BOOK REVIEW - TAKE THE WITNESS: CROSS-EXAMINATION IN INTERNATIONAL ARBITRATION

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Discernible from its title, the book, Take the Witness: Cross-Examination in International Arbitration, is a compilation of essays on cross-examinations in international arbitrations. Renowned international arbitration counsel and arbitrators Mr. L.W. Newman and Mr. B.H. Sheppard Jr. compiled the first edition of the book, which was published in the year 2010[1]. Subsequently, the second edition of the book was published in the year 2019[2] with inclusion of new essays on contemporary issues. The second edition was compiled by Mr. T.G. Nelson and Mr. L.W. Newman. Engaging essays contained in the book are contributions of international arbitration practitioners well known for their advocacy skills across the globe. The present book review is focused on the second edition.

The book discusses vivid themes relating to cross examination which are cautiously selected to provide readers with the complete knowledge of conducting cross-examinations in different formats. These themes also throw light on how a counsel should deal with ordinary and expert witnesses belonging to different cultures, legal systems and geographies. The authors have also been kind to share their secret tactics tested in real life situations and the lists of instructions and suggestions for achieving best outcomes in a cross-examination. These secrets, advice, and instructions are accompanied with excerpts of sequence of question-answers from cross examinations which have made the tricky subject easy to understand and follow.

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I.INTRODUCTION

"You got to know when to hold them, know when to fold them; know when to walk away, and know when to run" –Kenny Roger's song best presents the gist of what is entailed in the art of cross-examination. [3] The book, *Take the Witness*: *Cross-Examination in International*

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[1]L.W. Newman and B.H. Sheppard Jr (eds), *Take the Witness: Cross-Examination in International Arbitration* (1st edn, Huntington, NY.: Juris 2010).

[2]Lawrence W. Newman and Timothy G. Nelson (eds), *Take the Witness: Cross-Examination in International Arbitration* (2nd edn, Juris Net LLC 2019).

[3] Hilary Heilbron and Klaus Reichert, 'When to Cross-Examine and When to Stop' in Lawrence W. Newman and Timothy G. Nelson (eds), *Take the Witness: Cross-Examination in International Arbitration* (2nd edn, Juris Net LLC 2019) 207.

Arbitration[4] *(the "Book")* is a compilation of essays on different aspects of cross-examination, contributed by some of the best practitioners in the field of international arbitration across the globe.

The Book is first of its kind, as prior to the publication of its first edition,[5] the books on cross- examination focused on adversarial dispute resolution systems in general, with emphasis on litigation.[6] There was a lack of adequate literature dedicated to cross-examination in international arbitration. In arbitration, the international nature of the proceedings requires a counsel to understand geographical and jurisdictional nuances which generally remains absent in domestic court settings.

The Book, in my knowledge, is the first piece of literature dedicated to the practice of cross-examination in international arbitration. The Book, in my humble opinion, is also one of the most nuanced works on cross-examination in international arbitration so far. The other works[7] which made international arbitration their focal point while discussing cross-examination did not dig deeper into the regional and jurisdictional nuances, like this Book does. Further, those works kept their discussions limited to answering the question - 'How to cross- examine?'.[8]

II. CONTRIBUTORS AND CONTENTS

The Book contains twenty-nine essays, divided into six themes. Each of the themes discusses a new aspect of cross-examination. Through these vast themes, the Book leaves no stone unturned in presenting the reader with the required guidance one may need to prepare for a cross-examination, be it the basics, practice tips, preparing a witness, cross-examining experts, understanding geographical and cultural implications, and emerging issues such as cross-examination by videoconferencing.

Contributors of the Book share their experience and practical tips accumulated through decades of practicing as arbitrators and counsel. Hence, the essays read like personal tales which are very easy to read and understand. However, a drawback of compiling essays from different authors to form a book is apparent in the form of repetitive explanations of certain concepts in multiple essays. All the authors discussed the difference in approaches to conduct cross-examination by lawyers trained in civil law traditions in comparison to their counterparts in common law countries. Similarly, most of the authors preferred providing a distinction between approaches to cross-examination in litigation and international arbitration, which is repetitive.

