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Take the Witness: Cross-Examination in International Arbitration (L.W. Newman, B.H. Sheppard Jr. eds.) - Book review by P. Landolt

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Take the Witness: Cross-Examination in International Arbitration, L. W. Newman and B. H. Sheppard Jr., eds. (Huntington, NY: JurisNet, 2010), 312 pages, reviewed by Phillip Landolt, Landolt & Koch (www.landoltandkoch.com).

General Background

This book comprises twenty-one chapters distributed across four sections:

1. Techniques of Cross-Examination in International Arbitration
2. Anticipating Cross-Examination in the Presentation of Witnesses
3. Special Considerations in the Cross-Examination of Experts
4. Cultural Issues

The first section is advice for when you are in the hearing room. It is the biggest section of the book. The second section is advice on preparing for cross-examination. It is the shortest section. The third section is on what one might consider the most circumscribed subject matter of the four, examining experts, but is unexpectedly extensive. The fourth section is a more intensive examination of a theme running through the other three chapters, that cross-examination in international arbitration is highly context-sensitive, and depends in particular on the culture of the actors in the arbitration, most especially, the tribunal.

With so many chapters, it is possible here to give only the briefest description of essential content.

Summaries

In the Introduction, Lawrence W. Newman and Ben H. Sheppard Jr. state the purpose of their book:

> It is to be hoped that the effect of efforts such as this book will be to cause cross-examination in international arbitration to be more efficiently and effectively carried out. We hope that another effect will be a greater appreciation of the value placed on cross-examination by witnesses, lawyers and arbitrators in international arbitration."

In Chapter 1, "Taking Charge – Proven Tactics for Effective Witness Control", Ben Sheppard identifies important differences between international arbitration and cross-examination in its the home soil, namely the Anglo-American jury trial. The latter, he says, is more oral, and there are juries, who are unspecialised and have no prior knowledge of case. He argues that it is important to control a witness since this ensures you are assisting your case, and aiding the efficient conduct of the arbitration.

David Haigh observes in Chapter 2, "When to be Friendly and When to Impeach" that arbitration is a more collaborative process than domestic litigation, and suggests that it is the civil law influence in arbitration that blunts aggression.

In Chapter 3, "Confrontation – Techniques for Impeachment", Bill Rowley, Markus Koehnen, and Robert Wisner identify the reasons to impeach a witness as to reduce the witness' credibility, and, from a common law prospective, to avoid the inference that you accept the witness' evidence. These authors advise that one impeaches a witness rarely to show him to be a liar. Rather, it is to lower his over all credibility. Accordingly, they note that impeachment must be clean, material, and not trivial. Since in arbitration hearings are generally shorter than trial hearings, international arbitrators avoid concluding unnecessarily that witnesses are not credible – especially if the witness is a member of a party that appointed an arbitrator.

In Chapter 4, Laurence Shore deals with "Cross-Examination without Discovery: Not Blind but with Blinders". He advises not to attack matters collateral to the witness statement as credibility can only be damaged on a relevant matter. He emphasises the importance of preparation for cross-examination, but says that there are no "hard and fast rules". He presents a checklist of matters that one should address in the pre-hearing review, of relevance to cross-examination. At all events, says Shore, cases turn on the reasonableness of witnesses - "there is a place for 'gotcha' moments in cross-examination in international arbitration, but it is [a] very small place." He adds that the witness is not your enemy, and should be treated with respect.

Chapter 5 by Laurence W. Newman is dedicated to "Intuition in Cross-Examination". Newman argues that in international arbitration, one cannot strictly follow the trial rule about never asking a question one does not know the answer to. Rather, one needs to assess the likelihood of particular answers, with the consequences of those answers to your case. Arbitrators know you do not have perfect knowledge, and at any rate, for them the point of the exercise is to elicit information, whatever its effect.

In Chapter 6, Arthur W. Rovine examines "Polite Cross-Examination: A Symbolic Step toward further Uniformity in International Arbitration". Rovine states that substance is what really matters, but an inappropriate tone, which usually means an aggressive one, may subtlety diminish the effect of cross-examination. For Rovine, the prevalent expectation in international arbitration is that cross-examination will be more genteel and restrained than one finds in common law trial practice. This is becoming second nature for arbitration advocates, since the increasing specialisation of legal practice means that arbitration practitioners are increasingly devoted exclusively to international arbitration, and are no longer alloying that with trial practice. Moreover, observes Rovine, international arbitration procedure is now sufficiently detached from civil law influences as to have its own characteristic features.

