Professional Integrity
III. Skill at Exposition
IV. Professional Temperament
V. Implications for Examining Counsel
VI. The Arbitral versus Litigation Context
CHAPTER 19

Ten Guidelines for the Cross-Examination of Financial and Technical Experts

Carolyn B. Lamm, Francis A. Vasquez Jr., and Matthew N. Drossos

I. Know Your Purpose .......................................................... 275
II. Adapt to Your Audience ..................................................... 279
III. Do Your Homework .......................................................... 281
IV. Do Not Ask Questions that Have a High Probability of Hurting You .......................................................... 284
V. Focus on What the Expert Did Not Do .............................. 285
VI. Look for Altered Theories from Report to Report and Confront Changes or Back-Pedaling .................. 288
VII. Simplify Complicated Concepts ....................................... 290
VIII. Challenge “Group Reports” ............................................. 292
IX. Do Not Engage in Impromptu Debates or Complex Analysis .......................................................... 296
X. Make Appropriate Use of Technology ............................... 297

PART FIVE

Cultural Issues .................................................................... 299

CHAPTER 20

Cross-Examination in International Arbitration: Is It Worthwhile?

Bernardo M. Cremades and David J.A. Cairns

I. Cross-Examination in Common Law Jurisdictions ............ 303
II. Oral Evidence in Civilian Jurisdictions: The Example of Spain .......................................................... 310
III. The Questioning of Witnesses in International Commercial Arbitration .................................................. 313
IV. Conclusions .................................................................. 319
CONTENTS

CHAPTER 21 .................................................................................................................. 321
Cross-Examining Witnesses before Civil Law Arbitrators
Robert H. Smit
I. The Objectives of Cross-Examination ........................................... 322
II. Cross-Examination Techniques ................................................... 324
III. A Cross-Examination War Story ................................................. 329

CHAPTER 22 ............................................................................................................. 331
The English Approach to Cross-Examination in International Arbitration
Sophie Nappert and Christopher Harris
I. The Purpose and Key Principles .................................................. 332
II. General Approach to Cross-Examination .................................. 333
III. Issues in the International Arbitration Context ......................... 336
   A. General Adaptations of Style ................................................. 336
      1. Time pressure ............................................................. 336
      2. The civil law tribunal ................................................... 337
      3. Integrating body language: witnesses and arbitrators ......... 338
   B. Particular Hurdles in International Arbitration .......... 339
      1. Expert witnesses ......................................................... 339
      2. Witness conferencing ............................................... 340
      3. Establishing fraud, corruption or criminality ................. 341
      4. Coaching witnesses .................................................. 343
      5. State party representatives .......................................... 345
      6. Cross-examination through an interpreter ................... 345

CHAPTER 23 ............................................................................................................. 347
Effective Cross-Examination in Asian Arbitrations
Michael Hwang and Colin Y. C. Ong
I. Some Universal Skills that Can Be Applied to Any Tribunal .... 348
II. Cross-Examination on the Meaning of Contractual Documents or Intentions of Witnesses ............................................ 353
III. Re-examination ................................................................. 356
CONTENTS

IV. Cross-Examination of Experts ..................................................... 358
V. Distinction between a Common Law Asian Tribunal
(Former English Colonies) and a Civil Law Tribunal
(Japan, Korea, Indonesia, Thailand, Taiwan) .............................................. 367
VI. Cross-Examination of Witnesses Whose Statements
Have Been Drafted by Others .......................................................... 370

CHAPTER 24 ....................................................................................... 375
Understanding Cultural Challenges in
the Cross-Examination of Asian Witnesses
Joel Richardson
I. Unfamiliarity with Cross-Examination and Differences
   in Dispute Resolution Culture .......................................................... 377
II. The Importance of Hierarchy .......................................................... 380
III. The Importance of Not Losing Face .............................................. 381
IV. Interpretation of Body Language during Cross-Examination .... 382
V. Losses in Translation during Cross-Examination ...................... 383
VI. Conclusion ....................................................................................... 387

CHAPTER 25 ....................................................................................... 389
Effective Cross-Examination in International
Arbitrations Involving Latin America
Henri C. Alvarez
I. The Nature and Role of Cross-Examination ............................... 390
II. The International Arbitration Context .......................................... 391
III. Adapting to the Context ................................................................. 396
   A. Should You Cross-Examine? .......................................................... 396
   B. Consider Your Style ................................................................ 397
   C. Understand the Purpose of the Cross-Examination ............ 397
   D. Be Efficient and Brief ................................................................. 397
   E. Be Realistic ............................................................................... 398
   F. Don’t Argue Your Case .............................................................. 399
   G. Be Patient ............................................................................... 399
   H. Be Prepared for the Unexpected .............................................. 399
   I. Listen Carefully ....................................................................... 400

xviii
## CONTENTS

**CHAPTER 26** ................................................................. 403  
Cross-Examination of Witnesses from Former Soviet Union Countries  
Karyl Nairn  
I. Mistrust of Authority ................................................................. 403  
II. A Paper Trail Might Not Mean What It (Apparently) Says ................................................................. 408  
III. Getting Lost in Translation ................................................................. 413  
IV. Conclusion ................................................................................. 417  

**CHAPTER 27** ................................................................. 419  
The Perils of Cross-Examination in a Language Other than the Language of the Proceeding  
James H. Carter  
I. Can This Train Wreck Be Avoided? .................................................... 421  
II. Is Testimony in English a Possibility? ............................................. 422  
III. Will Simultaneous Interpretation Work? ......................................... 422  
IV. Possible Subjects of Cross-Examination ........................................ 425  

**PART SIX**  
Emerging Issues ................................................................................. 427  

**CHAPTER 28** ................................................................. 429  
Are There Special Considerations for How to Handle Cross-Examination in Investment Arbitration?  
Tai-Heng Cheng  
I. Certain Fundamental Considerations .............................................. 430  
II. Special Considerations in Investment Arbitration ............................ 432  
III. Conclusion ................................................................................. 436
CHAPTER 29 ........................................................................................................ 437
Cross-Examination by Videoconference
   David Roney
I. Should You Agree to Cross-Examination by
   Videoconference? .................................................................................. 438
II. What Safeguards and Arrangements Need to Be
   Put in Place in Advance of Cross-Examination
   by Videoconference? ........................................................................... 443
III. What Approaches and Techniques Should Be Applied
    to Cross-Examine Effectively by Videoconference? ................... 446