The first theme on the basics of cross-examination contains six essays. The first essay is contributed by one of the Book's editors, Mr. Lawrence W. Newman. He has been instrumental in

[4] Lawrence W. Newman and Timothy G. Nelson (eds), *Take the Witness: Cross-Examination in International Arbitration* (2nd edn, Juris Net LLC 2019).
[5] *Newman* and *Sheppard Jr.* (n 1).
[6] Francis L. Wellman, *The Art of Cross Examination* (Simon & Schuster 1997); Michael E. Tigar, *Examining Witnesses* (2nd edn, American Bar Association, 2004); Shane Read, *Winning at Cross-Examination: A Modern Approach for Depositions and Trials* (Westway Publishing 2019).
[7] Kaj I Hobér and Howard S. Sussman, Cross-Examination in International Arbitration (Oxford University Press 2014).
[8] ibid.

representing several claimants before the Iran-US Claims Tribunal.[9] He discusses why oral testimony is essential and provides his valuable inputs on various stages of preparation for cross-examination, right from receiving the witness statement up to facing the witness in a cross examination. His essay, *Strategy (and Some Tactics) in Cross-Examination*, perfectly fits into an introductory essay's role. As it is an introductory essay, the author has not delved deep into the concepts he introduced, such as how to use documents and how to lay the groundwork for conducting cross- examination. With the foregoing approach, he leaves the readers intrigued.

Mr. Ben H. Sheppard, Jr., practicing for decades has contributed to the second essay. His essay is the modern *avatar* of *Professor Irving Younger's lectures on the Ten Commandments of Cross-Examination*,[10] the significant difference being, Mr. Sheppard focuses only on international arbitrations while Irving's primary focus was litigation. He suggests, among others, a counsel should not quarrel with the witness. For buttering his suggestion, the author explains that doing so is ineffective as the tribunal may find the question argumentative and reject it, if not that, the witness will have an opportunity to reaffirm his testimony.

In the third essay, Mr. Timothy G. Nelson, the other co-editor of the Book, takes the reader to the common law roots of cross-examination and explains the crucial difference in conducting cross-examination before the common law courts and international arbitration tribunals. Mr. Nelson points out that the major differences lie in the public nature of proceedings before the courts in contrast to the private arbitration proceedings. He also points out that in common law systems evidence comes from direct testimony while in international arbitrations filing of written testimonies is an established practice. This essay is very interesting to read as it discussed the jurisprudential aspects, such as why in common law traditions adversarial proceedings take place in public. The author has aptly selected the most important principles of conducting cross-examination developed in common law culture and explained why these principles are still relevant and must be followed in international arbitration. For example, the author discusses the rule of direct confrontation developed in *Browne v. Dunn* in detail to explain that it is important to confront a witness when his testimony does not seem correct. The author argues that giving an opportunity to the witness to rectify his testimony to reflect the correct fact situation will help in achieving the greater goal of adjudication process, that is to resolve the dispute. Certain reviewers[11] found Mr. Nelson's suggestion and analysis based on jurisprudential aspect absurd because, in their opinion, these principles do not have applicability in the modern-day arbitration regimes where there is no room for allegation of document forgery, as levelled in *Browne v. Dunn*. I do not agree with this opinion, as it is intriguing to understand the origins of the ideas which have become commandments today. It further reflects upon the knowledge of the author and instills confidence among the readers that they are reading a well-researched essay. Such principles, although archaic,

[9] 'Lawrence (Larry) W. Newman Of Counsel Baker & McKenzie LLP' (*Baker Mckenzie*, 31 August 2021) <https://www.bakermckenzie.com/en/people/n/newman-lawrence-w> accessed 31 August 2021.

