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Book Review

TAKE THE WITNESS: CROSS-EXAMINATION IN INTERNATIONAL ARBITRATION[1]

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1 This book consists of a collection of papers that capture the experience of many leading practitioners in the field of international arbitration. With this second edition, *Take the Witness: Cross-Examination in International Arbitration* has been enlarged by eight new chapters. The 29 chapters are now organised into six parts. Part 1 is composed of six chapters on the basics of cross-examination in international arbitration. Part 2 offers tips for the practitioner, including topics such as avoiding pitfalls, as well as the role of intuition and politeness. Part 3 relates to preparing witnesses and anticipating cross-examination. Part 4 is dedicated to the cross-examination of experts. Part 5 engages with various cultural issues, including different legal and cultural backgrounds. Finally, Part 6 contains chapters on investment arbitration and cross-examination by videoconference.

2 Each of the new chapters is valuable both for counsel and arbitrators. Chapter 1 opens with a thoughtful discussion of strategy, such as how to respond to different witness statements by employing a variety of types of cross-examination. The final message from Lawrence Newman that one should maintain or develop his or her own authentic personality as a cross-examiner is an important lesson.

3 Chapter 3 explains some of the American and English rules of procedure and contrasts them with the general practice in international arbitration. For example, r 611 of the Federal Rules of Evidence mandates that topics of questioning in cross-examination will not be allowed to exceed the scope of the direct testimony. Another example is the English rule of *Browne v Dunn*, which states that where a party intends to lead evidence that will contradict or challenge the evidence of an opponent's witness, it must "put" that evidence to the witness in cross-examination.

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1 New York: Juris, 2nd Ed, 2019.
2 The opinions expressed are those of the author and do not necessarily reflect the views of the firm.

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Timothy Nelson explains that both rules are not officially applicable in international arbitration. Based on the background of the arbitrators, being aware of these rules can either allow counsel to follow some of the rules out of an abundance of caution, or in the alternative, foresee the issue by discussing their inapplicability in a procedural order.

4 Chapter 4 engages with the topic of cross-examining on documents, and contains valuable practical advice, such as the advantages and disadvantages of trial bundles or separate bundles for each witness, and the effect it may have on the ability of the arbitrators to take notes or appreciate the importance of a document. The wisdom in the advice of Wendy Miles will be apparent to experienced practitioners, such as saving time by not using documents for certain propositions, but also spending time to use a "stepping stone" or step-by-step approach when using documents.

5 In ch 11, Rory Millson presents various situations that have the potential to lead to a disastrous cross-examination, as well as sound advice to prevent counsel from encountering those perils. The first is a failed credibility attack, which is described as "the number one peril, in that it undermines your credibility as counsel". The second is knowing when to stop asking questions, a foundational element of the art of cross-examination in litigation as well as in arbitration. This difficulty is exacerbated by a panel of three arbitrators, who may feel differently about your cross-examination. Third, counsel must be polite, which is also the topic of another chapter. Fourth, do not follow the order of the witness statement, as this would repeat and underscore your adversary's points. In the opinion of the reviewer, perhaps this advice is not applicable in every case, as some counsel may aim to successfully dismantle their adversary's points one by one. I note that another approach may be to begin with an issue where it can be shown that the witness is wrong or at least weak. Finally, Millson echoes other chapters in this book by advising not to overwhelm the tribunal by using far too many documents.

6 Chapter 24 is dedicated to the cultural issues related to the cross-examination of Asian witnesses. It is followed by ch 26, which examines the cultural issues for witnesses from former Soviet Union countries. In the opinion of this reviewer, these are some of the most interesting new chapters of the book. Having said that, these captivating chapters also serve to highlight the glaring omission of a chapter on the cultural issues of African witnesses, which we hope will be remedied in a future edition

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of this book.[3] Both chapters note the difficulty and risks of generalising, and Joel Richardson states that "the personality of the specific witness is far more important than the cultural background of the witness". It is fundamental for counsel and arbitrators to be aware of some of the behaviours that may be prevalent in a certain culture and the reasons behind it. Someone who is familiar with East Asian culture may know that qualifiers such as "I think" or "maybe" are not necessarily a sign of uncertainty for a Japanese witness, or that nodding along is not a sign that the witness agrees with what is being said. The breadth of cultural issues raised in this chapter is vast and even experienced practitioners will have something to learn from it, whether on the topic of "face", how to prepare your witnesses' body language, or how to manage differences in age between witnesses, experts and counsel.

7 Chapter 26 on former Soviet Union witnesses is, in the opinion of this reviewer, fascinating. This chapter by Karyl Nairn opens with the stereotype that former Soviet Union witnesses "obviously lie so much", which she explains is not her experience. Rather, according to Nairn, one of the possible characteristics of former Soviet Union witnesses is a mistrust of authority and a natural reluctance to disclose information. Another potential characteristic is the paucity of the documentary record, as these witnesses may be reluctant to document anything and err on the side of secrecy. This is made more difficult by the fact that what is documented may also not be what it seems, often concealing in ordinary documents the true nature of the deal reached. Moreover, Nairn reports that situations where high-flying witnesses do not use or even have an e-mail address have been encountered, and important decisions may be negotiated directly by a small number of people without much paperwork. Thankfully, Nairn does not fail to provide advice on how to address these situations, and is careful to explain that each witness is unique and deserves tailor-made preparation. Finally, another issue is the difficulty of translating Russian testimony. Some of the practical tips in this chapter could also apply to other languages, *eg*, the potential opportunity to highlight that the witness statement in English contains expressions that the witness does not understand, or that counsel may want to agree in advance to a glossary of translated terms for the interpreters.

8 The new Part 6 is comprised of two short chapters. Chapter 28 addresses special considerations that may arise in investment arbitration. After having summarised general principles that will apply to any cross-examination, the following special considerations are discussed:

3 See, *eg*, Wesley Pydiamah & Manuel Tomas, "Cultural Considerations in Advocacy: French-Speaking Africa" in *Global Arbitration Review: The Guide to Advocacy* (London: Law Business Research, 4th Ed, 2019) at pp 336–341.

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questioning officials, questioning investors' witnesses and questioning industry experts. Chapter 29 discusses the topic of cross-examination by videoconference. Published prior to the global pandemic of 2020, this chapter represents a solid overview of the topic, but will need to be revised in a further edition of the book to reflect the various developments brought about by the pandemic.

9 *Take the Witness* furnishes the reader with a comprehensive and diverse set of techniques, experiences and insights on one of the most important stages of an international arbitration. Perhaps this book may be best complemented, not so much by other books on the topic, but by experience and high-quality cross-examination workshops, such as those offered by the Foundation for International Arbitration Advocacy.

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