Chapter 7, about "Identifying and Avoiding Pitfalls and Mistakes in Cross-Examination" is by Steven A. Hammond. He too takes issues with lawyers taking trial tactics into arbitration, and points out the arbitration difference:

> In a world where, to an increasing extent, a premium will be placed on streamlining the arbitral process, the practitioner's ability to develop a keen sense of when and how less is more may be the most valuable cross-examination skill of all.

Hammond contends that the key to effective cross-examination is to know the tribunal. While, as a general rule, experienced international arbitrators "will strive to maintain flexibility, efficiency and reduced cost of arbitration", the effective advocate should make sure to interview prospective arbitrators about cross-examination, "particularly where one or more of the eventual arbitrators are not trained in a common law system." A separate point that Hammond makes, significantly, is the importance of knowing the rules on burden of proof and their effect on cross-examination. Hammond concludes that cross-examination is more an art than a science. It is a matter of judgement.

In Chapter 8, Richard Kreindler considers "Cross-Examination against the Clock". As Kreindler points out, the chess-clock allotment of time – each party gets the same set amount of time to use as they deem best – is frequently used in international arbitration. Kreindler explains that the chess clock is attractive where parties cannot agree and the arbitral tribunal "does not want to dictate".
The chess clock presents opportunities and disadvantages for counsel. Counsel are generally happy to know in advance how much time they will get, and to have the freedom to use it as they like. On the other hand, Kreindler rightly notes that counsel tend to be risk-adverse and therefore are inclined to call all witnesses for cross-examination. This creates time pressure, and therefore Kreindler suggests it can be a good idea in a chess clock setting to have one's important witnesses appear first. The downside is that issues may only be identified later, as Kreindler observes.

Hilary Heilbron and Klaus Reichert's chapter (9) is titled "When to Cross-Examine and When to Stop". The topic is an important one, since, as the authors note, "modern international arbitration practice simply does not allow time for a leisurely cross-examination whereby every theory, point, document and issue is put to a witness or expert – nor indeed does such an approach cut any ice in the relatively dispassionate hearing rooms in arbitration [...]". Heilbron and Reichert also provide helpful advice on the important tactical issue of when to cross-examine a witness at all. They point out that this decision is generally taken in advance since there are witness statements, in accordance with the IBA evidence rules.

Robert S. Rifkind covers "Preparing the Witness for Cross-Examination" in Chapter 10. He acknowledges the scepticism and concerns about preparing witnesses, but says it needs be done, in order to know what the witness is going to say. He advises that the witness be given the documents necessary to understand both sides' positions and not simply those giving a one-sided account

of the facts. He cautions against drafting a statement for any witness, even busy executives. He reminds that one must make it clear to witnesses being prepared that they must stick to the facts. Some witnesses are not aware of this. He says that one should test and correct the accuracy of the witness' memory, and give the witness tips, such as that they should only answer questions that they know the answers to. He advises counsel to conduct a mock examination.

Mark Baker's topic in Chapter 11 is "The Effective Use of a Powerful Evidentiary Tool: Considerations for both Counsel and Arbitrators". Baker contends that there has been a demise in cross-examination since many common law practitioners are losing the art. He has three essential points for cross-examiners: identify issues that drive the dispute, expose inaccuracies in witness' testimony, and assess the overall credibility of the witness through intense questioning on facts. For arbitrators, Baker advises to be careful about getting involved, but get involved where counsel is not up to the job of getting out the facts.

Chapter 12 is John Townsend's "Crossing the Hot Tub - Examing Adverse Expert Witnesses in International Arbitration". He divides adverse experts into two categories, those that are honest but mistaken, and those who are paid liars! He says one must attack the paid liars aggressively, and focus on the weakness of the honest but mistaken expert's conclusions.

In Chapter 13, "Cross-Examining a Technical or Scientific Expert", Kim J. Landsman also deals with experts. He says that in arbitration it is necessary to be polite to experts due to the civil law tradition of court-appointed experts. He says that an effective tactic can be pointing out inconsistencies with the expert's prior writings. He advises that when selecting arbitrators one should aim for someone who is able to learn the subject matter.

In Chapter 14, "Cross-Examining the Legal Expert", George Bermann catalogues the qualities of a good legal expert, including deep knowledge of the legal system, professional temperament, and skill at exposition.

In Chapter 15, "Ten Guidelines for the Cross-Examination of Financial and Technical Experts", Carolyn B. Lamm, Francis A. Vasquez Jr., and Matthew N. Drossos tell us to organise cross-examination of experts around themes. They say that the purpose of such cross-examination is to limit the scope of the expert's report and to attack credibility. One must also adapt the cross-examination to the tribunal. Therefore it is important not just to learn about the expert, but also about the arbitrators.