[10] Ben H. Sheppard, Jr., 'Taking Charge: Proven Tactics for Effective Witness Control' in Lawrence W. Newman and Timothy G. Nelson (eds), *Take the Witness: Cross-Examination in International Arbitration* (2nd edn, Juris Net LLC 2019) 17.

[11] P. Landolt, 'Take the Witness Cross Examination in International Arbitration – Book Review' (2011) Transnational Dispute Management <https://www.landoltandkoch.com/medias/landolt_br_takethewitness_tdm2011.pdf> accessed 9 June 2021.

still play a greater role in unification of approaches of lawyers towards cross examination. Not knowing such principles may create difficulties for lawyers cross-examining before the arbitrators from commonwealth jurisdictions aware of *Browne v. Dunn*.

The fourth essay is *Cross-Examining on Documents*. Contributor Ms. Wendy Miles QC elaborates on why documents are pertinent for cross-examination and how counsel should use them to ask incisive questions. She not only discusses the importance of documents but also throws light on topics such as - how to arrange documents to gain most out of them during cross-examination. This is very insightful to understand for the practicing lawyers, as more often than not, international arbitrations are voluminous which makes counsel prone to getting lost in bundles and papers during cross-examinations.[12]

In the fifth essay, Mr. David R. Haigh QC explains that different horses need different courses and presents his views on when to be friendly and when to impeach a witness in cross-examination. The author suggests that counsel should be friendly while cross examining a witness in international arbitration, as it is a collaborative process where parties agree to submit their dispute to arbitration for speedier resolution, in comparison to litigation. Taking the cue from the previous essay, Mr. William Rawley QC and Mr. Robert Wisner discuss confrontation techniques in the following essay. These stalwarts explain why, how and when to impeach a witness in cross-examination. In addition, the essay contains valuable recommendations supplemented with several sequences of questions and answers from international arbitration transcripts. The authors suggest that a counsel must impeach a witness when documents contradicting witness testimony are available on record, as not doing so may amount to implied admission of sanctity of witness testimony.

The second theme is dedicated to the practical suggestions for conducting cross-examinations. Under this theme, the essay by Mr. Laurence Shore provides the most detailed and thought-through checklist. The checklist, among others, suggests that it is important to speculate the attitude of an arbitrator towards various issues in his previous cases through third party sources to streamline the pre-hearing preparations. Practicing lawyers could use this ready checklist to ensure that they are up to the mark in their preparations before conducting a cross-examination. Mr. Shore's essay also presents an analysis of how different and difficult it is to conduct cross-examination in international arbitration in the absence of discovery procedures generally followed in litigation, and solely on the basis of written witness testimony. Through this discourse, Mr. Shore again reminds the readers that cross-examination in international arbitrations requires a different skill-set.

In his absolute genius, Mr. Lawrence W. Newman has contributed another essay to the Book. His second contributory essay deals with the role of intuition in cross-examination. He narrates his experiences in conducting cross-examination, which are delightful and intriguing to read. Similarly, in another essay, Mr. Arthur W. Rovine modestly narrates his experiences where he

[12]ICC Commission Reports, 'Techniques for Managing Electronic Document Production When it is Permitted or Required in International Arbitration' (2011) ICC Dispute Resolution Library <https://library.iccwbo.org/content/dr/commission_reports/cr_0043.htm#TOC_BKL1_4_4> accessed 15 November 2021.

