
TAKE THE WITNESS:
CROSS-EXAMINATION IN
INTERNATIONAL
ARBITRATION

SECOND EDITION

Edited by

Lawrence W. Newman

Timothy G. Nelson

JURIS

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
ISBN: 978-1-944825-28-7

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

Summary Contents

<i>Contents</i>	ix
<i>Foreword by Charles B. Renfrew</i>	xxi
<i>Preface to the Second Edition</i>	xxiii
<i>by Lawrence W. Newman and Timothy G. Nelson</i>	
<i>Preface to the First Edition</i>	xxv
<i>by Lawrence W. Newman and Ben H. Sheppard, Jr.</i>	
<i>About the Authors</i>	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	
<hr/>	
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	

SUMMARY CONTENTS

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

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

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	
<hr/>	
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

<i>Foreword by Charles B. Renfrew</i>	xxi
<i>Preface to the Second Edition</i>	
by Lawrence W. Newman <i>and</i> Timothy G. Nelson.....	xxiii
<i>Preface to the First Edition</i>	
by Lawrence W. Newman <i>and</i> Ben H. Sheppard, Jr.	xxv
<i>About the Authors</i>	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. <i>Ad Hominem</i> Cross-Examination.....	13
VIII. The Cross-Examiner’s Style.....	14
IX. Summing Up	15

CONTENTS

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 <i>Browne v. Dunn</i>	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 <i>Browne v. Dunn</i>	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

CONTENTS

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: <i>Caveat Probatum</i> (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

CONTENTS

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

CONTENTS

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	
I. Attacking the Paid Liar	241
II. Cultivating the Mistaken Professional.....	243
III. Operating in the Hot Tub	244
CHAPTER 17	247
Cross-Examining a Technical or Scientific Expert Kim J. Landsman	
I. Witness Conferencing.....	248
II. Arbitrator Selection.....	250
III. Learning the Subject Matter.....	251
IV. Learning about the Opposing Expert	252
V. Prehearing Conferences.....	253
VI. Preparing and Doing the Cross-Examination.....	254
CHAPTER 18	261
Cross-Examining the Legal Expert George A. Bermann	
I. Deep Knowledge of the Law.....	262
II. Professional Integrity	266
III. Skill at Exposition	267
IV. Professional Temperament	268
V. Implications for Examining Counsel.....	269
VI. The Arbitral versus Litigation Context	270

CONTENTS

CHAPTER 19	273
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 <i>Not</i> 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	301
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

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	
<hr/>	
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

CONTENTS

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