Bernardo M. Cremades and David J. A. Cairns present the civil law perspective on cross examination in their chapter (16) on "Cross-Examination in International Arbitration: Is it worthwhile?". They begin by observing that cross-examination is different than it is in common law courts, but there is the constant danger of "infection", seen most particularly by the proliferation of guidelines and other rules to harmonise procedure and evidence in international arbitration. The authors, by contrast, recommend adapting procedure on a case by case basis.

Certain resonant statements made by the authors are that any rules developed for juries are suspect, the distinction between direct and cross-examination may have led to partisan experts, and "the faith of common law advocates in cross-examination as a good way of getting to the truth arguably lacks any scientific basis, particularly in a cross-cultural context."

Robert H. Smit employs Chapter 17 "Cross-Examining Experts before Civil Law Arbitrators" to provide practical tips. He says that civil law advocates do accept cross-examination and even treat it as a "guilty pleasure". He accepts that cross examination in international arbitration can be as effective an "engine of truth" as in US litigation, and recommends the application of Irving Younger's Ten Commandments of cross-examination in a modified fashion. The object is to control the witness but in arbitration there is less control. So be brief, and be genteel. Arbitrators are better informed of facts than juries and even judges since they have read the papers. They therefore frequently take a more active role in questioning. Smit recommends to arrange to let the arbitrators finish off the questioning since it is natural to believe something one has elicited oneself.

In Chapter 18, "The English Approach to Cross-Examination in International Arbitration", Sophie Nappert and Christopher Harris recommend, "enlightened cross-examination". One must identify the crucial piece of evidence needed to address to each witness, and ask agreeable questions so that the witness cannot disagree with a final question if the witness wants to be consistent. They say that in cross-examination, one must adapt one's style – be shorter, and less aggressive.

Michael Hwang and Colin Ong's chapter (19) "Efficient Cross-Examination in Asian Arbitrations", is a conspicuously well-researched one, with appropriate and rich citation from an abundance of sources. Hwang too accepts there is a difference between court-room cross-examination and international arbitration cross-examination. Hwang agrees that the IBA rules condition the entrance of common law attitudes into international arbitration, for example the rule that questions should not be unreasonably leading. A successful cross-examiner will need to have a combination of skills which will include good preparation, forceful but pleasant presentation, practice, graceful decorum, the ability to control a witness and most importantly, the ability to read and effectively communicate. Not much in Asian arbitration is different from Western arbitration. One must be careful to be respectful of witnesses though. The authors note the common law/civil law divide in Asia as regards witness qualifications. They advance that all you need in the common law is "competence".

Chapter 20 is Henri Alvarez' "Cross-Examination in International Arbitrations involving Latin America"- Alvarez relates that there are not many differences in Latin American arbitration, but it is civil law so cross-examination is of "limited familiarity".

In Chapter 21, "The Perils of Cross-Examination in a Language other than the Language of Proceeding", James H. Carter recommends getting simultaneous translation and keeping it simple.

Commentary

What is striking about this book is the convergence between the chapters. Despite the disparate themes in the book, and the different subject matter allotted to each set of authors, one finds that to a high degree the same questions keep coming up, and come in for a broadly uniform approach.

As will be clear from the summaries above, the big theme is that cross-examination is central to international arbitration and needs to be mastered. But it is different, since international arbitration is different from court-room litigation. Among the differences is that there are no depositions of witnesses, there are witness statements as examination-in-chief, time is precious, the adjudicators of fact are professionals with prior information of the case, and the significant influence of civilian systems on international arbitration in general and therefore in any particular case.

No author systematically traces these features to particular adjustments indicated for international arbitration cross-examination. But a number of chapters, most notably J. W Rowley, M. Koehnen, and R. Wisner's, point out that the absence of pre-hearing depositions, the higher cost of hearing time in arbitration, and the civil law influence combine to make it necessary that any attack on credibility be reserved to particularly material points. A number of authors assert that the civil law influence alone makes international arbitration cross-examination less aggressive and forceful.

Most of the authors are American and there is a strong current of American perspective in this book. That is a strength not a weakness. Like the ancient Romans, the Americans are decidedly good at war and law, and they certainly know the service-end of their law, which is cross-examination. There is absolutely no reason therefore that international arbitration practitioners from anywhere cannot gain from hearing from American practitioners on the subject. I have been in many international arbitration hearings pitting US counsel against civil law counsel before civil law tribunals, or where the majority of the tribunal is trained in a civil law country. The US counsel has generally been a source of real and admirable advantage, wielding their cross-examination skills, and deftly handling witnesses. Civil law arbitrators with experience of international business and the conduct of human affairs are not insensible to the inconsistencies and weaknesses that able cross-examination elicits. They are also rarely disturbed by vigorous questioning. The only negative sentiment that I have observed with any regularity is impatience with the length to which such cross-examination can extend. But with able cross-examiners, one is constantly impressed with the economy of their questioning, however minute. All questions build towards a point, and that point is unfailingly material to the issues. It is the advocate unfamiliar with cross-examination who, like Stephen Leacock's horseman, "jumped on his horse and rode off in all directions". Moreover, the

experienced advocate knows that cross-examination is not examination that is "cross", that is, angry. Much of what these American authors caution against is not a problem inherent in US tendencies in cross-examination. It is a problem inherent in uncertain ability in cross-examination.