acted rudely with the witnesses and learnt his lessons regarding the benefits of conducting a witness examination politely in international arbitrations. Mr. Rovine explains that aggression may cause more harm than good as it may portray a counsel as being disrespectful, which is not appreciated by arbitration tribunals. Mr. Rovine's narration provides a glimpse into the advancement of dispute resolution through arbitration. In my view and experience, there is an understanding among arbitrators and international counsel that cross-examinations should be gentle and polite. Stakeholders of international arbitrations accept that the purpose of cross examination is not to humiliate, coerce or threaten a witness but to make him clarify certain facts which cannot be deduced from documentary evidence. Certain direct questions asked politely are mostly enough to clarify such issues. If a witness dodges a question or lies about an event, the lawyers should have faith in arbitrators to notice such issues and judge the situation accordingly. Further, even if an arbitrator fails to notice such incidents, lawyers always have a chance to argue such issues vehemently during the oral submissions and post hearing briefs. In any case, if a witness has decided to act in a certain way, no admonition or aggression will make him change his pre-conceived stance during the cross examination. On the other hand, an aggressive cross-examination may make the arbitrators believe that the witness behaved in a certain way due to the impolite behavior of the lawyer.

The third theme deals with witness preparations and anticipation of a cross-examination. The essays in this theme contain impressive lessons on witness preparation, emphasizing how different jurisdictions may perceive such practices. It is essential to understand these nuances carefully as in certain jurisdictions witness preparations may lead to annulment of awards.

"*Gentlemen of the jury there are three kinds of liars: the common liar, the damned liar, and the scientific expert."*[13] The fourth theme deals with such misconceptions and suggestions regarding cross-examining legal, scientific and technical, and financial witnesses. The essay co-authored by Ms. Carolyn B. Lamm, Francis A. Vasquez Jr. and Mr. Mathew N. Drossos includes excerpts from several transcripts containing question-answer sequences from cross-examination of expert witnesses. The essay explains these excerpts in detail with the most valuable lessons a practitioner may learn upon years of practice and several attempts at cross-examining experts.

The fifth theme is dedicated to cultural nuances often experienced during cross examinations in international arbitrations. Witnesses in international arbitrations come from various jurisdictions and carry their traditional beliefs and practices. Hence, to draw the best out of a witness, it is pertinent to understand these beliefs and practices. For example, in Javanese culture, it is common when asked whether one has done, read or heard something, to respond "not yet" if the answer is no.[14] It is also pertinent for the arbitrators to understand such nuances to appreciate the witness testimony properly. The Book dedicates eight essays to such cultural issues. There are specific essays that deal with cultural issues in cross-examining witnesses from Asia, Latin America,

[13] Michael Hwang and Colin Y. C. Ong, 'Effective Cross-Examination in Asian Arbitrations' in Lawrence W. Newman and Timothy G. Nelson (eds), *Take the Witness: Cross-Examination in International Arbitration* (2nd edn, JurisNet LLC 2019) 360.

[14] Joel Richardson, 'Understanding Cultural Challenges in the Cross-Examination of Asian Witnesses' in Lawrence W. Newman and Timothy G. Nelson (eds), *Take the Witness: Cross-Examination in International Arbitration* (2nd edn, JurisNet LLC 2019) 386.

former Soviet Union countries, common law and civil law countries. In these essays, by being brutally honest, contributors have shared the cultural insights of communities in these geographical areas. Ms. Karyl Nairn QC commences her essay with a statement – "*I am sometimes told that it must be difficult to represent Russian clients in arbitration when they obviously lie so much*"[15]. From this premise, she explains the political and social fabric of the region and develops a perfect antithesis against the prevalent misconceived notion. Similarly, Mr. Joel Richardson has elaborated on the pertinence of not losing face among Asian witnesses with interesting anecdotes from practice. Another essay under this theme by Mr. James Carter on the perils of conducting cross-examination in a language other than the language of proceedings contains several precautionary practice tips on what to do when faced with such a challenge. He suggests that the best approach is to completely avoid such an exercise, as it may neither benefit the parties nor the tribunal, on that, could also create unnecessary confusions. If such a cross examination cannot be avoided, the author suggests emphasizing on written testimony rather than oral. He also appreciates the use of simultaneous interpretation technologies. However, the use of such technologies may undermine the economies of scale in resolving disputes through arbitration.

The sixth theme is dedicated to emerging issues. Mr. Tai-Heng Cheng discusses cross-examination in investment arbitrations. He nicely covers the significant considerations in cross-examining witnesses in investment arbitrations who may either be state officials (such as ministers and diplomats) or the officers from the investor companies. Mr. Cheng suggests a cautious approach in examining state officials and provides special tips to cross-examining experts in such cases. He insists that the counsel must learn about the specialized field of knowledge addressed in the competing reports of the industry experts prior to examining them, as without that, an able industry expert will run circles around the questions. He further suggests that, if possible, expert views should be attacked through the evidence on record; if not, then it may be wiser to leave it to the opposing expert witness to explain why his view is more reasonable. His essay is also full of anecdotes from practice.

As indicated above, the Book was published in 2019. Owing to the wisdom of its contributors, it also contains an essay on cross-examination by video conferencing when this mode of cross-examination was not generally acceptable. Prior to the advent of COVID-19, there were several doubts cast on this mode of cross-examination, such as fear of technical glitches. Hence, it has always been the least preferred, if not rejected out rightly. However, lately, it has been widely accepted among practitioners because of travel restrictions. In these times, Mr. David Roney's essay presents perfect checklists of safeguards (logistical and otherwise) and requirements one must consult before conducting a cross-examination by videoconferencing. The checklist includes practice tactics like ensuring the identity of a witness prior to commencement of the cross-examination and ensuring that the videoconferencing technology works well during the cross-examination.

[15] Karyl Nairn, 'Cross-Examination of Witnesses from the Former Soviet Union Countries' in Lawrence W. Newman and Timothy G. Nelson (eds), *Take the Witness: Cross-Examination in International Arbitration* (2nd edn, JurisNet LLC 2019) 403.

III. CONCLUSION

The Book presents a global perspective to cross-examination in international arbitration as it includes essays from practitioners from all across the world. Further, these practitioners have been involved in numerous international arbitrations and cross-border litigation conducted in various civil law and common law jurisdictions, hence I believe that they have been able to present a global perspective which is not influenced by any particular tradition/jurisdiction. With the objective of providing a global approach to cross-examination, the compilers have included contributions to the Book which provides a sneak-peek into the behaviors of witnesses from various continents. For instance, the fifth theme discusses the approaches to cross-examination in Asian, Latin American and Soviet Union countries. The authors of these chapters share intriguing details about vivid behaviors of witnesses which may lead to a disastrous cross-examination if not handled with caution.

However, there are certain limitations to the contents of the book as well. As already pointed out above, an apparent limitation thereof is its repetitive and ubiquitous discourse on topics such as litigation versus arbitration and civil law versus common law practices. Another apparent limitation is the absence of a chapter dedicated to re-direct-examinations. Re-direct-examination is a process available to counsel after cross-examination to rehabilitate the witness and correct obscurities regarding certain facts which have been misunderstood in the cross-examination. Re-direct-examinations can greatly influence the outcome of a cross-examination. On the basis of the harm done by re-direct-examination, counsel often plead to be given an opportunity to re-cross-examine.[16] The Book does not throw light on any of these procedures and techniques to be followed in such situations, which is disappointing.

Overall, one of its kind, the Book is the best available literature to understand the nuances of cross-examination in international arbitration. The art of conducting a cross-examination has always been considered one of the most intellectually challenging exercises in adversarial dispute resolution mechanisms. In international arbitrations, cultural, jurisdictional and methodological diversities make it further challenging. Therefore, it is fair to state that the Book comes to the rescue for those about to tread this difficult path.

[16]Anne Véronique Schlaepfer and Vanessa Alarcón Duvanel, 'Direct and Re-Direct Examination' (2019) Global Arbitration Review <https://globalarbitrationreview.com/guide/the-guide-advocacy/fourth-edition/article/direct-and-re-direct-examination>accessed 03 January 2022.