I especially liked, and felt it apt, that at least four or five of the chapters used the card-playing metaphor when describing cross-examination. Yes, one must understand the enterprise of cross-examination, and what it can and cannot achieve, in the international arbitration context and more generally. But it is only fair, in particular to civil law practitioners bemused if not intimidated by the lionising lore of cross-examination from common law lawyers, to acknowledge that cross-examination is not an exact science. As David Haigh rightly says, a surpassingly pivotal factor in the composition of an effective cross-examiner is "card sense".

I felt that Cremades and Cairn's chapter was a sincere, perhaps uncomfortably sincere, protest at the importation of certain particularities of common law trial cross-examination into international arbitration. The authors do not shrink from pointing out that the greater the admixture of those particularities in international arbitration, the more the role is reserved to Anglo-American practitioners. Point well taken. Certainly, it would impoverish international arbitration, and deprive it of much of the richness of the influences on it, if common law practitioners alone were positioned to conduct it.

But the more important and more practical point is whether those particularities are appropriate in the international arbitration sphere, since if they are, and if they present a real advantage, logically (in the French sense, as in inexorably), by the mechanism of natural selection, challenge and survival, they will establish themselves.

Most of the particularities of cross-examination in common law trials are in fact not necessary, and indeed are being whittled down even in their native context. The rule on not asking leading questions to one's own witness for example, is no longer a firm and mechanistic rule in English trial practice. Everybody knows that asking a leading question of one's witness when one could have easily not done so lessens the evidential impact of the answer since one's own witnesses are generally inclined to trust one. That is common sense, and it is common sense which recommends itself for application to international arbitration.

There is also no formalistic common law rule that if one disagrees with a witness' evidence, on *any* point, one must confront the witness with that. Rather, there is a formalistic rule of much lesser scope, operating in tandem with a rule of common sense. The rule of common sense is that if you do not confront the other side's evidence you *might logically* (in the English sense), but not necessarily be taken to have accepted it, or, better, not to have anything to say to impugn it. But you can confront it by questions asked of other witnesses, or by your own witness' evidence, or by documentary evidence, or in oral argument. You do not need to put it to every witness that you disagree with him on every

point. One regrets that such an impractical and distracting understanding is found in some quarters.

The formalistic rule is simply that if you want to submit that a witness is *being untruthful* you need to give her an opportunity to say she is not. That is the rule in *Browne* v. *Dunn*. That rule is of limited scope of application, in its original exposition (by Lord Herschell) and is not one estranged from common sense in its proper scope and context. *Browne* v. *Dunn* concerned allegations of document forgery. It is inconsistent with the basic human dignity of the witness not to give him an opportunity to face such accusations. That is very often acutely the case in international arbitration where, additionally, witnesses are frequently individuals of achievement and reputation.

So these particularities of cross-examination in the traditional common law trial are shorn away in international arbitration. To continue to insist on them is absurd, and no one can believably do so. They would look like those who in the early 1970s argued against having women vote in the Swiss Canton of Appenzell Inner Rhodes. To vote one must lift one's sword, and it is unseemly for women to wear a sword. *Lächerlich*.

On the whole, I liked this book, and learned from it. Like the common law itself, though, it is unsystematic, and episodic. I would have appreciated a more structured and exhaustive approach. Some important matters slipped through the cracks in my view, such as the matter of how to formulate questions in cross-examination. That for me is a matter of first-order importance, especially so in the international context of international arbitration. Some important matters seem to have been encountered as if accidentally, along the way, like the crucial admonition to keep cross-examination relevant. And some matters are discussed and the same (important) points made in a multitude of chapters, like stock characters reappearing in a *commedia dell'arte*.

Perhaps such system would only have been achievable with the same author or team of authors writing all the chapters. I do accept, though, that if that had been the approach, much of the authenticity and force of the text would have been sacrificed. These chapters are a pageant of accounts of real life experience in international arbitration. Cross-examination is not a science, and it is exquisitely context-based. Appropriately then, the chapters are each studded with anecdotes, and bristle with cautionary tales. That is the most use for those who want to learn the subject, and the only substitute, a partial one, for real life experience.